

Preface

When the International Law Commission was established in 1948, to 'encourage the progressive development of international law and its codification',¹ one of the first 14 topics selected by the Commission for codification was 'State responsibility'.² At the time it was not surprising that an examination of the law of responsibility would be limited to States: although there had been some suggestion in the inter-war period that the League of Nations could be a *sui generis* international person,³ the opening of the international legal system to inter-governmental organizations was not definitely affirmed until the 1949 Advisory Opinion of the International Court of Justice in the *Reparations* case,⁴ and later still in respect of other natural and legal persons. Hersch Lauterpacht, one of the first and most fervent advocates for recognition of individuals as subjects of international law,⁵ was still able to write in 1947 that '[a]s a rule, the subjects of the rights and duties arising from the Law of Nations are States solely and exclusively.'⁶ On this prevailing view, codification of the law of State responsibility would cover the field of international responsibility entirely.

At the start of the 21st century a rather different picture has emerged. The international legal system, although principally controlled by States, now encompasses a broad range of actors and may directly regulate not only relations between States, but relations between States and individuals, between inter-governmental organizations and individuals, between States and corporations, between inter-governmental organizations and non-governmental organizations. It seems that there is no natural or legal person beyond the reach of international law, if only to be the subject of a single right or injunction. When the ILC brought its codification of the law of State responsibility to a close in 2001, it had already commenced work on diplomatic protection, concerned with the invocation of responsibility in respect of injury to nationals. A year later it commenced work on responsibility of international organizations. Other projects have dealt with other aspects of international responsibility, including its two projects on 'liability' in respect of trans-boundary harm. To speak of international responsibility is to speak of all such relations.

This collection seeks to cover this field of international responsibility; it serves not only as a critique of the ILC's Articles on State responsibility (2001), on diplomatic protection (2006) and on responsibility of international organizations (adopted in 2009 on first reading), but it examines many aspects of international responsibility which may arise in a multifaceted international legal system. It also includes a review of the rules applying to liability for activities which are not as such prohibited under international law but which may entail special consequences both on the ground of prevention and of

¹ Art 1(3), United Nations Charter.

² *ILC Yearbook 1949*, 281.

³ A McNair, *Oppenheim's International Law, Volume I* (4th edn, London, Longmans, 1928), 133–134.

⁴ *Reparations for Injuries Suffered in the Services of the United Nations, Advisory Opinion, ICJ Reports 1949*, p 174.

⁵ See eg H Lauterpacht, *An International Bill of the Rights of Man* (New York, Columbia University Press, 1945).

⁶ H Lauterpacht (ed), *International Law: A Treatise, by L. Oppenheim* (6th edn, London, Longmans, 1947), 19 (§13).

compensation. These rules have also been progressively developed by the ILC under the English rubric of 'liability'; in all other official languages of the United Nations they are covered under the same wording as the consequences for wrongful acts (eg *responsabilité*, *responsabilidad*).

Part I of this book provides an introduction to the topic, covering issues relating to the definition of responsibility, the system of responsibility and the distinction between primary and secondary rules. Part II examines the development of the law on international responsibility and its relationship with other areas of law, including emerging areas of soft law, and municipal legal systems. Part III sets out the sources of international responsibility: the concept of an internationally wrongful act and the notion of responsibility in the absence of an internationally wrongful act. Part IV examines the content of international responsibility, from the general regime to the regime for grave breaches of obligations arising under peremptory norms, to specific regimes in respect of human rights, the WTO, environmental law, European community law and others. It also covers regimes of liability in the absence of an internationally wrongful act, including treaty-based regimes and environmental regimes as well as circumstances precluding wrongfulness. Part V deals with implementation of responsibility by States, international organizations and other entities. It covers modalities for the implementation of international responsibility and countermeasures.

These subjects are evidently wide in scope, and many of them remain controversial. Different contributors to this volume take different approaches to responsibility and to the ILC's work; thus what appears here is a range of views, sometimes conflicting. Within the confines of a single house-style, the individual authors of course speak for themselves. The book aims for a relatively comprehensive coverage, and in consequence an overall critique of the current international law and practice of responsibility; it does not present an overall conclusion.

* * *

The publication of this volume marks the end of a long bilingual project which was first envisioned in the immediate aftermath of the ILC's adoption of the Articles on State Responsibility in 2001 (here abbreviated as ARSIWA). Parallel versions of the book are being published in French by Pedone and in English by OUP; the French version under the care of the Centre for International Law at the University of Paris X (Nanterre) under the directorship of Alain Pellet; the English version under the care of the Lauterpacht Centre for International Law (Director: James Crawford). Due to differences in editorial style and linguistic tradition, the two versions differ in detail.

Concerning the English version, editorial assistance has been provided by a number of research associates of the Lauterpacht Centre, including in particular Merel Alstein, Stephanie Ierino, Jonathan Ketcheson, Dr Tom Grant, Kylie Evans, and Federica Paddeu. Mr Arnoldo Brenes, Dr Douglas Guilfoyle, and Dr Monique Sasson kindly provided expert assistance in the editing of specialized chapters. But thanks are due above all to Dr Kate Parlett for her meticulous attention to detail and perseverance over the course of the work; and to Affef Ben Mansour of CEDIN for her patience and skill in coordinating the French end of the joint project. The editors would also like to thank John Louth of Oxford University Press for his commitment to the project, and to Merel Alstein, Ceri Warner, Beth Cousins and Benjamin Roberts for their assistance in the final stages of the process.

About two-thirds of the contributions were originally written in French; a mountainous task of translation ensued. Thanks are due to Dr Sonia Rolland, Alex Campbell, Melissa

Thibault, Mark Power, Paul Davies, Julian Fell, Andria Robertson, Kelisiana Thynne, David McKeever, Dr Solène Rowan, Freya Baetens, Eva Nanopoulos, Francesca Galli, Mushtaq Namdarkhan, Merel Alstein, and Stephanie Ierino. But the major burden was born—with great good cheer and expedition—by Federica Paddeu and Olivia Dhein, without whom this work would never have been completed.

James Crawford
Lauterpacht Centre for International Law
University of Cambridge

Alain Pellet
Centre de droit international (CEDIN)
Université de Paris Ouest Nanterre La Défense

Simon Olleson
13 Old Square
London

26 October 2009

<http://www.pbookshop.com>

<http://www.pbookshop.com>

Contents

<i>Preface</i>	<i>v</i>
<i>List of Contributors</i>	<i>xviii</i>
<i>Table of Cases</i>	<i>xxiii</i>
<i>Table of Statutes</i>	<i>xlvi</i>
<i>The Work of the ILC on Responsibility</i>	<i>lxi</i>
<i>Select Abbreviations</i>	<i>lxiv</i>

PART I INTRODUCTION—RESPONSIBILITY AND INTERNATIONAL LAW

1 The Definition of Responsibility in International Law ALAIN PELLET	3
2 The System of International Responsibility JAMES CRAWFORD	17
3 Primary and Secondary Rules ERIC DAVID	27

PART II INTERNATIONAL RESPONSIBILITY— DEVELOPMENT AND RELATION WITH OTHER LAWS

Section 1 Development of the Law of International Responsibility

A Responsibility for Internationally Wrongful Acts

4 The Development of the Law of Responsibility through the Case Law PATRICK DAILLIER	37
5 Doctrines of State Responsibility MARTTI KOSKENNIEMI	45

B The Codification Process

6 Private Codification Efforts LUCIE LAITHIER	53
7 The Hague Conference of 1930 CLÉMENTINE BORIES	61
8 The Work of García Amador on State Responsibility for Injury Caused to Aliens DANIEL MÜLLER	69

9	The ILC's Articles on State Responsibility for Internationally Wrongful Acts and Related Texts ALAIN PELLET	75
	<i>C Liability in the Absence of an Internationally Wrongful Act</i>	
10	Liability for Injurious Consequences of Acts Not Prohibited by International Law ALAN BOYLE	95
	Section 2 Responsibility and the Legal System	
	<i>A Responsibility and the International Legal System</i>	
11	The Law of Responsibility and the Law of Treaties JOE VERHOEVEN	105
12	Responsibility and the United Nations Charter VERA GOWLLAND-DEBBAS	115
13	<i>Leges speciales</i> and Self-Contained Regimes BRUNO SIMMA AND DIRK PULKOWSKI	139
14	The Concept of 'Soft Responsibility'? JEAN-MARC SOREL	165
	<i>B Responsibility and Municipal Law</i>	
15	Relations between the International Law of Responsibility and Responsibility in Municipal Law PIERRE-MARIE DUPUY	173
	PART III THE SOURCES OF INTERNATIONAL RESPONSIBILITY	
16	Overview of Part One of the Articles on State Responsibility GILBERT GUILLAUME	187
	Section 1 The Notion of an Internationally Wrongful Act	
17	The Elements of an Internationally Wrongful Act BRIGITTE STERN	193
	<i>A Attribution</i>	
18	The Rules of Attribution: General Considerations LUIGI CONDORELLI AND CLAUS KRESS	221
19	Attribution of Conduct to the State	
	19.1 State Organs and Entities Empowered to Exercise Elements of Governmental Authority DJAMCHID MOMTAZ	237

19.2	Insurrectional Movements	247
	GÉRARD CAHIN	
19.3	Private Individuals	257
	OLIVIER DE FROUVILLE	
20	Attribution of Conduct to Multiple States and the Implication of a State in the Act of Another State	281
	CHRISTIAN DOMINICÉ	
21	State Succession and Responsibility	291
	VÁCLAV MIKULKA	
22	The Attribution of Acts to International Organizations	297
	PIERRE KLEIN	
23	The Responsibility of Other Entities	
23.1	Private Individuals	317
	CHRISTIAN TOMUSCHAT	
23.2	Armed Bands and Criminal Groups	331
	GÉRARD CAHIN	
23.3	Non-Governmental Organizations	343
	ANNA-KARIN LINDBLOM	
<i>B Breach of an International Obligation</i>		
24	Actions and Omissions	355
	FRANCK LATTY	
25	Source of the Obligation	365
	YUMI NISHIMURA	
26	Content of the Obligation: Obligations of Means and Obligations of Result	371
	CONSTANTIN P. ECONOMIDES	
27	Duration of the Breach	383
	JEAN SALMON	
28	Relevance of the Intertemporal Law	397
	PAUL TAVERNIER	
<i>C Grave Breaches of Obligations Owed to the International Community as a Whole</i>		
29	International Crimes of States	405
	JAMES CRAWFORD	
30	The Character of the Violated Obligation	415
	ANTONIO CASSESE	
31	The Character of the Breach	421
	PAOLA GAETA	

D Circumstances Precluding Wrongfulness

32	The Notion of Circumstances Precluding Wrongfulness SANDRA SZUREK	427
33	Circumstances Precluding Wrongfulness in the ILC Articles on State Responsibility	
33.1	Consent AFFEF BEN MANSOUR	439
33.2	Compliance with Peremptory Norms MAJA MÉNARD	449
33.3	Self-Defence JEAN-MARC THOUVENIN	455
33.4	Countermeasures HUBERT LESAFFRE	469
33.5	<i>Force Majeure</i> SANDRA SZUREK	475
33.6	Distress SANDRA SZUREK	481
33.7	Necessity SARAH HEATHCOTE	491

Section 2 Responsibility in the Absence of an Internationally Wrongful Act

34	The Concept of Liability in the Absence of an Internationally Wrongful Act MICHEL MONTJOIE	503
35	Allocation of Responsibility for Harmful Consequences of Acts not Prohibited by International Law PHILIPPE GUTTINGER	515
36	Obligations of Prevention and the Precautionary Principle GERHARD HAFNER AND ISABELLE BUFFARD	521

PART IV THE CONTENT OF INTERNATIONAL RESPONSIBILITY

37	Overview of Part Two of the Articles on State Responsibility ROSALYN HIGGINS	537
----	---	-----

Section 1 The General Regime of Responsibility for Internationally Wrongful Acts

A General Principles

- | | | |
|----|---|-----|
| 38 | The Obligation of Cessation
OLIVIER CORTEN | 545 |
| 39 | Assurances and Guarantees of Non-Repetition
SANDRINE BARBIER | 551 |
| 40 | The Obligation to Make Reparation
BRIGITTE STERN | 563 |

B The Modalities of Reparation

- | | | |
|------|---|-----|
| 41 | Interaction Between the Forms of Reparation
YANN KERBRAT | 573 |
| 42 | The Different Forms of Reparation | |
| 42.1 | Restitution
CHRISTINE GRAY | 589 |
| 42.2 | Compensation
JOHN BARKER | 599 |
| 42.3 | Interest
SIR ELIHU LAUTERPACHT AND PENELOPE NEVILL | 613 |
| 42.4 | Satisfaction
ERIC WYLER AND ALAIN PAPAUX | 623 |
| 43 | Contribution to the Injury
ANAÏS MOUTIER-LOPET | 639 |
| 44 | Division of Reparation between Responsible Entities
ALEXANDER ORAKHELASHVILI | 647 |

Section 2 Consequences of Grave Breaches of Obligations Owed to the International Community as a Whole

- | | | |
|----|---|-----|
| 45 | Punitive Damages
STEPHAN WITTICH | 667 |
| 46 | The Obligation of Non-Recognition of an Unlawful Situation
MARTIN DAWIDOWICZ | 677 |
| 47 | The Obligation of Non-Assistance to the Responsible State
NINA HB JØRGENSEN | 687 |

48	The Obligation of Cooperation	695
	NINA HB JØRGENSEN	
49	International Criminal Responsibility of the State	703
	ANTOINE OLLIVIER	
50	The ‘Transparency’ of the State	717
	RAFAËLLE MAISON	

Section 3 Specific Regimes of Responsibility

51	Responsibility for Violations of Human Rights Obligations	
51.1	International Mechanisms	725
	SUSAN MARKS AND FIORENTINA AZIZI	
51.2	Inter-American Mechanisms	739
	RAPHAËLE RIVIER	
51.3	European Mechanisms	763
	JEAN-PAUL COSTA	
51.4	African Mechanisms	775
	HABIB GHERARI	
52	Responsibility and the World Trade Organization	791
	JOANNA GOMULA	
53	Responsibility and International Environmental Law	803
	CÉLINE NÈGRE	
54	Other Specific Regimes of Responsibility	
54.1	Investment Treaty Arbitration and ICSID	815
	ZACHARY DOUGLAS	
54.2	The Iran-US Claims Tribunal	843
	DANIEL MÜLLER	
54.3	The UN Compensation Commission	849
	DRAŽEN PETROVIĆ	
55	Responsibility in the Context of the European Union Legal Order	861
	JEAN-MARC THOUVENIN	

Section 4 Regimes of Responsibility in the Absence of an Internationally Wrongful Act

A Reparation for Harmful Consequences of Acts not Internationally Wrongful

56	The ‘Polluter Pays’ Principle	877
	RÉGIS CHEMAIN	
57	Reparation in the Event of a Circumstance Precluding Wrongfulness	887
	MATHIAS FORTEAU	

B Treaty-Based Mechanisms

58	Maritime Law	895
	GABRIEL NAKHLEH AND MIKAEL QUIMBERT	
59	Space Law	903
	MATHIAS FORTEAU	
60	Nuclear Energy	915
	MICHEL MONTJOIE	

PART V THE IMPLEMENTATION OF INTERNATIONAL
RESPONSIBILITY

61	Overview of Part Three of the Articles on State Responsibility	931
	JAMES CRAWFORD	

Section 1 The Injured Party*A The State*

62	The Concept of an Injured State	941
	GIORGIO GAJA	
63	Plurality of Injured States	949
	ROSARIO HUESA VINAIXA	
64	States having an Interest in Compliance with the Obligation Breached	957
	GIORGIO GAJA	
65	Succession of States in Respect of Rights of an Injured State	965
	VÁCLAV MIKULKA	

B International Organizations

66	Invocation of Responsibility by International Organizations	969
	EGLANTINE CUJO	

C Other Entities

67	Individuals	985
	CHRISTIAN TOMUSCHAT	
68	Peoples and Minorities	993
	ANNE-LAURE VAURS-CHAUMETTE	
69	Injuries to Corporations	1005
	VAUGHAN LOWE	
70	The International Community as a Whole	1023
	ANNE-LAURE VAURS-CHAUMETTE	

Section 2 Modalities for the Implementation of International Responsibility

A Conditions for Claims

- | | | |
|----|---|------|
| 71 | Notice of Claim by an Injured State
JACQUELINE PEEL | 1029 |
| 72 | Waiver, Acquiescence, and Extinctive Prescription
CHRISTIAN J TAMS | 1035 |

B Diplomatic and Functional Protection

- | | | |
|----|---|------|
| 73 | Diplomatic Protection
JOHN DUGARD | 1051 |
| 74 | Functional Protection
MYRIAM BENLOLO CARABOT AND MURIEL UBÉDA-SAILLARD | 1073 |

C Procedures for the Peaceful Settlement of Disputes

- | | | |
|----|--|------|
| 75 | The Diplomatic Channel
MICHAEL WAIBEL | 1085 |
| 76 | Conciliation and Other Forms of Non-Binding Third Party
Dispute Settlement
NADINE SUSANI | 1099 |
| 77 | Arbitration
FRÉDÉRIQUE COULÉE | 1107 |
| 78 | Resort to International Courts in Matters of Responsibility
GILLES COTTEREAU | 1115 |

Section 3 Countermeasures

A The Object of Countermeasures

- | | | |
|----|---|------|
| 79 | The Definition of Countermeasures
DENIS ALLAND | 1127 |
| 80 | Countermeasures in Response to Grave Violations of Obligations
Owed to the International Community
LINOS-ALEXANDRE SICILIANOS | 1137 |

B Conditions for Recourse to Countermeasures

- | | | |
|----|--|------|
| 81 | Procedural Conditions
YUJI IWASAWA AND NAOKI IWATSUKI | 1149 |
| 82 | Proportionality
ROGER O'KEEFE | 1157 |
| 83 | The Time Factor in the Application of Countermeasures
MAURICE KAMTO | 1169 |

C Substantive Limits on the Recourse to Countermeasures

84	Obligations Relating to Human Rights and Humanitarian Law SILVIA BORELLI AND SIMON OLLESON	1177
85	Obligations Relating to the Use of Force and Arising from Peremptory Norms of International Law CHARLES LEBEN	1197
86	Other Non-Derogable Obligations LAURENCE BOISSON DE CHAZOURNES	1205
Appendices: The ILC Texts		
Appendix 1	Draft articles on State Responsibility provisionally adopted by the International Law Commission on first reading (1996)	1217
Appendix 2	Articles on Responsibility of States for Internationally Wrongful Acts (2001)	1229
Appendix 3	Articles on Diplomatic Protection (2006)	1237
Appendix 4	Articles on Responsibility of International Organizations adopted by the International Law Commission on first reading (2009)	1241
	<i>Index</i>	1253