

## Chapter 1

# THE DEFINITION OF RESPONSIBILITY IN INTERNATIONAL LAW

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As Paul Reuter remarked, 'responsibility is at the heart of international law . . . it constitutes an essential part of what may be considered the Constitution of the international community'.<sup>1</sup> Responsibility interacts with the notion of sovereignty, and affects its definition, while, reciprocally, the omnipresence of sovereignty in international relations inevitably influences the conception of international responsibility. At the same time, responsibility has profoundly evolved together with international law itself: responsibility is the corollary of international law, the best proof of its existence and the most credible measure of its effectiveness. Responsibility has become diversified and more complex as a result of the developments which have affected international society. However, even though certain similarities have been (in part) confirmed, international responsibility retains its marked specificity when compared with systems of responsibility in domestic law.

<sup>1</sup> P Reuter, 'Trois observations sur la codification de la responsabilité internationale des États pour fait illicite', in *Le droit international au service de la paix, de la justice et du développement—Mélanges Michel Virally*, (Pedone, Paris, 1991), 390; reproduced in P Reuter, *Le développement de l'ordre juridique international—Écrits de droit international* (Paris, Economica, 1995), 574.

## 1 Responsibility as the 'necessary corollary of law'

### (a) No responsibility, no (international) law

In an oft-quoted formulation, Charles de Visscher described State responsibility as the 'necessary corollary' of the equality of States.<sup>2</sup> But it is possible to go further; in the international legal order, it is the necessary corollary of law itself: 'if one attempts [. . .] to deny the idea of State responsibility because it allegedly conflicts with the idea of sovereignty, one is forced to deny the existence of an international legal order'.<sup>3</sup> No responsibility, no law.

Of course, it is possible to debate endlessly the criterion or criteria for law—the question whether or not one is in the presence of a *legal* norm or a *legal* order. Although Anzilotti expressed the view that 'the existence of an international legal order postulates that the subjects on which duties are imposed should equally be responsible in the case of a failure to perform those duties',<sup>4</sup> it may be too extreme to identify this criterion with the existence of a system of responsibility. It is possible to conceive of normative systems which contain no system of responsibility—for instance, this is the case in relation to certain constitutional systems, in which the only consequence of the violation of their rules is a purely political sanction. Similarly, under French civil law, a failure to comply with a 'natural' obligation<sup>5</sup> does not entail the responsibility of the author of the omission. On the other hand, there can be little doubt that the maxim '*ubi responsabilitas, ibi jus*' holds true: where, in a normative system, the violation of rules results in foreseeable consequences, there can be no doubt that the system can be qualified as a 'legal' one.

Charles de Visscher's remark also leads to a further observation: while, as a matter of the domestic law of some States, public authorities historically enjoyed (and may still enjoy) a certain immunity from responsibility, such a situation is inconceivable on the international level. The maxim 'the King can do no wrong'—the foundation for this 'irresponsibility' of the State—long reflected the domestic law of the States of Western Europe during the time of their emergence and consolidation; however its transposition to the international sphere is excluded. To some extent this is an echo of the double meaning of 'sovereignty', depending on whether one is looking at the national or international legal order: within the State, sovereignty denotes the supreme and unlimited power of the State; in its external aspect, the sovereignty of the State is confronted with the equally sovereign status of other States, and responsibility is the inevitable regulatory mechanism through which that conflict is mediated and the rights of each State may be opposed to those of all others. To paraphrase another famous formula, far from constituting 'an abandonment of its sovereignty', the possibility for a State to incur responsibility 'is an attribute of State sovereignty'.<sup>6</sup> In the same way that the responsibility of the individual is the consequence of his or her liberty,<sup>7</sup> it is *because* the State is sovereign, and as a result, coexists with other entities which are equally sovereign, that the State can engage its own responsibility and invoke the consequences of the responsibility of others: 'If it is the prerogative of

<sup>2</sup> C de Visscher, *La responsabilité des États* (Leiden, Bibliotheca Visseriana, 1924), 90.

<sup>3</sup> R Ago, Third Report on State Responsibility, *ILC Yearbook 1971*, Vol II(1), 199, 205 (para 31).

<sup>4</sup> D Anzilotti, *Cours de droit international* (trans Gidel, 1929) (Paris, Panthéon-Assas/LGDJ, 1999), 467.

<sup>5</sup> In those obligations in return for which payment is not obligatory as a matter of law, but which provide a sufficient cause to preclude an action for recovery of money as unduly paid once payment has in fact been made: see Art 1235, *Code civil*.

<sup>6</sup> *The SS 'Wimbledon'*, 1923, *PCIJ Series A, No 1*, p 4, 25.

<sup>7</sup> S Popescu, 'Le fondement de la responsabilité juridique' (1966) *Revue roumaine des sciences juridiques* 139.

sovereignty to be able to assert its rights, the counterpart of that prerogative is the duty to discharge its obligations'.<sup>8</sup>

These observations constitute the first steps towards a definition of responsibility in international law, without however in themselves providing any definition; this is especially so given that international responsibility is not limited either *ratione personae* solely to States (other subjects of international law may equally engage their international responsibility), and must be distinguished *ratione materiae* from those cases in which consequences may arise for States at the international level as a result of conduct not involving any breach of an obligation under international law (international liability).<sup>9</sup>

### (b) The traditional definition of international responsibility

Although hardly distinguishing between the responsibility of individuals and that of the State, Grotius nevertheless admitted that from an injury caused 'there arises an Obligation by the Law of Nature to make Reparation for the Damage, if any be done'.<sup>10</sup> That formulation formed the very basis of international responsibility until relatively recently. Simplifying, as was often his way, Vattel formally assimilated and limited responsibility (although this was a word he did not use) to the obligation to make reparation.<sup>11</sup> This classic theory, which is still sustained by certain authors,<sup>12</sup> was clearly expressed by Anzilotti: 'The wrongful act, that is to say, generally speaking, the violation of an international obligation, is thus accompanied by the appearance of a new legal relationship between the State to which the act is imputable, which is obliged to make reparation, and the State with respect to which the unfulfilled obligation existed, which can demand reparation'.<sup>13</sup> That observation is echoed in the famous *dictum* of the Permanent Court that responsibility is limited to an obligation to make reparation: 'it is a principle of international law, and even a general conception of law, that any breach of an engagement involves an obligation to make reparation'.<sup>14</sup>

This strictly private/civil law approach, exclusively relating to inter-State relations, corresponded well to the demands of the 'Westphalian' international society, characterized by the presence of competing sovereign States: only they had a place in that society, and the conception which they elaborated of their sovereignty (and which was encouraged by the predominantly positivist views of authors) excluded anything resembling a criminal punishment, which would necessarily imply some form of constraint. Further, the absence of any form of transfrontier solidarity (or an awareness of the possibility that such solidarity could exist) favoured this purely bilateral and inter-personal approach. In this system, 'other States might have an interest that reparation should be made for the international wrong and the international legal order restored, but they do not have a right to that

<sup>8</sup> Commentary to draft art 2, para 2, *ILC Yearbook 1973*, Vol II, 177. Draft art 2 as adopted on first reading was deleted on second reading, and with it the accompanying commentary; however, Ago's proposition still holds true.

<sup>9</sup> The present Chapter was originally written in French, in which the same word ('*responsabilité*') covers both 'responsibility' and 'liability'.

<sup>10</sup> H Grotius, *The Rights of War and Peace* (R Tuck (ed), J Barbeyrac (trans), 1625, Indianapolis, Liberty Fund, 2005), Ch XVII, para 1 (vol II, 884); and see the Prolegomena, para 8 (vol I, 86).

<sup>11</sup> See E Jouannet, *Emer de Vattel et l'émergence du droit international classique* (Paris, Pedone, 1998), 407.

<sup>12</sup> See eg J Combacau & S Sur, *Droit international public* (Paris, Montchrestien, 2009), 526.

<sup>13</sup> D Anzilotti, *Cours de droit international* (trans Gidel, 1929) (Paris, Panthéon-Assas/LGDJ, 1999), 467.

<sup>14</sup> *Factory at Chorzów, Merits*, 1928, *PCIJ, Series A, No 17*, p 4, 29; see also *Factory at Chorzów, Jurisdiction*, 1927, *PCIJ, Series A, No 9*, p 4, 21.

effect',<sup>15</sup> given that they had suffered no injury. Injury constituted, together with a failure to respect the law, a necessary condition for incurring responsibility.

At the same time, any idea of 'fault' on the part of the State was clearly excluded: it was not only that '*societas delinquere non potest*', but diplomatic usage and the necessities of the coexistence of equally sovereign entities could not have been accommodated. If a violation of international law had caused damage, reparation had to be made for it: 'In the absence of any specific requirement of a mental element in terms of the primary obligation, it is only the act of the State that matters, independently of any intention.'<sup>16</sup>

## 2 The complex definition of a multi-faceted notion

It remains true today that a breach of international law must be objectively ascertained, without having regard to the reasons which might have motivated its author (at least, so long as the rule violated does not itself require that the act in question has been committed with a certain state of mind, as is the case, for example, with genocide or crimes against humanity). However, on the other hand, the very notion of responsibility has been drastically modified as a result of a tripartite evolution, which reflects that of international law itself:

- it is no longer reserved only to States, and has become an attribution of the international legal personality of other subjects of international law;
- it has lost its conceptual unity as a result of the elimination of damage as a condition for the engagement of responsibility for breach, since
- the common point of departure which it shared with liability for acts not involving a breach of international law has disappeared.

### (a) The diversification of persons who may be responsible

#### (i) *The responsibility of international organizations*

According to the traditional definition, public international law was, exclusively, a 'law between States'. Being the only subjects of international law, States were the only entities which were capable of incurring responsibility on the international plane as a result of a breach of its rules. With the diversification of the subjects of international law and the recognition of a certain 'measure of international legal personality'<sup>17</sup> to other entities, that monopoly has disappeared. Responsibility is at one and the same time an indicator and the consequence of international legal personality: only a subject of international law may be internationally responsible; the fact that any given entity can incur responsibility is both a manifestation and the proof of its international legal personality.

In the *Reparations* Advisory Opinion, the International Court arrived at the conclusion that 'the [United Nations] is an international person', principally as a result of the fact that 'its Members, by entrusting certain functions to it, with the attendant duties and responsibilities, have clothed it with the competence required to enable those functions to be effectively discharged'.<sup>18</sup> The Court continued, observing that, as a result, the United Nations 'is a subject of international law and capable of possessing international rights and duties,

<sup>15</sup> D Anzilotti, *Cours de droit international* (trans Gidel, 1929) (Paris, Panthéon-Assas/LGDJ, 1999), 517.

<sup>16</sup> ARSIWA, Commentary to art 2, para 10.

<sup>17</sup> *Reparation for Injuries Suffered in the Service of the United Nations*, ICJ Reports 1949, p 174, 179.

<sup>18</sup> *Ibid.*

and that it has capacity to maintain its rights by bringing international claims;<sup>19</sup> consequently, the UN can invoke the responsibility of States, but equally, it may itself engage its own responsibility in their regard.<sup>20</sup> Accordingly, 'from the moment that organizations exercise legal competencies of the same type as those of States, it seemed logical that the same consequences should attach to the actions of both one and the other'.<sup>21</sup>

At the same time, '[t]he subjects of law in any legal system are not necessarily identical in their nature or in the extent of their rights',<sup>22</sup> and, just as the 'legal personality and rights and duties [of an international organization are not] the same as those of a State',<sup>23</sup> similarly the mechanisms of responsibility which are applicable to States may not necessarily be transposed wholesale and unmodified to international organizations. In reality, 'it may be admitted . . . that the international law of responsibility applicable to international organizations includes both some general rules which apply in the sphere of the responsibility of States, as well as some special rules required by the specific nature of international organizations'.<sup>24</sup> In particular, two elements prevent a pure transposition: on the one hand, the principle of speciality which characterizes (and limits) the competencies of international organizations; and on the other, the limited concrete resources (including financial resources) which international organizations have available to deal with the obligations resulting from the engagement of their responsibility. These two characteristics explain why the Draft Articles adopted on first reading by the ILC on the 'Responsibility of International Organizations' in 2009<sup>25</sup> are inspired to a very large degree by the Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA), but nevertheless diverge in certain important respects: 'the main question that was left out in the Articles on State responsibility, and that [is considered in the draft Articles on International Organizations], is the issue of the responsibility of a State which is a member of an international organization for a wrongful act committed by the organization'.<sup>26</sup>

It remains the case that the responsibility of international organizations is largely governed by the same general principles which apply to the responsibility of States, and that, seen from afar, it has the same general characteristics and is susceptible of the same type of analysis. However, the same is not true in relation to the responsibility of individuals.

### (ii) *The international responsibility of individuals*

For a long time regarded as 'objects' of international law,<sup>27</sup> both individuals and corporations have acquired legal personality, both 'active' and 'passive',<sup>28</sup> which finds its

<sup>19</sup> Ibid.

<sup>20</sup> See also P Klein, *La responsabilité des organisations internationales dans les ordres juridiques internes et en droit des gens* (Brussels, Bruylant, 1998), esp 2–5. <sup>21</sup> Ibid, 305.

<sup>22</sup> *Reparation for Injuries Suffered in the Service of the United Nations*, ICJ Reports 1949, p 174, 178.

<sup>23</sup> Cf ibid, 179.

<sup>24</sup> R Zacklin, 'Responsabilité des organisations internationales' in SEDI, *La responsabilité dans le système international* (Paris, Pedone, 1991), 91; see also M Pérez González, 'Les organisations internationales et le droit de la responsabilité' (1988) 92 *RGDIP* 99; and A Pellet, 'Syllabus: Responsibility of international organizations', Report of the ILC, 52nd Session, *ILC Yearbook 2000*, Vol II(2), 135.

<sup>25</sup> See Report of the ILC, 61st Session, 2009, A/64/10, 19 (para 48).

<sup>26</sup> Draft Articles on the Responsibility of International Organizations, Commentary to draft art 1, para 6; ibid, 41.

<sup>27</sup> See the *dictum* of the Permanent Court of International Justice in *Jurisdiction of the Courts of Danzig*, 1928, PCIJ, Series B, No 15, p 4, 17–18.

<sup>28</sup> A Pellet, 'Le droit international à l'aube du XXIème siècle (La société internationale contemporaine—permanence et tendances nouvelles)' (1997) I *Cursos Euromediterraneos* 83.

expression in the fact that they may, on the one hand, invoke the responsibility of other subjects of international law on the international plane in certain specific circumstances (essentially in the realms of human rights and investment), and on the other, be held accountable for their own internationally wrongful acts.

The international responsibility of individuals shares a common characteristic with that of States (and international organizations): its source is the violation of an obligation (of abstention) arising under international law. However, apart from this, the responsibility of individuals is markedly different:

- it is largely, if not exclusively, criminal;
- it is implemented by international tribunals (while as regards State responsibility, the intervention of an international court or tribunal is exceptional and is entirely dependent upon the consent of the States concerned); and
- it is quite exceptional at the international level, occurring only if an international criminal tribunal has been created to adjudicate upon its existence, either by treaty, or by a resolution of the Security Council. In the absence thereof, a crime may be defined by an international legal instrument or under customary international law (or both: eg piracy, slavery, racial discrimination), but its sanction—that is to say, the penal implementation of punishment—is left to the domestic courts of States.

This intrusion of criminal responsibility into international law constitutes one of the causes of the loss of conceptual unity of the notion of responsibility in international law; however, it is not the only such cause.

### (b) The 'objectivization' of international responsibility

Two other elements, both of which show a growing shift in the notion of international responsibility towards 'objectivization', have contributed greatly to its conceptual fragmentation. First, the traditional analysis which saw damage as one of the conditions required for international responsibility to arise has been profoundly called into question. Second, the requirement of a breach is no longer the sole source of liability in the international legal order, although neither the basis upon which this purely 'objective' liability arises, nor the entities to which it is owed, have yet been identified with any clarity.

#### (i) Questioning the traditional definition of responsibility

According to the most widely-accepted formulation '[t]he term "international responsibility" covers the new legal relations which arise under international law by reason of the internationally wrongful act of a State'.<sup>29</sup> That conception of responsibility has not changed; by contrast, however, the conditions governing the circumstances under which these new legal relations and their 'content' (to use the formulation of the title of Part Two of the Articles on Responsibility of States for Internationally Wrongful Acts), have been the object of a radical reconceptualization, resulting from both developments in international society and the particular resonance which Roberto Ago was able to give to those developments within the context of the codification of the topic of State responsibility by the ILC. The product of that process is the text, remarkable for both its conciseness and

<sup>29</sup> ARSIWA, Commentary to art 1, para 1; see also D Anzilotti, *Cours de droit international* (trans Gidel, 1929) (Paris, Panthéon-Assas/LGDJ, 1999), 467.

its scope, of articles 1 and 2 of the Articles on Responsibility of States for Internationally Wrongful Acts. Those two provisions provide:

*Article 1*

*Responsibility of a State for its internationally wrongful acts*

Every internationally wrongful act of a State entails the international responsibility of that State.

*Article 2*

*Elements of an internationally wrongful act of a State*

There is an internationally wrongful act of a State when conduct consisting of an action or omission:

- (a) is attributable to the State under international law; and
- (b) constitutes a breach of an international obligation of the State.

The most striking feature of this new approach compared to the traditional understanding of the notion of responsibility is the exclusion of damage as a condition for responsibility. In order for an internationally wrongful act to engage the responsibility of a State, it is necessary *and sufficient* that two elements (breach and attribution) are present. This is certainly not to say that, in this system, injury has no role to play; however, it fades into the background, at the level not of the triggering of the mechanisms of responsibility, but at that of the 'new legal relations' which arise from the fact of responsibility, some of which (the principal being, without doubt, the obligation of reparation) are dependent upon injury for their existence.

The ILC explained, in a most convincing fashion, the elimination of damage as a condition for responsibility:

If we maintain at all costs that 'damage' is an element in any internationally wrongful act, we are forced to the conclusion that any breach of an international obligation towards another State involves some kind of 'injury' to that other State. But this is tantamount to saying that the 'damage' which is inherent in any internationally wrongful act is the damage which is at the same time inherent in any breach of an international obligation.<sup>30</sup>

The requirement that there should be a breach of obligation is therefore sufficient.<sup>31</sup>

We have therefore passed from a purely inter-subjective conception of responsibility, with decidedly 'civil' or 'private law' overtones, to a more 'objective' approach: international law must be respected independently of the consequences of a violation and any breach entails the responsibility of its author, while the content of such responsibility, its concrete effects, varies according to whether or not the internationally wrongful act has caused damage, and according to the nature of the norm breached. This reconceptualization of international responsibility, properly described as 'revolutionary',<sup>32</sup> bears witness to the (relative) progress of solidarity in international society. In a world in which sovereigns were juxtaposed and in which the very notion of an international 'community' had no place, it is understandable that the focus of commentators was on inter-State relations, and that

<sup>30</sup> Commentary to draft art 3, para 12, *ILC Yearbook 1973*, Vol II, 183.

<sup>31</sup> For a different view, see B Stern, 'Et si on utilisait la notion de préjudice juridique? Retour sur une notion délaissée à l'occasion de la fin des travaux de la C.D.I. sur la responsabilité des États' (2001) *AFDI* 3, published in English as 'A Plea for 'Reconstruction' of International Responsibility Based on the Notion of Legal Injury', in M Ragazzi (ed), *International Responsibility Today: Essays in Memory of Oscar Schachter* (Leiden, Brill, 2003), 93.

<sup>32</sup> A Pellet, 'Remarques sur une révolution inachevée—Le projet de la C.D.I. sur la responsabilité des États' (1996) 42 *AFDI* 7.

responsibility was analysed solely from that perspective. However, such an approach is no longer acceptable once it is admitted that the function of international law is not only to guarantee the independence of States, but also to organize their coexistence and inter-dependence. That is the function of the notion of the 'international community', the interests of which transcend those of the entities of which it is composed, and in relation to which 'it is more essential than ever that the rules developed to ensure the ordered progress of relations between its members should be constantly and scrupulously respected'.<sup>33</sup>

(ii) *A truly objective concept of responsibility?*

Cross-border solidarities are evidenced in other manners in the modern world: the gravity of the harm which certain activities, made possible by scientific and technological progress, may cause to individuals and to the environment leads, in the international legal order as in domestic legal systems, to consideration of whether strict liability should exist. Such liability is 'objective', in the sense that its source is not as such the conduct of a subject of international law, but rather arises from the result of an act or omission, whether that result is the occurrence of a 'risk' or even simply of 'damage' itself.

In international law, there exist a number of examples of mechanisms of liability of this type. However, they possess very particular characteristics: either, on the one hand, they are exclusively treaty-based (for example, in the fields of marine pollution, activities in outer space, or civil nuclear activities), or, on the other, they result from the 'polluter pays' principle. But in this latter case they do not affect the State in its role as a public authority, and the consequences for the polluter are essentially a matter of domestic law, such that it is difficult to characterize them as 'new legal relations which arise under international law' by reason of an act resulting in responsibility.

In any case, it is not possible to argue that there exists at present a rule of customary international law in relation to strict liability which plays the same role as article 1 of the ILC's Articles on State Responsibility in relation to responsibility for breach of an international obligation: a formulation such as 'Any damage resulting from a lawful but potentially dangerous act authorized by, or attributable to, a State, results in its liability' is clearly unsustainable.

First it poses problems, impossible to resolve given the present state of international law, in relation to the definition of dangerous activities and of determination of the threshold of gravity of damage necessary for the triggering of responsibility. Second, quite apart from those difficulties, which might be resolved by a political decision, the very principle of such liability is very far from being accepted, as was demonstrated by the inconclusive work carried out by the ILC on the topic of 'International Liability for Injurious Consequences Arising out of Acts not Prohibited by International Law'.<sup>34</sup> The following conclusions may be drawn from that work:

- the strongest reactions from States faced with risks resulting from hazardous activities (even extremely hazardous activities) not prohibited by international law consist of insistence upon obligations of prevention, incumbent on both operators and States (and the violation of which gives rise to responsibility for omission);<sup>35</sup>

<sup>33</sup> *United States Diplomatic and Consular Staff in Tehran (United States of America v Iran)*, ICJ Reports 1980, p 3, 43 (para 92). <sup>34</sup> See below, Chapter 10.

<sup>35</sup> See the ILC's Draft Articles on Prevention of Transboundary Damage from Hazardous Activities; *ILC Yearbook 2001*, Vol II(2), 146–170 (para 97).



- there is concern as to the provision of compensation for victims of damage caused by such activities, but this is not seen as involving the creation of a liability of the State for that purpose; the draft Principles on the Allocation of Loss in the case of Transboundary Harm Arising out of Hazardous Activities adopted by the ILC in 2006 are limited to providing that:

Each State *should* take all necessary measures to ensure that prompt and adequate compensation is available for victims of transboundary damage caused by hazardous activities located within its territory or otherwise under its jurisdiction or control.<sup>36</sup>

Even if it may be the case that all systems of national law provide for mechanisms of objective liability by which the State guarantees compensation for the activities of highly hazardous activities, it nevertheless appears difficult to derive from that fact any general principles of law applicable in international law. Further the laborious formulations used by the ILC by way of paraphrase throughout its work demonstrates how far the international system is from a system of strict liability, properly so-called. Nevertheless, it is still possible to discern the first outlines of a 'soft' responsibility, which the use of the term 'liability' in English describes more faithfully than does the undifferentiated use of the term '*responsabilité*' in French.

### 3 The characteristics of international responsibility

The profound manner in which the very concept of State responsibility was called into question by the 'Ago revolution'—which is much more in line with the realities of modern international relations than was the traditional approach—as well as by the other developments of international law in this area, has two important consequences. First, in French at least, it has resulted in a fragmentation of the meaning of the single word '*responsabilité*', which is indiscriminately used to describe juridical institutions which are very different. Second, although 'classic' State responsibility could be assimilated to responsibility in private or civil law, such an approach is no longer possible: in part 'civil', in part 'criminal', responsibility fulfils functions which are particular to it in the international legal order.

#### (a) Diversity and unity of the concept of international responsibility

For as long as damage played a central role in ascertaining when international responsibility arose, the unity of the notion was assured, or at the least, defensible. Whether discussing responsibility for internationally wrongful acts, or liability for acts not prohibited by international law, damage remained the central trigger of both responsibility and liability; the object of both mechanisms being to ensure reparation for damage, whether that damage resulted from violation of an obligation, or from an activity involving risk. The elimination of damage as a condition for, or the trigger of, State responsibility for internationally wrongful acts has, however, destroyed that unity. Although still the source of responsibility in the case of liability, in the case of responsibility as a result of the breach of an international obligation, damage is only a factor relevant to certain of the new relations which arise as a result of incurring responsibility, in particular the obligation to make reparation. As was highlighted by the ILC, following the lead of Roberto Ago:

<sup>36</sup> Principle 4, Draft Principles on the Allocation of Loss in the Case of Transboundary Harm Arising out of Hazardous Activities; Report of the ILC, 58th Session, 2006, A/61/10, 108 (emphasis added).

Being obliged to accept the possible risks arising from the exercise of an activity which is itself lawful, and being obliged to face the consequences—which are not necessarily limited to compensation—of the breach of a legal obligation, are two different matters. It is only because of the relative poverty of legal language that the same term is habitually used to designate both.<sup>37</sup>

However, moving on from the abstract analysis of the concepts of responsibility and liability to examine the concrete modes of their functioning in the international legal order, certain unifying elements are apparent. First, a failure to comply with the obligations of prevention and reparation by a State or an international organization constitutes an internationally wrongful act which takes one back into the realm of, and triggers, the mechanisms of responsibility. Further, in relation to liability, it is far from being accepted that damage is its fundamental basis or source. In this context, it is possible to argue that damage is only a factor entailing the implementation of the obligation to make reparation, whilst it is the risk engendered by hazardous activities which is the foundation of both the 'preventative' and 'reparative' aspects of liability (however uncertain the latter may be). In any case, even if never expressly stated by the ILC, it is only this analysis which justifies grouping together the two texts, relating on the one hand to prevention of transboundary damage resulting from hazardous activities, and on the other, the allocation of loss in the case of such damage, under the heading of 'Injurious Consequences Arising out of Acts Not Prohibited by International Law'.

All the same, those considerations do not permit us to re-establish the unity of the notion of international responsibility, understood in its broadest sense (that is, as including both responsibility proper and liability). The foundations of the two forms which accountability may take in the international legal order remain distinct: a breach of obligation in the case of responsibility; risk in the case of liability. Further, the functioning of the two forms remains profoundly different, even if it were one day to be accepted that reparation may be due to the 'international community' in the case of damage caused to its own interests by hazardous activities, for instance by damage to the 'global commons'.<sup>38</sup> If that possibility were accepted, liability for risk would share a further common feature with the modern system of responsibility for internationally wrongful acts: it would not arise solely in the bilateral relations between States, but would be truly international since it could produce consequences for the international community as a whole (even if those consequences would not be of a criminal character).

These observations only concern the responsibility of States and international organizations. The acts for which individuals may be responsible in the international legal order are entirely different, and in truth, however recent the manifestations of such responsibility may be, remain much more traditional. Individuals may now in the international legal order be held criminally responsible (before international criminal tribunals), and may also, at least in certain cases (for instance, before the International Criminal Court), incur civil responsibility. This development is, of course, yet another element of the 'fragmentation' of the law of international responsibility.

### (b) International responsibility: neither civil nor criminal . . .

Traditionally, the international responsibility of the State was presented as being of a 'civil' or 'private law' character. This was entirely acceptable insofar as State responsibility did not

<sup>37</sup> Report of the ILC, 25th Session, *ILC Yearbook 1973*, Vol II, 161, 169 (para 38); for Ago's original formulation, see R Ago, Third Report on State Responsibility, *ILC Yearbook 1971*, Vol II(1), 199, 203 (para 20).

<sup>38</sup> Cf art 139, United Nations Convention on the Law of the Sea, Montego Bay, 10 December 1982, 1833 UNTS 3.

call into question anything other than inter-personal relations, even if it had always been accompanied by forcible methods of implementation, namely the institution of reprisals, now reborn under the name of 'countermeasures'; such methods of implementation had as their only goal (or at least were conceived as having as their only goal) enforcing compliance with the obligation of reparation, and did not constitute a punishment for a breach of international law.

Conversely, for Kelsen, responsibility was 'made up of specific sanctions [under international law], that is reprisals and war',<sup>39</sup> which could be seen as having a penal connotation. However, Kelsen's analysis was based on the (debatable) postulate that law is a system of coercion, with the inevitable result that his analysis considered international responsibility as being a sanction:

Starting from the idea that the legal order is a coercive order, this view sees the authorization accorded to the injured State to apply coercion to the offending State by way of sanction precisely as the sole legal consequence flowing directly from the wrongful act.<sup>40</sup>

Although its postulates are open to criticism, this position at least has the merit of demonstrating that the obligation to make reparation is not the sole consequence of the incurring of responsibility; the availability of recourse to countermeasures is another.

However, Kelsen did not derive from this that State responsibility was criminal. In a much quoted passage, he underlined the contrary, stating 'In international law, responsibility is neither civil nor criminal'.<sup>41</sup> In reality, it is the coexistence and mixing of these two aspects, civil and criminal, which endow international responsibility with characteristics which are distinctly its own, and which render any assimilation with those notions in domestic law both dangerous and open to question.

In fact, according to the formulation of Gaetano Arangio-Ruiz 'international liability [*sic*] presents civil and criminal elements':<sup>42</sup> civil because responsibility, in the great majority of cases, involves the making of reparation by one subject of law to another, or the adoption of countermeasures which are (or at least are said to be) simply the substitute for specific performance in a legal order in which the judiciary and the 'public authorities' intervene only exceptionally; criminal, to the extent that responsibility, in and of itself, constitutes a 'sanction' for a breach of the law—as the definition contained in article 1 of the ILC's Articles makes very clear.

In the same way that a driver who jumps a red light incurs responsibility by reason of the sole fact that he has not complied with the relevant law, even if he has caused no damage, so a State which breaches one of its obligations under international law incurs responsibility, independently of any injury which may result for another State, since it is

<sup>39</sup> H Kelsen, 'Théorie du droit international public' (1953-III) 84 *Recueil des cours* 1, 87; see also *ibid*, 19, 29.

<sup>40</sup> Commentary to draft art 1, para 5, *ILC Yearbook 1973*, Vol II, 174.

<sup>41</sup> H Kelsen, 'Théorie du droit international public' (1953-III) 84 *Recueil des cours* 1, 87; see also P Reuter, 'Principes de droit international public' (1961-I) 103 *Recueil des cours*, 584ff; Commentary to draft art 19, para 21, *ILC Yearbook 1976*, Vol II(2), 103-104 (n 473); Commentary to art 12, para 5; R Ago, 'Le délit international' (1939-II) 69 *Recueil des cours* 415, 530-531; R Ago, Third Report on State Responsibility, *ILC Yearbook 1971*, Vol. II(1), 199, 209 (para 38); R Ago, Fifth Report on State Responsibility, *ILC Yearbook 1976*, Vol II(1), 3, 33 (n 154), 46 (para 137); G Arangio-Ruiz, Fifth Report on State Responsibility, *ILC Yearbook 1993*, Vol. II(1) 1, 54-57 (paras 250-263); J Crawford, First Report on State Responsibility, *ILC Yearbook 1998*, Vol II(1), 1, 13-14 (para 54).

<sup>42</sup> G Arangio-Ruiz, Fifth Report on State Responsibility, *ILC Yearbook 1993*, Vol II(1) 1, 56 (para 256) (*italics in original*); cf F García Amador, First Report on State Responsibility, *ILC Yearbook 1956*, Vol II, 173, 180 (para 35), 182-183 (paras 46-53).

in the interests of the international community as a whole that international law should be respected. As a consequence of the consolidation (even if only embryonic) of solidarity in international society, the system of international responsibility has to this small extent become similar to systems of domestic law. However, such an analogy cannot be pushed too far:

- it is of the essence of criminal sanctions that they are pronounced by a court; however neither States, nor international organizations, are subject to the compulsory jurisdiction of any form of judge;
- although mechanisms of 'sanction' exist in international law (for instance, in Chapter VII of the Charter, even if the term is not expressly used), they are aimed at ensuring the maintenance of international peace and security, and not at ensuring respect for the rules of international law as such; even if it may be argued that, in fact, certain States have been the object of 'punitive' sanctions for having gravely violated international rules of fundamental importance (as was the case with Germany after the two World Wars, or Iraq after its invasion of Kuwait in 1990), those measures form part of the law of collective security and not part of the law of international responsibility;<sup>43</sup>
- in the current state of international law, the consequences resulting from the 'objectivization' of responsibility remain extremely limited; even if the provisions of the ILC's Articles devoted to 'serious breaches of obligations under peremptory norms of general international law'<sup>44</sup> are gravely deficient,<sup>45</sup> it is significant that they foresee collective reactions to breaches, while article 48 opens the possibility that States other than the injured State may under certain circumstances invoke the responsibility of the author of an internationally wrongful act.

Despite their extreme caution in this regard, it remains the case that the ILC's Articles have the great merit of demonstrating (even if they do so in an extremely insufficient manner) that in addition to the breach of obligations of 'bilateral interest', there exists in contemporary international law, to use the abandoned formula of draft article 19, a class of international obligations 'so essential for the protection of fundamental interests of the international community' that their breach attracts a regime of aggravated responsibility, the penal elements of which are certainly more apparent than is the case in relation to the 'ordinary' responsibility incurred by States as the result of a 'normal' internationally wrongful act. However, those elements are not sufficient to change the nature of international responsibility as a whole, nor even to conclude that the regime of aggravated responsibility is in truth of a penal nature; without doubt the ILC was correct to abandon, during the process of second reading the misleading vocabulary of criminal law which marked certain provisions of the draft adopted on first reading in 1996.<sup>46</sup>

<sup>43</sup> See the masterly and nuanced demonstration of the different logic on which these two 'branches' of the law are based by M Forteau, *Droit de la sécurité collective et droit de la responsabilité internationale de l'État* (Paris, Pedone, 2006).

<sup>44</sup> See ARSIWA, art 41, and, in an excessively cautious manner, art 54. <sup>45</sup> See below, Chapters 45–50.

<sup>46</sup> Cf the use of the terms 'crimes' and, above all, 'delicts' in draft art 19; see A Pellet, 'Le nouveau projet de la C.D.I. sur la responsabilité de l'État pour fait internationalement illicite: *Requiem pour le crime?*' in L Vohrah et al (eds), *Man's Inhumanity to Man—Festschrift Antonio Cassese* (The Hague, Kluwer, 2002), 654; published in English as A Pellet 'The New Draft Articles of the International Law Commission on the responsibility of States for internationally wrongful acts: A Requiem for State's Crimes?' (2002) 32 *Netherlands Yearbook of International Law* 55.

The objectivization of responsibility for internationally wrongful acts which results from the excision of damage as a precondition for responsibility is at the origin of a transformation of the function which responsibility is called upon to fulfil in an international society which has less a purely inter-State character and is better integrated than formerly. The international law of responsibility has distanced itself from the 'civil law' model which previously characterized it, and no longer solely plays the role of a compensatory mechanism, to which it was for a long time confined. It is now also, and perhaps principally, a mechanism having as its function the condemnation of breaches by subjects of international law of their legal obligations and the restoration of international legality, respect for international law being a matter in which the international community as a whole has an interest.<sup>47</sup> Many provisions of the Articles on Responsibility of States for Internationally Wrongful Acts reflect this new (or newly 'discovered') function, whether they relate to the continued duty of performance of the obligation breached (article 29), the obligation of the responsible State to cease the internationally wrongful act and if necessary, offer guarantees and assurances of non-repetition (article 30), or the possibility open to States other than the injured State to invoke, within certain limits, the responsibility arising from the violation of the law (article 48). Similarly, it may be considered that the strengthening of the obligations relating to the conduct of States in relation to hazardous activities equally represents a conception of international society and the law applicable to it, which is representative of greater solidarity and 'communitarianism'.

### Further reading

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- B Simma, 'Bilateralism and Community Interest in the Law of State Responsibility', in Y Dinstein (ed), *International Law at a Time of Perplexity—Essays in Honour of Shabtai Rosenne* (Dordrecht, Nijhoff, 1989), 821

<sup>47</sup> See P-M Dupuy, 'Responsabilité et légalité', in SFDI, *La responsabilité dans le système international* (Paris, Pedone, 1991), 263.

- B Stern, 'Et si on utilisait la notion de préjudice juridique? Retour sur une notion délaissée à l'occasion de la fin des travaux de la C.D.I. sur la responsabilité des États' (2001) *AFDI* 3; published in English as 'A Plea for 'Reconstruction' of International Responsibility Based on the Notion of Legal Injury' in M Ragazzi (ed), *International Responsibility Today: Essays in Memory of Oscar Schachter* (Leiden, Brill, 2005), 93
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# The Law of International Responsibility

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