Prologue

State responsibility is that oddest of international legal institutions, theoretically omnipresent but rarely visible as practical implementation. There is a sense in which the institution appears simply tautologous with the totality of international law itself. Isn't every legal subject "responsible" for carrying out their obligations? Isn't it part of the very definition of a legal rule – in contrast to other rules – that it is accompanied by the "responsibility" of the one who breaches them? The word plays tricks on its users: it designates both the rule ("you have a responsibility to do this") and the consequences of the rule ("breach of obligation entails responsibility"). In such ways, responsibility penetrates all legal thinking and practice, underlining the seriousness of the legal system and the duty of the subjects of that system to comply. And yet it is seldom applied as such. States may readily agree to ex gratia payments to settle disputes with their neighbours – but responsibility is seldom recognized, perhaps to avoid the tone of moral condemnation it may engage.

Like "state sovereignty," state responsibility appears as a necessary part of any serious description of international law, a structural feature without which popular doubt about international law's character as "law" would be so much harder to dispel. But owing to its legalistic tenor, it does not appear often in diplomatic correspondence. Its place has in practice been largely taken by specific treaty regimes that address the implementation of the treaty rules, regimes or process and of civil liability, of non-compliance as well as, recently, criminal enforcement. Or then it is reduced to the technical question about measuring the liability to pay compensation for some damage. Nevertheless, it is a favourite topic of doctrine and of textbooks and every international lawyer is to some extent at least familiar with the saga about the codification of the topic by the International Law Commission and perhaps also of the culmination of that process in the 2001 Draft Articles on State Responsibility.

Bearing all that in mind, it may seem astonishing that there has not, until now, been a comprehensive history of that notion. This may be

precisely because the topic seems so amorphous, hard to compress in few succinct statements or an easily identifiable pattern of state practice. Our debt to Tzvika for having done this is therefore all the greater. Pulling together the different strands that have made state responsibility in modern international law what it is, he has been able to give credit to its abstract complexity while simultaneously offering an excellent account of the legal contexts where our professional ways to address the phenomenon have been forged. It will become no surprise, then, that as an important aspect of the structure of "modern" international law, the notion arose in the latter part of the nineteenth century and that this took place in the context of the efforts by the US government to deal with problems emerging from its relations with its Latin American neighbours. Nor, in view of the many recent retellings of international law's recent history, can it come as a surprise that these practices were eventually given a doctrinal articulation within German public law. The Latin American pedigree of the notion then follows into the early efforts in the 1950s at the International Law Commission to give it legal form as the law covering the treatment of aliens, a kind of predecessor to international human rights law, weighted towards the question of the status of foreign property. And yet, the author of this work ends his history quite properly at the very point where the doctrine comes to its own as a combination of what he calls ad hoc legalism focusing on investment protection and a more theoretically imbued effort to give international law meaning as the general law applicable in a society of states, or a *lex generalis*.

This is an erudite, occasionally also in places a provocative work on an excellent topic that provides a welcome description of the type of *bricolage* in which ambitious lawyers engage so as to provide workable legal solutions to new problems. Operating between concrete problem–solution and efforts at doctrinal articulation, a history of the institution of state responsibility provides a powerful insight into the character of legal work, both as diplomacy and as academic reflection. It also interestingly highlights the presence within state policy of private interests of various sorts, especially those of foreign investment, as formative elements behind ostensibly public law doctrines such as state responsibility. To have given such a lucid articulation of that feature of the practical operation of their field, Tzvika deserves the gratitude of all international lawyers.

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1

The Responsibilities of States in International Law

An Overview

Mending Femurs

As long as humans have occupied this earth, they have fought and sought to make amends. A student once asked Margaret Mead (1901–1978), an American anthropologist, when exactly civilization began. In a response that must have surprised her student, Mead said that the history of socialization began 15,000 years ago, the age of an excavated human skeleton containing a broken femur that was healed. To Mead, the fact of the mended femur established that humans had begun caring for one another. Without the social support to mend it, a broken leg was a death sentence carried out by roaming predators. As intertribal contacts increased, humans developed further rules of cooperation such as the fair treatment of travelers. Abraham of Ur, the patriarch of three world religions, was known for his generosity to strangers. Upon the arrival of guests to his tent, Abraham is said to have washed their feet, provided cooked food and offered a place to sleep.[1] Over time, the custom grew into a broader duty of hospitality imposed upon individuals and communities alike.

Fast forward to the modern era of nation-states when governments employed international law to mandate a minimum standard of care to foreigners. It was the legalized duty of hospitality that would form the basis of state responsibility, the modern set of enforcement rules that is the subject of this study. This history is an account of how a handful of American and European lawyers established the first mechanisms of legality to hold states accountable for failing to mend the broken femurs of foreigners.

[1] *See* Genesis 18:4.

A Sacred Doctrine

To international lawyers, state responsibility is a sacred doctrine. As the legal framework that determines whether a state has breached its international duties, and what can be done about such a breach, the existence of state responsibility underpins our hope of ordering the world through law. It is one of the most frequently referenced doctrines of international law. Yet, unlike other international legal norms, state responsibility is a relatively young one. Whereas the concept of state sovereignty was in wide usage since the sixteenth century,[2] the term "state responsibility" was rarely used before the late nineteenth century and had no effective meaning prior to 1930.[3] How could it be that such a fundamental doctrine of international law is of such recent origin?[4] The law of nations has existed for as long as there have been nations. But there was never any technical framework to regulate international disputes until the expansion of US and German territories in the nineteenth century.

I trace the creation of state responsibility through three narratives: (1) the US arbitral practice in the New World; (2) the German theorization of public law in the setting of its national unification and (3) the institutional effort to codify state responsibility within world bodies. As a legal framework for resolving interstitial disputes, state responsibility was created sometime in the late nineteenth century. The US and Germanic conceptions of state responsibility, however, were very different. When the League of Nations, and later the United Nations (UN), undertook to codify the field, they had two credible sources upon which to base their work: (1) The US practice of alien protection and (2) German theories of public international responsibility. The UN ultimately codified state responsibility based on German theory, but international practice is still mostly in the field of alien protection.[5] One was

[2] Jean Bodin, *Les Six Livres de la République* (Paris: J. Du Puys, 1576) (sets out classical principles of absolute state sovereignty).

[3] *See* Martti Koskenniemi, "Doctrines of State Responsibility" in James Crawford, Alain Pellet and Simon Olleson (eds.), *The Law of International Responsibility* 45–51 (Oxford: Oxford University Press, 2011) (there is no concept of state responsibility that would not be connected to or seek justification from its recent manifestation as a doctrine of international law); *see also* Table 1.1.

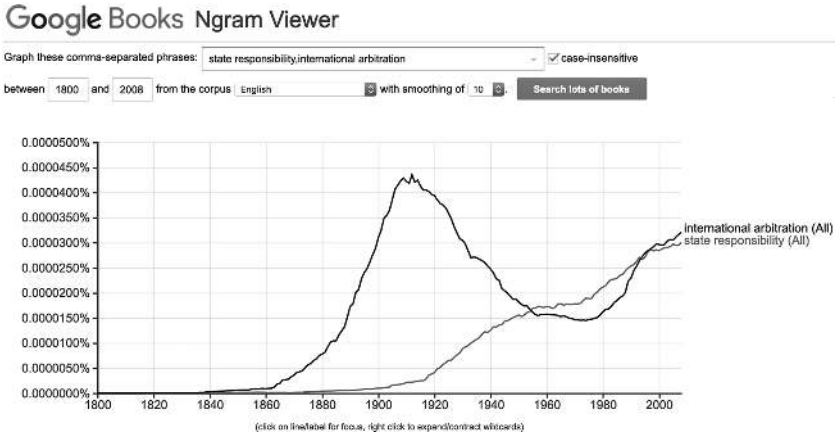
[4] *See* Jean d'Aspremont, *International Law as a Belief System* (Cambridge: Cambridge University Press, 2017), especially at p. 4 (state responsibility as a "fundamental" doctrine of international law).

[5] As will be explained below, the term "alien protection" originated from the Latin "alienus," which means of or belonging to another; namely, something not shared or someone different. The idea of the term is that the law of nations required different protection for Westerners because they were deemed to be different from natives. See Julia Cresswell (ed.), *Oxford Dictionary of Word Origins* (Oxford: Oxford University Press, 2010), at p. 11.

codified by the UN and the other continues to be practiced ad hoc. According to both the narrow (US) and broad (UN) approaches, the existence of state responsibility asserts the legitimacy of international law as the appropriate forum for international dispute resolution.[6]

In sum, this history is a phenomenology of and not a treatise on state responsibility. State responsibility is impossible to define. Despite the legal citations to and commentaries associated with the doctrine, it is important to recognize at the outset of this project that there is no objective thing called "state responsibility."[7] This history is but a series of stories about how merchants and their advocates used legalism to protect private investments abroad. And it is about the unintended consequences of this turn to legalism on fundamental doctrines of international law.

Table 1.1 *State responsibility in books (1800–2008)*[8]



[6] Legitimacy is particularly important to international law because of its "flat," non-hierarchical nature; *see* Alexis Galán, "The Search for Legitimacy in International Law: The Case of the Investment Regime," 43 *Fordham International Law Journal* 79 (2019), at p. 84 ("There is no field in which legitimacy does not appear."). Galán convincingly argues that legitimacy as a concept is a purely evaluative one (as opposed to also being descriptive); it is a thin concept that helps make simple judgments (such as "good" and "bad") as opposed to a thick one (such as "friendly" and "rude"), *ibid* at p. 91.

[7] *See* Yves Dezalay and Bryant Garth Law, "Merchants of Law as Moral Entrepreneurs: Constructing International Justice from the Competition for Transnational Business Disputes," 29(1) *Law & Society Review* 27 (1995), at p. 31 (from where I borrowed this turn of phrase).

[8] This rise in usage is similar in French (though in French there is a higher spike in the 1960s) – Google Ngrams: Jean-Baptiste Michel, Yuan Kui Shen, Aviva Presser Aiden, Adrian Veres, Matthew K. Gray, William Brockman, The Google Books Team, Joseph P. Pickett, Dale Hoiberg, Dan Clancy, Peter Norvig, Jon Orwant, Steven Pinker, Martin A. Nowak and Erez Lieberman Aiden.

Of Modern Origins

The existing literature contains no monographs on the origins of state responsibility.[9] This is the first book-length attempt to provide a history of the topic.[10] What explains this apparent lack of attention to such an important doctrine of international law? One reason is that there is a

[9] Commentators have written histories by way of "introduction" to other agenda, but not as a stand-alone monograph. Existing histories of state responsibility include introductory sections to lengthier studies as well as article-length discussions. *See* Edwin M. Borchard, *The Diplomatic Protection of Citizens Abroad or The Law of International Claims* (New York: The Banks Law Publishing Company, 1915), ∫17; Clyde Eagleton, *The Responsibility of States in International Law* (New York: New York University Press, 1928), ch. 1; Roberto Ago, *L'origine de la responsabilité internationale*, Yearbook of the International Law Commission, 1970, Vol. II, U.N. Doc. A/CN.4/233; Ian Brownlie, "The History of State Responsibility," in R. G. Girardot, H. Ridder, M. L. Sarin and T. Schiller (eds.), *New Directions in International Law: Essays in Honour of Wolfgang Abendroth – Festschrift zu seinem 75. Geburtstag* 19 (Frankfurt: Campus, 1982); Shabtai Rosenne (ed.), *The International Law Commission's Draft Articles on State Responsibility, Part 1, Articles 1–35* (Dordrecht: Nijhoff, 1991), at p. vi; Pierre-Marie Dupuy, "Dionisio Anzilotti and the Law of International Responsibility of States," 3(1) *European Journal of International Law* 139 (1992); Georg Nolte, "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," 13(5) *European Journal of International Law* 1083 (2002); Jan Arno Hessbruegge, "The Historical Development of the Doctrines of Attribution and Due Diligence in International Law," 36 *New York University Journal of International Law & Politics* 265 (2004); Jan Paulsson, *Denial of Justice in International Law* (Cambridge: Cambridge University Press, 2005), ch. 2; James Crawford, Thomas Grant and Francesco Messineo, "Towards an International Law of Responsibility: Early Doctrine," in Laurence Boisson de Chazournes and Marcelo Kohen (eds.), *International Law and the Quest for Its Implementation* 377–402 (Leiden: Brill, 2010); N.D. Gowda, *State Responsibility in the Present Context: A Critical Study with Reference to the Contemporary Issues under International Law* (Thesis Submitted to University of Mysore, May 2010); Borzu Sabahi, *Compensation and Restitution in Investor-State Arbitration* (Oxford: Oxford University Press, 2011), ch. 2; James Crawford, *State Responsibility: The General Part* (Cambridge: Cambridge University Press, 2013), ch. 1; Robert Kolb, *The International Law of State Responsibility: An Introduction* (Cheltenham: Edward Elgar, 2017), ch. 1; Kathryn Greenman, "Aliens in Latin America: Intervention, Arbitration and State Responsibility for Rebels," 31 *Leiden Journal of International Law* 617 (2018); Katja Creutz, *State Responsibility in the International Legal Order: A Critical Appraisal* (Cambridge: Cambridge University Press, 2020), ch. 2.

[10] Given the immense volume of data through which I had to sift for this study, several historical works and styles have informed my analysis; but none provided a direct road map or methodological framework for researching the history of state responsibility. On the methodology of my research for this book, see chapter 1 of my doctoral dissertation, Alan Tzvika Nissel, *A History of State Responsibility: The Struggle for International Standards (1870–1960)*, dissertation submitted to Helsinki University in satisfaction of LLD degree, 2016, available online at www.stateresponsibility.com/2016/02/blog-post.html, last visited February 2, 2019.

certain level of inevitability to the concept.[11] The idea that a person (or nation) should be responsible for breaking the law is as old as *lex talionis* and inherent in the idea of law as law.

When the twentieth-century dean of legal positivism H. L. A. Hart (1907–1992) set out to write a clear introduction for first-year law students, his resulting work, *The Concept of Law*, became one of the most influential law books of the twentieth century. For Hart, what is critical to the concept of law is its consequentiality. There must be socially acceptable and predictable consequences when the law is broken: "it has consequences definable in terms of the rules, which the system enables persons to achieve."[12] In international law, if states were not held accountable for breaching their international obligations, "then it would be questionable whether anything worthy of the name of international law – and *a fortiori* international responsibility – would be left."[13]

A second reason why the history of state responsibility is so understudied is the *complexity* of the concept. As the late James Crawford (1948–2021) has written, "[r]esponsibility has a bewildering array of meanings, each of which occupies a distinctive role in legal and moral reasoning."[14] State responsibility exercises multiple functions in the institutionalized regime of international law. Its rules determine the following:

1. Existence of an attributable international wrong;
2. Extent to which a State is liable for an international wrong; and
3. Manner in which a State may act to remedy that international wrong.

These multiple roles of responsibility – culpability, imputability and implementation – are unique to international law. In domestic law, culpability rules govern the extent to which the law can impute a civil

[11] According to Clyde Eagleton (1891–1958), "If one inquires as to the origin of obligation in jurisprudence, he is forced back to moral axioms" (*supra* note 9; Eagleton cites Thomas Atkins Street, *The Foundations of Legal Liability* (Northport: Edward Thompson Company, 1906) at p. 67).

[12] Herbert Lionel Adolphus Hart, *The Concept of Law* (3rd ed., Oxford: Oxford University Press, 2012), at p. 31. *See generally* Anthony Townsend Kronman, "Hart, Austin, and the Concept of a Legal System: The Primacy of Sanctions," 84(3) *Yale Law Journal* 584 (1975).

[13] James Crawford and Jeremy Watkins, "International Responsibility" in Samantha Besson and John Tasioulas (eds.), *The Philosophy of International Law* 283 (Oxford: Oxford University Press, 2010), at p. 292.

[14] *Ibid.* I come back to discuss this point further in the Epilogue.

or criminal wrong to the respondent. Punishment generally reflects a level of fault.[15] A legal remedy will generally be justified to the extent that it "fits" the wrong that was done. It is the task of law enforcement institutions to safeguard the justness of domestic law by implementing legal acts consistently and in a like manner. This is the rule of law.

Considering the function of responsibility in the domestic law highlights the problem of responsibility in international law.[16] There are no formal civil or criminal distinctions of international law. The extent to which civil and criminal (or even private and public) remedies are available is a matter of ongoing debate.[17] The nature and purpose of state responsibility are equally open to controversy. Are they based on utilitarian or deontic principles? Are they limited to compliance, or do they extend to retributive elements? Each adjudicator is left to select the particular nature of the responsibility to apply on a case-by-case basis – with little guidance from positive sources. Indeed, even the nomenclature of "state responsibility" conflates the distinction between a state's duties and the legal consequences of breaching them. International lawyers use "responsibility" to mean either and both.[18]

A related explanation for the lack of attention to the doctrine's history is the confusion over its applicability. In 2001, the International Law Commission of the UN (ILC) finalized its draft articles on state responsibility (Draft Articles).[19] The lengthiness and inclusiveness of this international codification process commanded considerable attention from law scholars, many of whom believe that the resulting code has attained

[15] Obligations of result and strict liability concepts, of course, exist as well as an exception to this rule.

[16] *See* Amanda Perreau-Saussine, "A Case Study on Jurisprudence as a Source of International Law: Oppenheim's Influence," in Matthew Craven, Malgosia Fitzmaurice and Maria Vogiatzi (eds.), *Time, History and International Law* 100 (2007); Arthur Nussbaum, *A Concise History of the Law of Nations* (New York: Macmillan, 1947), at p. 61.

[17] As discussed in Chapters 3–5.

[18] As discussed in the Epilogue.

[19] International Law Commission, *Responsibility of States for Internationally Wrongful Acts 2001*, Text adopted by the Commission at its fifty-third session, in 2001, and submitted to the General Assembly as a part of the Commission's report covering the work of that session. The report, which also contains commentaries on the draft articles, appears in Yearbook of the International Law Commission, 2001, vol. II (Part Two). Text reproduced as it appears in the annex to General Assembly resolution 56/83 of December 12, 2001 and corrected by document A/56/49(Vol. I)/Corr.4; reproduced in James Crawford, *Commentaries to the Draft Articles on Responsibility of States for Internationally Wrongful Acts* (Cambridge: Cambridge University Press, 2001).

the reified status of customary international law.[20] But this acceptance has led to a misconception about the relevance of the ILC rules to actual disputes.[21] The Draft Articles were intended to apply only by default, where no other special laws hold force.[22] The ILC code does not apply when there are other, specific rules that do pertain, based on the general principle of *lex specialis derogat legi generali*; namely, when in conflict, specific rules trump general ones.[23] The fact that the ILC doctrine is

[20] *See, e.g.*, Kaj Hobér, "State Responsibility and Attribution," in P. Muchlinski *et al.* (eds.), *The Oxford Handbook of International Investment Law* (Oxford: Oxford University Press, 2008), at p. 553; *Noble Ventures, Inc. v. Romania*, Award, ICSID Case No. ARB/01/11, para. 69 (October 12, 2005). According to Judge James Crawford (1948–2021), "They have been referred to as often as any treaty of the same sort in the period in question, and much more often than most." (Jack Taylor, "Inside the ICJ: Interview with Judge James Crawford," *Harvard Political Review*, May 11, 2020, available online at https://harvardpolitics.com/interviews/interview-with-judge-james-crawford/, last visited June 2, 2020). In a 2017 report, the UN identified at least 392 decisions including those of the ICJ, the ICC and the WTO that authoritatively reference the Draft Articles (UNSG-UNGA, 'Responsibility of States for internationally wrongful acts – Compilation of decisions of international courts, tribunals and other bodies – Report of the Secretary-General – Addendum' (June 27, 2017) A/71/80/Add.1); The report identifies 264 arbitral decisions referencing the Draft Articles. On the total number of investment arbitrations leading to a decision since 2000, see: UNCTAD, Investment Dispute Settlement Navigator (UNCTAD Investment Policy Hub, December 31, 2019) https://investmentpolicy.unctad.org/investment-dispute-settlement/ as cited in Sotirios-Ioannis Lekkas, "The Uses of the Work of the International Law Commission on State Responsibility in International Investment Arbitration: Maintaining the Unity of the Law of State Responsibility through Interpretation?" in J. M. Alvarez Zarate, Panos Merkouris, Andreas Kulick and Maciej Zenkiewicz (eds.), *The Rules of Interpretation of Customary International Law 93* (Cambridge: Cambridge University Press, 2024), at p. 93. *The Rules of Interpretation of Customary International Law*, available online at SSRN: https://ssrn.com/abstract=3719456, last visited May 5, 2021, at p. 1.

[21] *See, e.g.,* my discussion of how four Argentinian gas cases (*CMS Transmission Co. v. Argentine Republic*, ICSID Case No. ARB/01/8, Award (May 12, 2005); *LG&E Energy Corp. v. Argentine Republic*, ICSID Case No. Arb/02/1, Decision on Liability (October 3, 2006); *Enron Corp., Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. Arb/01/3, Award (May 22, 2007); *Sempra Energy Int'l v. Argentine Republic*, ICSID Case No. Arb/02/16, Award, P 391, September 28, 2007) approach the ILC Draft Articles – Alan Tzvika Nissel, "The Duality of State Responsibility," 44(3) *Columbia Human Rights Law Review* 793 (2013), at p. 853. As Martins Paparinskis states: "there is something to be said against the excessive enthusiasm of adopting the ILC formulae wholesale." (Martins Paparinskis, "Circumstances Precluding Wrongfulness in International Investment Law," 31(2) *ICSID Review – Foreign Investment Law Journal* 484 (2016), at p. 488).

[22] *See* para. 1 of the Introduction to the Draft Articles, *supra* 19.

[23] *See* Draft Article 55 ("These Articles do not apply where and to the extent that the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility of a State are governed by special rules of international law").

residual in nature[24] seems to have been overlooked in the literature.[25] There is, thus, a duality of state responsibility doctrines: one general and codified, and the specific and largely uncodified.

Since most of the academic attention has focused on the UN, its codification of state responsibility has become identified as *the* doctrine of state responsibility,[26] and its history as *the* history of state responsibility. However, the majority of doctrines of state responsibility – including those regarding the use of force, regional human rights regimes, environmental law, consular law and alien protection – remain either expressly or implicitly outside its purview.[27] Recently, international scholars have begun to question the relevance of the ILC Draft Articles to all international disputes.[28] Some have critiqued its eloquent simplicity

[24] See para. 5 of the Introduction to the Draft Articles, *supra* 19: "In principle, States are free, when establishing or agreeing to be bound by a rule, to specify that its breach shall entail only particular consequences, and thereby to exclude the ordinary rules of responsibility."

[25] In their recently edited book on "Exceptions in International Law," while Lorand Bartels and Federica Paddeu analyze the exceptional structure of ILC doctrine of state responsibility, almost no attention is paid to the biggest loophole of the project – *i.e.*, the distinction between *lex specialis* and *lex generalis* in Draft Article 55 (Lorand Bartels and Federica Paddeu (eds.), *Exceptions in International Law* (Oxford: Oxford University Press, 2020). To Lorand Bartels and Federica Paddeu, "In its simplest form, a rule is a norm that, when its preconditions and international conditions are satisfied, generates a specified outcome" (*ibid* at p. 1). They continue, "Rules regulating conduct, for example, typically state that when a given event occurs (the antecedent), a given legal person must (obligation) or may (a right) engage in a certain type of conduct (the consequent)." Is the exception a part of or a deviation from the rule? Cambridge University criminal law professor Glanville Williams argued that it was the former. To him there really is "no intrinsic difference between the elements of an offence and an exception (or defence) to that offence" (Glanville Williams, "The Logic of 'Exceptions,'" 47 *Cambridge Law Journal* 261 (1988), at pp. 277–278).

[26] James Crawford, "The International Court of Justice and the Law of State Responsibility" in Christian J. Tams and James Sloan (eds.), *The Development of International Law by the International Court of Justice* 71 (Oxford: Oxford University Press, 2013), at p. 81 (it has "encoded" the manner in which we think about *all forms* of international responsibility).

[27] *See* Katja Creutz, *State Responsibility in the International Legal Order: A Critical Appraisal* (Cambridge: Cambridge University Press, 2020), at p. xi ("State responsibility is a blunt tool." "This is why in practice, state responsibility has been taken over by special . . . regimes").

[28] *See, e.g.,* Lekkas, *supra* note 20; The Rules of Interpretation of Customary International Law series, available online at SSRN: https://ssrn.com/abstract=3719456, last visited May 5, 2021 (the ILC Articles on state responsibility "constitute an experiment in international law-making" (p. 1)).