Part I

The framework of responsibility

1 Historical development

1.1 Introduction

Any system of law must address the responsibility of its subjects for breaches of their obligations. For a long time, however, responsibility was ignored or touched on only incidentally in international law doctrine. Writers concerned themselves with substantive fields such as the law of the sea, the laws of war, diplomatic relations or the law concerning treatment of foreigners. Their main interest was in identifying specific rules and practices associated with each field and, sometimes, in identifying the mechanisms by which states might seek to vindicate their rights, especially through reprisals and war. When they treated responsibility at all, writers treated it as an incident of the substantive law, lacking any systematic order or basis. International responsibility was not a discrete subject for study until the late nineteenth century. By this time it was naturally thought of exclusively in terms of *state* responsibility, states being seen by that time as effectively the only international actors.

Vitoria, Suarez, Bodin and other early writers did not identify responsibility as a legal category. They tended to approach the question from a theological point of view: the sovereign by definition answered to no temporal authority, answering only to God.[1] Pierino Belli and Alberico Gentili gave some consideration to the issue of the responsibility of citizens for the wrongs of the sovereign (and vice

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[1] Bodin, *Six livres de la République* (1576), Bk I, Ch. VIII (trans. Tooley 1955, 25ff.).

versa).[2] Both, however, lacked any secure concept of representation of the citizen by the sovereign and as such could treat issues of responsibility only in a contingent, ad hoc way. Much the same is true of Grotius, that paradigm intermediary between old and new. It is only with Zouche and Pufendorf that tentative ideas of international obligations and their breach (especially breach of treaty) come to be considered, although still unsystematically.[3] Indeed, it is not before the second half of the nineteenth century that a recognizably modern conception of responsibility appeared,[4] and even later a monograph concerned wholly with the responsibility of states in international law.[5]

1.2 Intimations of responsibility in early international law writings

1.2.1 Italian precursors of Grotius: Belli and Gentili

Bodin is of no particular interest here, given that he proceeded along the lines of earlier writers such as Vitoria and Suarez. A secular approach was needed before responsibility could be considered as a legal topic.[6] The relevant pre-Grotian authors here were Belli and Gentili.[7] Neither identified international responsibility as a legal category, but both addressed the question of the bond between prince and people with regard to obligations towards other princes: why were citizens to be held responsible for the wrongs of their princes?

[2] Belli, *De Re Militari et Bello Tractactus* (1563), Pt X, Ch. II (trans. Nutting 1936, 296–8); Gentili, *De Legationibus* (1594), Bk II, Ch. VI (trans. Laing 1924, 72–6); Gentili, *De Jure Belli* (1612), Bk III, Chs. XXIII–XXIV (trans. Rolfe 1933, 421–9).

[3] See e.g. Zouche, *Iuris et judicii fecialis* (1650), Pt I, §§V, X (trans. Brierly 1911, 27, 53); Pt II, §V (106–11); Pufendorf, *Elementorum jurisprudentiae universalis* (1672), Bk I, Defs. XII, XXI (trans. Oldfather 1931, 71–112, 199ff.); Bk II, Axiom I, §9 (215–16). See also, later on, van Bynkershoek, *Questionum juris publici* (1737), Bk II, Ch. X (trans. Frank 1930, 190–5); and, more explicitly Wolff, *Jus gentium methodo scientifica pertractatum* (1764), Ch. III, §§315–318 (trans. Drake 1934, 161ff.).

[4] See e.g. Heffter, *Le droit international public de l'Europe* (1857).

[5] Eagleton, *The Responsibility of States in International Law* (1928).

[6] See e.g. Bodin (1576), Bk I, Ch. VIII (35): 'the prince is bound as much by the law of nations, but no more, than by any of his own enactments. If the law of nations is iniquitous in any respect, he can disallow it within his own kingdom, and forbid his subjects to observe it, as was done in France in regard to slavery. He can do the same in relation to any other of its provisions, so long as he does nothing against the law of God. If justice is the end of the law, the law the work of the prince, and the prince the image of God, it follows of necessity that the law of the prince should be modelled on the law of God.'

[7] See e.g. Belli (1563), Pt X, Ch. II (296–8); Bodin (1576), Bk I, Ch. VIII (25ff.); Gentili (1594), Bk II, Ch. VI (72–6); Gentili (1612), Bk III, Chs. XXIII–XXIV (421–9).

Pierino Belli of Alba (1502–75) is considered by some to be a precursor of Gentili and Grotius, by others to be the scrappy author of a botched collection of ancient authorities mixed with personal anecdotes. The latter view owes much to Gentili, who deprecated Belli's work even as he apparently made unacknowledged use of it.[8] Belli's role has been re-evaluated in the light of his observations concerning cruelty and the absolute prohibition against torturing prisoners of war.[9]

Belli did not address international responsibility as a separate legal category, nor did he have any consistent theory of the state. However, he did consider the question whether 'a sovereign of a free state may make peace and, by its terms, remit payment for losses inflicted upon its own citizens and subjects':[10]

> Baldus cites Hostiensis as saying that this is not permissible, unless the populace and those who have suffered the loss give their consent, and Panormitanus, too, seems to agree; but, although this is generally true, there is exception if the sovereign takes such action for reasons that concern the public weal, for example in the present case, when he so acts in order to secure the blessing of peace. Decio warns that the above must not be forgotten, citing many passages in its confirmation, and declaring that it is the commonly accepted view, from which no one dissents. But Joannes Lupus states that if peace cannot be made on other terms, the populace must acquiesce in the action of a ruler who remits losses; for, although he thereby acts much to the disadvantage of his subjects, on the other hand he benefits them largely in securing peace for them.[11]

Thus the principle is that the consent of the population is required before entering into a peace treaty waiving payment of war damage. This implies that the ruler is still only exercising a form of individual power dependent on agency: responsibility relations are in principle individual, not communal. But this is qualified by something like an agency of necessity – the necessity to make peace and thereby benefit the people.

Belli took his argument a step further, in order to consider responsibility of the sovereign for losses suffered by the enemy. If the sovereign can be responsible towards his subjects when he wages an unjust war or carries on an unjust resistance to a just war,

> [m]uch less, therefore, will he be free from responsibility for losses inflicted by his soldiers upon the opposing party, whatever may be said in the compact and terms of the peace.

[8] Cavaglieri, in Belli (1563), Vol. II (11a–28a).
[9] Comba and Vidari (eds.), *Un giurista tra principi e sovrani: Pietrino Belli a 500 anni dalla nascita* (2004).
[10] Belli (1563), Pt X, Ch. II (296). [11] Ibid.

And here applies a remark of Barbazza, who cites Petrus de Ancharano, to the effect that even though states by compact have agreed that reparation be not made for the plundering on either side, the plunderers will nevertheless not be safe on the score of conscience; in fact, as he says, the owner of the stolen property may sue for it, the pact notwithstanding.[12]

The religious argument (on which Belli dwells further, suggesting recourse to the ecclesiastical tribunal to recover losses against one's sovereign) and the legal one are conflated; and one should be wary of an English translation of 1936 rendering the Latin *civitates* unequivocally as 'states'.[13] But, again, this passage shows the complex relationship between the sovereign and its population. Belli sought to clarify this with an example:

> [At times, war] is made [between an independent and free sovereign and its] subject – e.g. if the King of France were at war with the Duke of Bourbon, [he] would not be able in the peace pact to excuse the Duke and his followers for losses which had been inflicted upon the subjects of the King – unless the King were willing to reimburse them out of his own treasury.[14]

Another form of responsibility applies in time of war:

> [S]tates which in time of war occupy strongholds [taken from others than the enemy] that they afterward refuse to restore except on payment of money, do wrong in extorting this price; and they may be sued for the money, notwithstanding the terms of the peace that has ensued.[15]

Nor can one look to Alberico Gentili (1552–1608) for an autonomous concept of responsibility. In his work on fetial law Gentili devotes a chapter to the question of countermeasures in the specific case of 'one who has injured the ambassador of another'.[16] He holds that 'the right of embassy does not hold for the envoy of a sovereign who has violated that right':

> To withhold rights from one who has violated them is believed to be not a violation but a rendering of justice. Francis I, the French king, when he heard that his ambassador was being detained by the Emperor Charles, retaliated by detaining the ambassador of the Emperor.[17]

This rule was to be applied restrictively – that is, only when the ambassadors had been injured, because '[u]nder other circumstances no violence should be done to ambassadors, not even if other laws of

[12] Ibid. (297). [13] Ibid. Cf. Vol. I (130b, line 11) with Vol. II (297, line 16).
[14] Ibid. (298). [15] Ibid. [16] Gentili (1594), Bk II, Ch. VI (72ff.). [17] Ibid. (73).

nations have been violated, for none is to be compared with this in majesty and prestige'.[18]

In response to the question 'what reason is there for punishing the guilty in the person of the innocent?',[19] Gentili replies,

> But how can he be called innocent who is the personal representative of one who is notoriously guilty? If this were possible, it would never be permissible to take action against the subjects of a sovereign on account of an offense committed by the sovereign, and there would be no war.[20]

This remark underlines the problem of the relation between the individual and his sovereign, common to Pierino Belli and in general to all early attempts to detach that relation from theological considerations. Gentili recognized that it was problematic to hold subjects responsible for their sovereign's acts (which Vitoria and perhaps Bodin did not), but none of the early writers had a solution, perhaps because this would have required a radical rethinking of just war theory.

In *De Jure Belli*, Gentili deals at one point with the relation between the conduct of the sovereign and the conduct of the population. When a peace treaty is signed, will the actions of the subjects constitute a breach of the treaty if they are contrary to the obligations undertaken by the prince?

> [T]he question arises, whether not only the people as a whole but also individuals should be regarded as included in a treaty, when no mention is made specifically of individuals. Decio decided that if the Venetians promised not to do something, the promise was understood to mean that the people as a whole would not do it; for an arrangement which looks to a large number as a whole does not have regard to individuals. Therefore individuals do not break a peace, as was decided by Baldus. 'Private individuals do not harm the whole body politic.' ... That is, unless it was expressly stipulated in the treaty, that not even private individuals should offend; for in that case, the peace would certainly be broken.[21]

In the last chapter (XXIV) of Book III, Gentili addressed the concept of violation of a treaty:

> A treaty is not violated if one departs from its provisions for a legitimate reason, as Ulpian and Pomponius say of a partnership of individuals ... If one of the conditions on which a partnership was based is not observed by one of the partners, or if it is not permitted to enjoy the benefits for which the partnership was formed, there is good reason for dissolving the partnership ... It is to

[18] Ibid. (74). [19] Ibid. (73). [20] Ibid. (73–4).
[21] Gentili (1612), Bk III, Ch. XXIII (421).

be understood, however, that this one thing must be a matter of prime importance ... and reason also tells us (whatever some may also maintain about trivial causes) that an important contract should not be annulled because of an insignificant matter. Trivial things are always happening, simply because they are trivial, and therefore all contracts would be most unstable, if it were lawful to withdraw from them on account of some trivial and unimportant matter. The justice of the law of nations does not allow this. But is war to be made because of a trivial reason? The law in that case is buried under the syllables and fine distinctions of the pettifoggers.[22]

Gentili mentions some reasons why some actions might not constitute a breach of treaty, or are to be excused:

Certainly necessity and superior force will excuse an ally from being considered a breaker of treaties ... Furthermore, the peace will not be said to be broken if the failure to observe a given condition does not result in offence; for example, if it was promised that something should be done within a given number of days, and it was not done.[23]

1.2.2 *Grotius: civil law obligations with no equivalent in the law of nations*

Not even Hugo Grotius (1583–1645) identifies international responsibility as a legal category, despite his more systematic approach. He deals with responsibility for war but in the context of individual leaders and their punishment.[24] In a chapter 'Of the Communication of Punishments' he discusses *inter alia* 'the distinction between that which is inflicted directly and that which comes as a consequence'.[25] In keeping with his rudimentary approach to the state, he makes no clear distinction between individual and state responsibility.[26]

This can be seen in Chapter XVII of Book II, entitled 'Of the Damage done by an Injury, and of the Obligation thence arising'. The chapter is largely devoted to obligations under the law of nature or under the civil laws. As to the former, Grotius refers to

that Right, which arises by the Law of Nature from an Injury received. We here call any Fault or Trespass, whether of Commission or Omission, that is contrary

[22] Ibid., Ch. XXIV (427). [23] Ibid. (428–9).
[24] Grotius, *De Iure Belli ac Pacis* (1625), Bk III, Ch. XI, §§V–VII (ed. Tuck 2005, 1431–9).
[25] Ibid., Bk II, Ch. XXI (1053); also Bk II, Ch. XXI, §II, heading (1055) ('The State or the Superior Powers are accountable for the Crimes of their Subjects, if they know of them, and do not prevent them, when they can and ought to do so').
[26] See Onuma, in Onuma (1993) 57, 88–90.

to a Man's Duty, either in respect of his common Humanity, or of a certain particular Quality, an Injury. From such a Fault or Trespass there arises an Obligation by the Law of Nature to make Reparation for the Damage, if any be done.[27]

There follows a rather miscellaneous discussion of property, rights and compensation within civil society. Only two paragraphs deal with issues of the law of nations, and in each the point is to distinguish such issues from those governed by the law of nature or the civil law. Thus whereas one who 'procures a Contract or Promise by Force, Fraud or unjust Terror, is bound to release the Person who made the Contract or Promise, from any Obligation of Performance',[28] the same is not true for public wars:

> [A]s it is established by the Consent of Nations, that all Wars declared in Form, and carried on by the Authority of the supreme Powers on both Sides, shall be accounted lawful, as to the outward Effects or Consequences of them, ... so likewise is the Fear whereby one has been induced to do any Thing in such a War, so far to be accounted just, that if any Advantage be obtained, it cannot be required by the adverse Party. And in this Sense may be admitted the Distinction made by *Cicero*, between an Enemy in Form, with whom, says he, we have many Rights in common, that is, by the Consent of Nations, and Pirates, and Robbers. For if these extort any Thing from us by Fear we may require it, unless we bind ourselves by an Oath not to require it; but of an Enemy we cannot. Wherefore, what *Polybius* saith of the *Carthaginians*, that they had just Cause to enter into the second *Punick* War, because the *Romans* had declared War against them, and extorted from them the Island *Sardinia*, and a great Sum of Money, while they were engaged in Quelling a Sedition of some People they had taken into their Service, has indeed some Shew of Equity according to the Law of Nature, but is contrary to the Law of Nations.[29]

The point emerges even more clearly when considering the obligations of sovereigns to make reparation for damage done by their soldiers; such damage, done without the superior's individual fault, are compensable only under the civil law:

> Nor are Kings bound to make Reparation, if their Soldiers, either by Sea or Land, shall do their Allies any Damage, contrary to their Command; which is proved by the Testimonies of *France* and *England*. But if any one be bound to make Reparation for what his Minister or Servant does without his Fault, it is not according to the Law of Nations, which is the Point now in Question, but according to the Civil Law, and even that Rule of the Civil Law is not general; it regards only the Masters of Ships, and some others, for particular Reasons.[30]

[27] Grotius (1625), Bk II, Ch. XVII, §I (884).
[28] Ibid., Bk II, Ch. XVII, §XVII (892).
[29] Ibid., Bk. II, Ch. XVII, §XIX (893–4).
[30] Ibid., Bk. II, Ch. XVII, §XX.2 (895).

By contrast, Grotius's work on civil (Roman-Dutch) law contains a general account of obligation: obligations can either arise from 'the duty of benevolence', 'the duty of keeping faith' or 'the duty of making amends for wrongdoing'.[31] This is further explained, and the kinds of obligation arising from delict and generally from an unlawful act are considered.[32]

One reason why none of the early writers identified responsibility as a legal category, or dealt with it other than incidentally, was the virtual absence of procedures and institutions at the international level that might have required clear distinctions to be drawn between the state and its nationals, or that might have focused on excuses for non-performance or on the content of the obligation of reparation. Such institutions as there were – short of war itself – tended to create more difficulties than they resolved and were prone to abuse – measures against ambassadors, for example, or the system of letters of marque.[33]

Another reason was the rudimentary treatment of the law of obligations in Roman law. Ibbetson notes that by the time of Justinian there had developed a fairly elaborate classification of rights as *in rem* or *in personam*; within the latter category, contract, delict, quasi-contract and quasi-delict were distinguished.[34] Nonetheless, according to Zweigert and Kötz,

> Roman lawyers ... never arrived at the general principle that everyone is responsible for the harm he is to blame for causing. This principle had to wait until the seventeenth and eighteenth centuries for its promulgation by the great natural lawyers, especially GROTIUS and DOMAT. Thereafter it made its way into many of the codes of Europe.[35]

While Grotius may have promulgated such general principles in his work on the civil law, they are not to be found in his work on the law of nations.

[31] Grotius, *Inleiding tot de Hollandsche Rechts-geleertheyd* (1631), Bk III, Ch. I, §3 (ed. and trans. Lee 1926, 293).
[32] Ibid., Ch. XXXII (459ff.).
[33] Letters of marque and reprisal were rejected over the course of the nineteenth century. The European states, by the Declaration of Paris, 30 March 1856, 15 NRG (1st ser.) 791, had agreed that letters of marque were unlawful. The United States declared in the Civil War (1861–5) and the Spanish–American War (1898) that it would not issue letters of marque. See Winthrop, (1894) 3 Yale LJ 116; Maclay, *A History of American Privateers* (1899), xxiii.
[34] Ibbetson, *A Historical Introduction to the Law of Obligations* (1999), 1–10, esp. 6–10.
[35] Zweigert and Kötz, *An Introduction to Comparative Law* (1998), 597. See also von Bar, 1 *The Common European Law of Torts* (1998), 1–5.