

# RESPONSIBILITY IN INTERNATIONAL LAW: GENERAL PRINCIPLE OR INSTITUTION OF CUSTOMARY LAW?

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## INTRODUCTION

Professor Karol Wolfke had devoted a considerable part of his research work to the domain of the sources and codification of international law.<sup>1</sup> The present contribution comes within this field of interest as well, in that it addresses some fundamental, but still unresolved, issues concerning the sources of international law – the mutual relations and interactions between them and the determination of the character of particular norms of international law in the context of their assignment to the appropriate sources.<sup>2</sup> However, it is done by a means of reference to a specific case of norms concerning international responsibility. As the examination of their nature will show, a relationship between different sources may not necessarily be hierarchical or exclusive; it may be just complementary and evolving.

## I.

The idea of the responsibility of states for breaches of the law of nations is a relatively old one.<sup>3</sup> The fathers of international law doctrine – among them

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<sup>1</sup> The two most significant works by Professor Wolfke in this regard are certainly *Custom in Present International Law*, (1<sup>st</sup> edition 1964, 2<sup>nd</sup> edition 1993) and *Rozwój i kodyfikacja prawa międzynarodowego: wybrane zagadnienia z praktyki ONZ* (1972).

<sup>2</sup> See e.g. VD Degan *Sources of International Law* (1997) 517 ff; H Thirlway *The Sources of International Law* (2014) 129 ff; W Czapliński, A Wyrozumka *Prawo międzynarodowe publiczne. Zagadnienia systemowe* (2nd ed. 2014) 35 ff.

<sup>3</sup> For the historical evolution of responsibility in international law from 16th to 20th century see P Reuter, 'La responsabilité internationale – Problèmes choisis (cours de doctorat professé pendant l'année universitaire 1955-1956)' in P Reuter *Le développement de l'ordre juridique international – Ecrits de droit international* (1995) 379-401.

Grotius, Bynkershoek or Vattel – had written about the monarchs’ right to requital for violations of their rights or the rights of their subjects by other states (other sovereigns) and to claim reparation for the consequences of such violations.<sup>4</sup> An early example is given by C.G. Roelofsen who describes a case (mentioned by Grotius) concerning a claim made by the Pomeranian duke Philip II against the Republic of the United Netherlands in protection of the townsmen of Stetinum (Szczecin) who suffered damages from a Dutch caper on service of the Republic.<sup>5</sup> Interestingly, the authors of the oldest works had not even used the term “responsibility”, which e.g. was introduced to French language and legal terminology (*responsabilité*) at the end of eighteenth century and meant “obligation to redress, to make good damage”.<sup>6</sup>

In the nineteenth century, despite the decline of the law of nature school, the idea of the international responsibility of states was adopted and developed within the positivist doctrine as well as in the practice of claims commissions, which at that time became more and more popular.<sup>7</sup> This resulted in a determination and a certain systematization of the rules concerning responsibility.

While state responsibility became subject of serious theoretical deliberations, i.a. by A.W. Heffter, J.C. Bluntschli or W.E. Hall,<sup>8</sup> the authors started to reveal divergences in their views on various issues such as the nature of norms defining responsibility, its sources and the effects of responsibility for

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<sup>4</sup> See H Grotius *De Iure Belli ac Pacis* (1625), book II, ch XX, XL), C van Bynkershoek *De Foro Legatorum Liber Singularis*, (1744) ch XXII, E de Vattel *Le droit des gens ou principes de la loi naturelle* (1758) vol I para 348, vol II para 70). See also G Nolte ‘De Dionisio Anzilotti à Roberto Ago – Le droit international classique de la responsabilité internationale des Etats et la prééminence de la conception bilatérale des relations inter-étatiques’ in PM Dupuy (ed) *Obligations Multilatérales, Droit Imperatif et Responsabilité des Etats* (2003) 5, 6-9 (for English version ‘From Dionisio Anzilotti to Roberto Ago: The Classical International Law of State Responsibility and the Traditional Primacy of a Bilateral Conception of Inter-State Relations’ (2002) 13 EJIL 1083. See also P Reuter (n 4) 384 ff; I Brownlie, *Principles of Public International Law* (2008) 434.

<sup>5</sup> CG Roelofsen ‘The Claim of Some Citizens of Stettin against the Dutch Republic and its Adjudication (1609-17) – State Responsibility in Early Modern Europe; apropos of De Iure Belli ac Pacis II.17.20’ in TD Gill, WP Heere (eds) *Reflections on Principles and Practice of International Law – Essays in Honour of LJ Bouchez* (2000) 175.

<sup>6</sup> Fr. “l’obligation de réparer”, see G Cottereau ‘Système juridique et notion de responsabilité’ in SFDI *La responsabilité dans le système international – Actes du XXIV Colloque de la SFDI, 31 V – 2 VI 1990* (Paris) 1991 5; JP Quéneudec *La responsabilité internationale de l’Etat pour les fautes personnelles de ses agents* (1966) 1.

<sup>7</sup> The model for these commissions was the one constituted under the Jay treaty (of 19 November 1794) between Great Britain and the USA, which was competent in resolving cases of mutual claims arising from the US independence war USA; see: P Reuter (n 3) 389-390; Sh Rosenne *The Perplexities of Modern International Law* (291 RCADI 2001) 382; W Czaplinski, A Wyrozumska (n 2) 825.

<sup>8</sup> E.g. AW Heffter *Das Europäische Völkerrecht der Gegenwart* (1844); JC Bluntschli *Das moderne Völkerrecht der zivilisierten Staaten* (1878); WE Hall *A Treatise on International Law* (1880); AM de Bulmerincq ‘Die Staatsstreitigkeiten und ihre Entscheidung ohne Krieg’ in F. von Holtendorff (ed) *Handbuch des Völkerrechts* (1885); F Martens *Sowriemjennoje miezdunarodnoje pravo cywilizowannich narodow* (1883). In this respect see G Nolte ‘De Dionisio Anzilotti...’ (n 4) 7 ff.

parties directly and indirectly concerned. At that time the achievement of a uniform solution to all particular questions in respect of international responsibility seemed immensely difficult, if not impossible.

One of the most extreme views was adopted by Th. Funck-Brentano and A. Sorel. Having departed from an absolutely voluntarist understanding of sovereignty, they denied any idea of responsibility of states in their mutual relations as incompatible with the very essence of sovereignty.<sup>9</sup> They claimed that a violation of international law entailed neither any legal (enforceable) obligation of reparation, nor any legal relationship between the perpetrator and the victim.<sup>10</sup> Accordingly, it was solely for practical reasons, such as the maintenance of peace and amity, that states cultivated a habit of making good the consequences of a breach, which was to be seen solely as an act of goodwill and specific rehabilitation of the perpetrator. The notion “responsibility” gained in this context a rather instrumental meaning. This approach, however, remained isolated and did not influence further development of the concept of international responsibility.

Actually, according to the opinion prevailing in the doctrine of international law, sovereignty was to be regarded as one of the reasons for the idea of international responsibility. Ch. de Visscher argued that responsibility was a necessary corollary of the sovereignty of states.<sup>11</sup> According to him, responsibility constituted an indispensable element of international law which made the coexistence of sovereign states possible.<sup>12</sup> Even further went M. Huber, who discovered the reason for the idea of responsibility in the very essence of law, in the nature of legal order. As he stated in his report in the *British Claims in the Spanish Zone of Morocco* case:<sup>13</sup>

“Responsibility is the necessary corollary of a right. All international rights entail international responsibility. Responsibility involves as consequence the obligation to make reparation in case where the obligation had not been performed.”<sup>14</sup>

<sup>9</sup> G. Nolte ‘De Dionisio Anzilotti...’ (n 4). 9.

<sup>10</sup> Th Funck-Brentano, A Sorel *Précis du droit des gens* (1877, 1900) after JP Quéneudec (n 6) 4 and G Cottureau (n 6) 10-11. See also M Lachs *Rzecz o nauce prawa międzynarodowego* (1986) 87.

<sup>11</sup> Orig. in French “*corollaire obligé de leur souveraineté*”, Ch de Visscher ‘Responsabilité des Etats’ in II *Bibliotheca Visseriana* (1924) 90.

<sup>12</sup> Ch de Visscher (n 11) 90.

<sup>13</sup> *Spanish Zone of Morocco Claims (Great Britain v Spain)* 2 RIAA 615, 641. See also O Steiner ‘Spanish Zone of Morocco Claims’ in R Bernhardt (ed) IV *Encyclopedia of Public International Law* (2000) 572.

<sup>14</sup> “La responsabilité est le corollaire nécessaire du droit. Tous droits d’ordre international ont pour conséquence une responsabilité internationale. La responsabilité entraîne comme conséquence l’obligation d’accorder une réparation au cas où l’obligation n’aurait pas été remplie.”, *Spanish Zone of Morocco Claims* 641.

In the Polish doctrine L. Ehrlich argued in a similar way:

“[I]nternational law governs the relations between its subjects, thus responsibility arises when the right of one subject was violated by another.”<sup>15</sup>

Both approaches, although referring to different notions – the first to sovereignty and the second to the nature of law, actually lead to one conclusion. Responsibility is an inherent element in the international legal order. It constitutes the fundamental principle that determines its “legal” character. However international responsibility may be also defined in another way – as a body of customary norms developed by states, regulating rights and duties which form the contents of these specific legal relations. Therefore, a controversy arose as to the character of responsibility as a legal norm and whether it should be defined as a general principle, fundamental for every legal order (thus international legal order as well) or as institution of customary law.<sup>16</sup>

## II.

The quality of a general principle in respect of international responsibility was confirmed by the Permanent Court of International Justice in the judgment concerning the *Factory at Chorzów Case*:<sup>17</sup>

“[...] 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>18</sup>

As a general principle, international responsibility plays a pivotal role in the system of international law: it serves as the guarantee of observance and execution of other norms existing in this legal order.<sup>19</sup> Thus it may be defined as the general sanctioning norm towards all other norms of international law. In that regard, though, it must be born in mind that the characteristics of the international legal order are the equality of all of its subjects and the lack of a single law enforcement mechanism or any superior organ endowed with powers in that

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<sup>15</sup> “[P]rawo międzynarodowe normuje stosunki między podmiotami tego prawa, odpowiedzialność więc powstaje, jeżeli prawo jednego podmiotu zostało naruszone przez drugi podmiot.”, L Ehrlich *Prawo międzynarodowe* (1958) 638.

<sup>16</sup> See G Cottreau (n 6) 7 ff, where the author presents a review of the doctrine (mostly French) in that respect. See also M Schröder ‘Verantwortlichkeit, Völkerstrafrecht, Streitbeteiligung und Sanktionen’ in W Graf Vitzthum (ed) *Völkerrecht* (2007) 584ff; R. Sonnenfeld ‘Podstawowe zasady odpowiedzialności międzynarodowej państwa’ in R Sonnenfeld (ed) *Odpowiedzialność państwa w prawie międzynarodowym* (1980) 15.

<sup>17</sup> *Case Concerning the Factory at Chorzów (Germany v Poland)* (Merits) 1928 PCIJ Rep Series A No 17.

<sup>18</sup> *Case Concerning the Factory at Chorzów* (n 17) 29. See also *Case Concerning the Factory at Chorzów (Germany v Poland)* (Jurisdiction) 1927 PCIJ Rep Series A No 9, 21.

<sup>19</sup> See R Sonnenfeld (n 16) 15; PM Dupuy ‘Responsabilité et legalité’ in SFDI *La responsabilité dans le système international – Actes du XXIV Colloque de la SFDI, 31 V – 2 VI 1990* (1991) 263-264; PM Dupuy ‘The International Law of State Responsibility: Evolution or Revolution?’ (1989) 11 Michigan JIL 108 and 123 ff; D Carreau *Droit International* (2004) 444.

respect to which they all would be subordinated to.<sup>20</sup> Therefore the effectiveness of the principle of responsibility depends on the norms regulating its implementation, which together constitute international responsibility understood as the institution of law.

Notwithstanding the universal acceptance of the principle of international responsibility itself (with the minor exception mentioned above), it took a long time to reach a consensus, in particular amongst international law scholars, as to the contents of norms serving its implementation.<sup>21</sup> The doctrine presented divergent views, frequently in respect of fundamental issues such as the source of responsibility, its premises, the character of obligations and rights rising within the relation of responsibility or the means of execution of these obligations.<sup>22</sup> This diversity is echoed, even nowadays, in the commentaries to the two sets of ILC draft articles concerning international responsibility, including the decision of the Commission to work on the issues of responsibility in respect of states and of international organizations separately, as well as the doctrinal comments and opinions thereon.<sup>23</sup>

However, the long-time process of the development of customary norms regulating the matter of responsibility for violations of international law finally resulted in the establishment of a coherent, universal legal regime of international responsibility.<sup>24</sup> It had been formed mainly through the gradual simplification of rules governing the rise and enforcement of responsibility and through purification thereof from the influences of domestic law regulations. In the legal order of equal subjects such as international law, lacking any superior sovereign power over them but the power of a legal norm whose binding force they had

<sup>20</sup> See P Reuter (n 3) 379; G Cottareau (n 6) 3; K Ginther 'Verantwortlichkeit, Haftung und Verantwortung im Völkerrecht' in K Ginther, G Hafner, W Lang, H Neuhold, L Sucharipa-Behrmann (eds) *Völkerrecht zwischen normativem Anspruch und politischer Realität - Festschrift für Karl Zemanek* (1994) 337; JP Quéneudec (n 6) 5. See also D Anzilotti *Corso di diritto internazionale* (3<sup>rd</sup> edition 1927), French translation by G Gidel – *Cours de droit international* (1929) 522.

<sup>21</sup> *Draft articles adopted on first reading - Text of articles with commentaries*, ILC 48th Session UN Doc A/CN.4/L.528/Add.3 (1996) II(2) YbILC *Commentary to Article 1* para 5.

<sup>22</sup> UN Doc A/CN.4/L.528/Add.3 (1996) II(2) YbILC *Commentary to Article 1* para 5.

<sup>23</sup> See i.a. PM Dupuy (ed) *Obligations multilaterales, droit impératif et responsabilité internationale des États* (2003); J Crawford, S Olleson 'The Nature and Forms of International Responsibility' in MD Evans (ed) *International Law* (2003) 445 ff; 'Symposium: Assessing the Work of the International Law Commission on State Responsibility' (2002) 13 EJIL 1053; J Crawford, J Peel, S Olleson 'The ILC's Articles on Responsibility of States for Internationally Wrongful Acts: Completion of the Second Reading' (2001) 12 EJIL 963; D Bodansky, JR Crook (ed) 'Symposium: The ILC's State Responsibility Articles' (2002) 96 AJIL 773; R Sonnenfeld *Kodyfikacja odpowiedzialności międzynarodowej państwa*, (2002); ChJ Tams 'All's Well That Ends Well. Comments on the ILC's Articles on State Responsibility' (2002) 62-II ZAÖRV 759; A Nollkaemper 'Constitutionalization and the Unity of the Law of International Responsibility' (2009) 16 Indiana JGLS 535; G Hafner 'Is the topic of international responsibility of international organizations ripe for codification? Some critical remarks' in U Fastenrath, R Geiger, D Khan, A Paulus, S von Schorlemer, Ch Vedder (eds) *From Bilateralism to Community Interest: Essays in Honour of Judge Bruno Simma* (2011) 695-717; J d'Aspremont *The Articles on the Responsibility of International Organizations: Magnifying the Fissures in the Law of International Responsibility*, (2012) 9 IOLR 15.

<sup>24</sup> See A Boyle, Ch Chinkin *The Making of International Law* (2007) 183 ff.

recognized, only the regime of responsibility based on principles that are simple, clear and uniform for all subjects. These conditions are met by the customary norms codified in the ILC draft on state responsibility.<sup>25</sup>

Responsibility as the basic principle of international law is universal in as much as it concerns all its subjects the same way, regardless of when and how they emerged in the history of this legal order. Therefore, the norms regulating the implementation of international responsibility should likewise be of a universal character. Because of the function of the principle of responsibility for the violation of international law in the international legal order the premises and forms of such responsibility cannot vary whether the violation is committed by a state, or by an international organization, or any other subject of international law.<sup>26</sup> In other words, responsibility must be universal, as is also the institution of international law. Just as the principle of responsibility, the customary norms developed by states as the primary, and in certain historical periods as the only subjects of international law, are a priori binding upon the new subjects or even to whole categories of subjects, such as, in particular, international organizations, in exactly the same way as they would be binding upon newly established states.<sup>27</sup> Such statement is all the more justified when we realise that the norms concerning responsibility regulate, on one hand, the exercise of the essential attributes of international personality. Since the content of international personality is the same in respect of any subject of international law and covers the features which enable their participation in international legal relations, there is no reason for the regulation of the way in that different subjects or types of such subjects (most of all states and international organizations) make use of the attributes of their personality to vary. What may differ is the *ratione materiae* scope of their competence, but that factor has no impact on the essence of international personality.<sup>28</sup> On the other hand, the norms on international responsibility belong to the special category of “secondary” norms which regulate the functioning of other “primary” norms in a legal order, and therefore their scope and content should be uniform, irrespective of the differences between the subjects of this order.<sup>29</sup> Both these observations are confirmed by

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<sup>25</sup> *Draft articles on Responsibility of States for internationally wrongful acts*, ILC Report 53<sup>rd</sup> Session (2001) UN Doc A/56/10 43 and *Commentaries to the draft articles on Responsibility of States for internationally wrongful acts*, ILC Report 53<sup>rd</sup> Session (2001) UN Doc A/56/10 59.

<sup>26</sup> A similar principle was confirmed by the European Court of Justice in respect of member state responsibility for damage resulting from breach of EU law in joined cases C-46/93 and C-48/93 *Brasserie du pêcheur SA v Bundesrepublik Deutschland and The Queen v Secretary of State for Transport ex parte: Factortame Ltd and Others* (judgment of 5 March 1996) para 42. See also C Eagleton *International Organization and the Law of Responsibility* (76 RCADI 1950-I) 324; E Butkiewicz ‘The Premises of International Responsibility of Inter-Governmental Organizations’ (1981-82) 11 Polish YbIL 117.

<sup>27</sup> E Butkiewicz (n 27) 118. See also G Cahin *La coutume internationale et les organisations internationales* (2001) 513 ff; Ch Tomuschat ‘The International Responsibility of the European Union’ in E Cannizzaro (ed) *European Union as an Actor in International Relations* (2002) 179.

<sup>28</sup> See in this respect A Czaplińska *Odpowiedzialność organizacji międzynarodowych jako element uniwersalnego systemu odpowiedzialności międzynarodowoprawnej* (2014) 73 ff.

<sup>29</sup> This corresponds with HLA Hart’s concept of “primary” and “secondary” rules, see HLA Hart *The Concept of Law* (1994) 92 ff, 213 ff.

the story of the codification of the law of treaties which resulted in elaboration of two separate conventions on the law of treaties regarding states (the VCLT of 1969)<sup>30</sup> and international organizations (the VCLT IO of 1986)<sup>31</sup>, the latter containing regulations mirroring those of the former,<sup>32</sup> as well as by the concurrence, to large extent, of wording of the ILC drafts concerning respectively the responsibility of states and of international organizations.<sup>33</sup>

### III.

In effect, the dispute over the character of international responsibility seems pointless, for it is actually of a dual nature. As R. Sonnenfeld rightly pointed out, its two aspects are complementary: responsibility as the general principle of international law is implemented by more detailed norms which constitute responsibility as an institution of customary law.<sup>34</sup> Further study would be necessary (and advisable, too) in order to examine whether this conclusion, drawn in respect of international responsibility, is transferable onto other norms of international law.

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<sup>30</sup> Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331.

<sup>31</sup> Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations (adopted 21 March 1986) Doc A/CONF.129/15.

<sup>32</sup> See G Cahin (n 27) 515 ff.

<sup>33</sup> ILC Report 63rd session (2011), UN Doc A/66/10, Ch 5 *Responsibility of international organizations*, Part E. *Text of the draft articles on responsibility of international organizations (with commentaries)*. See also A Czaplińska (n 28) 116 ff.

<sup>34</sup> R Sonnenfeld (n 16) 15. See also I Brownlie (n 4) 434; G. Cottureau (n 6) 7 ff.

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