Introduction

STATE RESPONSIBILITY ISSUES ON THE RISE

State responsibility has for long been at the core of the international legal order with roots in state practice, legal theorizing, and judicial pronouncements. The Permanent Court of International Justice (PCIJ) affirmed in its very first case, that of the SS *Wimbledon*, the duty of the responsible state to compensate for wrongful acts occasioned by it.[1] Almost a century later, the central role played by state responsibility for international law is practically taken for granted. It is considered important whether international lawyers in international judicial institutions, foreign ministries, or universities ponder how to respond to illegal fishing of straddling fish stocks, or how to react to armed aggression. State responsibility – or any other responsibility system for that matter – 'comes across as the final island of certainty in an ocean of doubt'.[2]

The generality of state responsibility law has guaranteed steadfast scholarly interest in the topic, which peaked with the adoption of the International Law Commission's Articles on the Responsibility of States for Internationally Wrongful Acts of 2001 (ASR, the ILC Articles).[3] Analyses of the ILC

[1] *S.S. Wimbledon*, 1923, PCIJ Series A. No.1, p. 15, at p. 30.

[2] Jan Klabbers, 'Responsibility of States and International Organisations in the Context of Cyber Activities with Special Reference to NATO', in Katharina Ziolkowski (ed.), *Peacetime Regime for State Activities in Cyberspace: International Law, International Relations and Diplomacy* (Tallinn: NATO Cooperative Cyber Defence Centre of Excellence, 2013), pp. 485–506 at 505.

[3] Report of the International Law Commission (ILC) on the Work of Its Fifty-third Session, UN Doc. A/56/10 (2001), p. 29. The General Assembly took note of the ASR in UNGA Res. 56/83, 12 December 2001.

codification end-result mushroomed.[4] Around the same time, much attention was also paid to high-profile international incidents involving issues of state responsibility law. Among others, these incidents included: the Kosovo crisis and the bombing of Yugoslavia in 1999, the United States' attack upon Afghanistan in 2001 following the 9/11 terrorist attacks, the Coalition of the Willing invading Iraq in 2003 and the concomitant abuses of prisoners at Abu Ghraib.

These cases enabled international lawyers to apply the newly codified ASR to concrete situations and gave them the opportunity to raise several questions about the law that seemed indecisive or undealt with by the ILC Articles. These questions included: aiding and abetting, how to apportion responsibility among multiple state actors,[5] collective countermeasures,[6] as well as the appropriate level of control needed for attribution of responsibility to the state in the case of non-state actors, such as private military and security companies (PMSCs) or terrorist networks.[7] Unsurprisingly, despite extensive legal codification and development on the matter of state responsibility, not all issues had been solved once and for all.[8]

In some cases, it seemed that the law of state responsibility not only was uncertain, but also that the entire body of law had a lesser role – or no role to play – in spite of its comprehensive scope. For example, two judges of the International Court of Justice (ICJ) held in the *Bosnian Genocide* case that

4 See the 'Symposium on the ILC's State Responsibility Articles' (2002) 96 *American Journal of International Law* 773–890; James Crawford, *The International Law Commission's Articles on State Responsibility* (Cambridge: Cambridge University Press, 2002); René Provost (ed.), *State Responsibility in International Law* (Dartmouth: Ashgate, 2002).

5 For general analysis on coalitions of the willing and responsibility, see Matteo Tondini, 'Coalitions of the Willing', in André Nollkaemper and Ilias Plakokefalos (eds.), *The Practice of Shared Responsibility in International Law* (Cambridge: Cambridge University Press, 2017), pp. 701–732.

6 Martti Koskenniemi, 'Solidarity Measures: State Responsibility as a New International Order?' (2001) 72 *British Yearbook of International Law* 337–356.

7 Derek Jinks, 'State Responsibility for the Acts of Private Armed Groups' (2003) 4 *Chicago Journal of International Law* 83–95; Tal Becker, *Terrorism and the State: Rethinking the Rules of the Law of State Responsibility* (Oxford and Portland, OR: Hart Publishing, 2005); Kimberley Trapp, *State Responsibility for International Terrorism: Problems and Prospects* (Oxford: Oxford University Press, 2011); Katja Nieminen, 'The Rules of Attribution and the Private Military Contractors at Abu Ghraib: Private Acts or Public Wrongs?' (2006) XV *Finnish Yearbook of International Law* 289–319; Marie-Louise Togas, 'La responsabilité internationale d'État pour le fait d'entreprises militaires privées' (2008) 45 *Annuaire Canadien de droit international* 97–130.

8 Guy S. Goodwin-Gill, 'State Responsibility and the "Good Faith" Obligation in International Law', in Malgosia Fitzmaurice and Dan Sarooshi (eds.), *Issues of State Responsibility before International Judicial Institutions* (Oxford and Portland, OR: Bloomsbury, 2004), pp. 75–104 at 75.

international criminal law appeared to be more suitable for dealing with allegations of genocide than the law of state responsibility.[9] The same was argued by many commentators with respect to the torture at Abu Ghraib,[10] particularly after the minor role played by the law of state responsibility. And lately, the limited relevance of state responsibility law to some emerging global problems has become visible. For example, the normative solution provided by state responsibility for handling claims of climate change and cybercrimes, seems thinner and less meaningful than with respect to classic interstate issues. All in all, the predominantly binary, interstate setting of the law of state responsibility seems increasingly ill-fitted to deal with the complexity of actors and issues that characterize the transnational relations of the changing global order.

These developments were naturally reflected in the international legal literature regarding state responsibility. First, following the initial analyses of the ILC Articles, an increasing number of studies sought to analyze state responsibility in conjunction with other responsibility regimes in international law, such as that of the responsibility of international organizations or international criminal law.[11] Such efforts were thus focused on the broader field of international responsibility. However, the past decade has also witnessed the growth of corrective or critical assessments of the law of state responsibility, which suggests that the initial exhilaration over the ILC Articles is fading. Although criticism has been directed towards state responsibility law before,[12] several researchers have now started to pay increasing attention to the lacunae

[9] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia)(Preliminary Objections)*, ICJ Reports 1996, p. 595, Joint Declaration of Judges Shi and Vereschetin, p. 632.

[10] Alette Smeulers and Sander van Niekerk, 'Abu Ghraib and the War on Terror – A Case against Donald Rumsfeld?' (2009) 51 *Crime, Law and Social Change* 327–349; Chia Lehnardt, 'Individual Liability of Private Military Personnel under International Criminal Law' (2008) 19 *European Journal of International Law* 1015–1034.

[11] Maurizio Ragazzi (ed.), *International Responsibility Today: Essays in Memory of Oscar Schachter* (Leiden and Boston: Martinus Nijhoff Publishers, 2005); Marja Lehto, *Indirect Responsibility for Terrorist Acts: Redefinition of the Concept of Terrorism Beyond Violent Acts* (Leiden and Boston: Martinus Nijhoff Publishers, 2010); Beatrice I. Bonafè, *The Relationship Between State and Individual Responsibility for International Crimes* (Leiden, Boston: Martinus Nijhoff Publishers, 2009); Rafaëlle Maison, *La responsabilité individuelle pour crime d'État en droit international public* (Bruxelles: Bruylant, 2004).

[12] See e.g., Philip Allott, 'State Responsibility and the Unmaking of International Law' (1988) 29 *Harvard International Law Journal* 1–26; Christine Chinkin, 'A Critique of the Public/Private Dimension' (1999) 10 *European Journal of International Law* 387–395; Koskenniemi, 'Solidarity Measures'.

and shortcomings of the doctrine.[13] Specific problematic aspects have been explored in greater detail, such as: complicity or shared responsibility,[14] third-party countermeasures,[15] as well as the law's non-institutionalized nature.[16] Recent literature has also focused on the question of how well state responsibility fares with respect to particular issues or wrongdoings such as transnational terrorism and global security.[17] This noticeable shift in interest towards critiques of state responsibility is to be welcomed, particularly since the adoption of the ASR has mostly been seen as a successful endeavour. This study seeks to combine both of the above-mentioned trends in the state responsibility literature by linking the more recent critical approach with analysis of the broader picture of international responsibility,[18] with the aim to unmask in a comprehensive manner uncertainties that characterize the law.

THE PURPOSES OF STATE RESPONSIBILITY

The law of state responsibility is usually analyzed from the perspective of its elements: that is, issues pertaining to the existence of an internationally wrongful act, as well as the content and implementation of responsibility. However, the aims of state responsibility are rarely spelled out and the social element of state responsibility is often lacking.[19] Yet, what objectives one assigns to a responsibility regime will have implications for how well it is seen to fare in overall terms, as well as for what solutions are envisaged for solving potential problems.

[13] See e.g., Tzvika Alan Nissel, *A History of State Responsibility: The Struggle for International Standards (1870–1960)* (Helsinki: University of Helsinki, 2016); Becker, *Terrorism and the State*.

[14] Vladyslav Lanovoy, *Complicity and Its Limits in the Law of International Responsibility* (Oxford and Portland, OR: Bloomsbury, 2016); Helmut Philipp Aust, *Complicity and the Law of State Responsibility* (Cambridge: Cambridge University Press, 2011); André Nollkaemper and Dov Jacobs (eds.), *Distribution of Responsibilities in International Law* (Cambridge: Cambridge University Press, 2015); Georg Nolte and Helmut Philipp Aust, 'Equivocal Helpers – Complicit States, Mixed Messages and International Law' (2009) 58 *International and Comparative Law Quarterly* 1–30.

[15] Martin Dawidowicz, *Third-Party Countermeasures in International Law* (Cambridge: Cambridge University Press, 2017).

[16] Vincent-Joël Proulx, *Institutionalizing State Responsibility: Global Security and UN Organs* (Oxford: Oxford University Press, 2016); Dawidowicz, *Third-Party Countermeasures*.

[17] Proulx, *Institutionalizing*; Vincent-Joël Proulx, *Transnational Terrorism and State Accountability: A New Theory of Prevention* (Oxford and Portland, OR: Hart Publishing, 2012); Becker, *Terrorism and the State*.

[18] One study which also combines critique with a broad approach to international responsibility is James Crawford, Alain Pellet and Simon Olleson (eds.), *The Law of International Responsibility* (Oxford: Oxford University Press, 2010).

[19] Jan Klabbers, 'Book Review on André Nollkaemper and Dov Jacobs (eds.), *Distribution of Responsibilities in International Law*' (2016) 27 *European Journal of International Law* 541–551 at 541.

But how is one to understand the purposes of state responsibility, whose nature is famously claimed as being neither civil nor criminal, but sui generis? It is not easy to spell out its purposes definitively. Positive sources provide little direction,[20] as much of the general law is of a customary nature. For example, the first point of reference, the ASR, do not explicitly state any goal(s) to be achieved akin to what is to be found in the Statute of the International Criminal Court (ICC).[21] Whereas the latter names punishment and prevention as the objectives to be reached through this particular institution of international criminal law, the general commentary to the ASR presents no explicit goals. However, the content of state responsibility lays bare that the immediate objectives are cessation of the wrongful act as well as reparation for injury. Also prevention of the occurrence of breaches is mentioned.[22]

Therefore, in a manner similar to domestic responsibility systems, there are several aims that can be ascribed to state responsibility. This holds particularly true if one explores the international legal literature, which mentions inter alia the following goals of state responsibility: 'preservation of peace', 'reparation of harm', 'deterrence', 'loss allocation', 'administrative efficiency', and 'securing international cooperation'.[23] The civil aims of state responsibility stand out in listings of purposes of state responsibility, and many scholars take the law's non-punitive nature at face value.[24] However, there are allegedly penal aspects to state responsibility, too, although they may be less apparent with respect to ordinary harms. According to Special Rapporteur Gaetano Arangio-Ruiz, responsibility in itself should be considered a sanction with a penal connotation.[25] Yet, manifestly missing in discourses on the purposes of state responsibility are any expressive goals that are commonly connected to criminal law, whether national or international.

The views on the purposes of state responsibility have varied over time as scholars have attempted to frame the law over the course of several centuries. Moreover, those who have enforced it as adjudicators may have a different take on the purposes of state responsibility. Despite the controversies surrounding

[20] Nissel, *A History of State Responsibility*, p. 16.
[21] Rome Statute of the International Criminal Court, Rome, 17 July 1998, in force 1 July 2002, 2187 *United Nations Treaty Series* 3, preamble.
[22] See Commentary to Art. 30 of the ASR.
[23] Anne van Aaken, 'Shared Responsibility in International Law: A Political Economy Analysis', in André Nollkaemper and Dov Jacobs (eds.), *Distribution of Responsibilities in International Law* (Cambridge: Cambridge University Press, 2015), pp. 153–191 at 159–160.
[24] Trapp, *State Responsibility*, p. 11; Robert Kolb, *The International Law of State Responsibility: An Introduction* (Cheltenham: Edward Elgar, 2017), p. 153.
[25] Fifth report of Arangio Ruiz, ILC Yearbook 1993, vol. II(1), 1, para. 256.

the purposes of state responsibility,[26] broadly speaking it shares some common aims with other responsibility systems: legal and material restoration with both backward- and forward-looking connotations.[27] There is both a relational function, which seeks to restore the relations between the wrongdoing and injured states, and a systemic function, to uphold the international legal order.[28] With regard to both aspects, the aim can be seen as guaranteeing stability and certainty in international relations,[29] an aim which is inherently more forward-looking in nature. To that effect, the aim of deterrence or prevention is important. It contributes to the overarching goal of maintaining peaceful relations between states, the original motivation for codification of state responsibility in the first place.[30]

The existence of several objectives for state responsibility, or any other responsibility system for that matter, is not problem-free: it may be difficult to achieve multiple goals at the same time.[31] The multiplicity of aims also opens the door for a case-by-case selection of the nature and purposes of state responsibility on the part of each commentator or adjudicator.[32] The incidence of multiple objectives may also complicate assessments of how these goals are to be reached, especially since there might be tensions among the different aims. At the same time, a multivalued responsibility system should not be seen as a misfortune. Social objectives can never be 'single or simple',[33] and the interaction between different purposes may also be positive.

APPROACH AND ARGUMENT OF THE BOOK

This book is a critical study of the general law of state responsibility and its shifting role within the international legal order. It situates state responsibility law within the larger framework of international responsibility and

[26] Nissel, *A History of State Responsibility*, p. 16.
[27] André Nollkaemper and Dov Jacobs, 'Introduction: Mapping the Normative Framework', in André Nollkaemper and Dov Jacobs (eds.), *Distribution of Responsibilities in International Law* (Cambridge: Cambridge University Press, 2015), pp. 1–35 at 16–19.
[28] Brigitte Bollecker-Stern, *Le préjudice dans la théorie de la responsabilité internationale* (Paris: Editions A. Pedone, 1973), p. 10; Pierre-Marie Dupuy, 'Dionisio Anzilotti and the Law of the International Responsibility of States' (1992) 3 *European Journal of International Law* 139–148 at 146.
[29] Comments by the United Kingdom in 1998 on the second reading of the ILC draft articles. ILC Yearbook, 1998, vol. II, part one, p. 99, para. 3.
[30] UNGA Res. 799 (VIII), 7 December 1953.
[31] van Aaken, 'Shared Responsibility', 160.
[32] Nissel, *A History of State Responsibility*, p. 16.
[33] Henry M. Hart Jr., 'The Aims of the Criminal Law' (1958) 23 *Law and Contemporary Problems* 401–441 at 401.

analyzes the law from the perspective of its functionality as well as against the background of alternative responsibility thinking. By adopting this holistic technique, the aim is to encourage more frank discussions regarding state responsibility as a normative solution for the globalized world with its ever-expanding agenda and plethora of actors. Building on the nascent critical turn that has been discernible in the international legal literature on state responsibility in recent years, the objective is to raise awareness of the complexities and difficulties that permeate the law of state responsibility. However, this study attempts to see the forest for the trees rather than exploring a particular doctrine or aspect of state responsibility. Its aim is to contribute to discussions which, in the long run, can lead to improved ideas and practices regarding responsibility.

In doing so, this study moves beyond traditional questions of interpretation and application such as: what entities constitute state organs, what are the limits of necessity, or whether declaratory judgments constitute appropriate means of redress. Although there is nothing wrong with these questions per se, this book seeks to address more profound questions by pursuing a comprehensive assessment of state responsibility, as well as the issue of how the law is affected by the burgeoning of other responsibility regimes in international law. It will focus not only upon the question of whether the present models of state responsibility are sufficient, but also that of whether they are indeed preferable to begin with. The questions this study raises include: Does state responsibility constitute an appropriate solution to all internationally wrongful acts? Can it respond sufficiently to new phenomena and actors in the international arena? Can the law of state responsibility affect the conduct of actors? Can it differentiate between international obligations that are of heightened importance, and those that do not play a major role in the international community? And, ultimately: are there worthy alternatives to the rules of state responsibility within international responsibility?

The argument set forth in the book is twofold. It first focuses on the general law of state responsibility and argues that the law in question enjoys a higher normative value than what may be merited on the basis of the relevance of state responsibility to the operation of different legal branches. The argument will suggest that the practical weight of state responsibility across the whole spectrum of international legal obligations is not equally strong. While state responsibility remains important in some fields of international law such as international investment law, this claim does not hold true for all issue areas, for instance as demonstrated by cyberspace law. Thus, a discrepancy exists between the aspirations imbued in the law of state responsibility and its actual importance. This mixed significance, in broad terms, of state responsibility

is partly the consequence of globalization, which has changed significantly the international setting both in terms of actors and issues. As a result, state responsibility law is more and more difficult to apply to the infinite variety of situations calling for responsibility. Other contributing factors to the uneven relevance of the law include the shortcomings of state responsibility law itself. These problems are foremost issues pertaining to the basis of the internationally wrongful act as well as to the law's implementation.

The second part of my argument purports to show how, in international practice, alternative constructions of responsibility have come to challenge state responsibility. This part of the book's argument suggests that there now exist in international law several responsibility systems that in many branches of international law have set aside or at least called into question the exclusive role previously played by the law of state responsibility. International criminal law and international liability, which can be viewed as theoretical alternatives to or even partly as offshoots from state responsibility,[34] can deal with certain problems differently – and often more efficiently – than can the general law of state responsibility. In other words, they may display greater functionality in terms of the requirements laid down in this book. Therefore, in the doctrine they should not merely be perceived as gap-fillers or complements to the rules of state responsibility. Rather, they have reduced the sphere of issues to which state responsibility remains pertinent.

It is important to spell out what this study is not about. In assessing the position and aptness of state responsibility law, this study cannot be a work in legal dogma – understood as the study of the content of rules. While the rules are significant, the main focus of this study is the overall picture of state responsibility and the functions of the law of state responsibility. Neither is the aim of this exercise to undermine the importance of responsibility as an idea and practice in international law. Quite to the contrary, state responsibility is such a well-grounded institution of international law that it also merits critical reflection. Therefore, this study highlights the general value of responsibility because its underlying presumption is the existential importance of sanctions for international law. Finally, despite the fact that this study assesses the functionality of state responsibility law against other responsibility regimes, it does not constitute a full comparative analysis of state responsibility, international criminal law, and international liability. It focuses first and foremost upon state responsibility, with the aim of complementing the book's analysis of state responsibility with insights from different responsibility constructions.

[34] Pierre-Marie Dupuy, 'International Law of State Responsibility: Revolution or Evolution?' (1989) 11 *Michigan Journal of International Law* 105–128, referring more generally to international criminal responsibility and international liability.

In spite of much development within the field, a critical approach to state responsibility is needed. Responsibility issues lie at the heart of international law, and as noted by Jules Basdevant in 1930, the practical value of a legal order depends to a large extent upon the effectiveness and scope of its rules on responsibility.[35] There are also more concrete reasons for why the law of state responsibility should be analytically explored. First, the law of state responsibility may be subjected to re-evaluation: the future status of the general law of state responsibility is still being contemplated before the Sixth Committee of the UN with an increasing number of states preferring to turn customary state responsibility law into a convention.[36] It is important that scholars analyze the ILC Articles as a number of the rules have been considered controversial or unclear by states as well as scholars. Such rules pertain mostly to the constitutive elements of the internationally wrongful act itself as well as implementation, rather than to issues of the content of state responsibility. Particularly debated are the rules on attribution, shared responsibility, and countermeasures.[37] Second, a critical assignment is meaningful based on the fact that new responsibility systems have been built upon on older systems such as the responsibility of international organizations, which is largely structured along the lines of state responsibility. Moreover, since the framework of international responsibility remains to some extent underdeveloped,[38] discussions may arise with respect to developing responsibility frameworks for new actors such as transnational corporations or sub-national territorial units like cities.

Throughout the scholarly discussion of responsibility, it has often been maintained that the problems with international responsibility are not so much that of responsibility, but rather that they derive from the vagueness or insufficiency of international legal obligations.[39] Many commentators assert

[35] Jules Basdevant, 'Actes de la Conférence SDN', 1930, Vol. 7, cited in Jean-Pierre Quéneudec, *La responsabilité internationale de l'État pour les fautes personelles de ses agents* (Paris: Pichon et Durand-Auzias, 1966), p. 5.

[36] Federica Paddeu, 'To Convene or Not to Convene? The Future Status of the Articles on State Responsibility: Recent Developments' (2018) 21 *Max Planck Yearbook of United Nations Law* 83–123.

[37] See e.g., Paddeu, 'To Convene'; André Nollkaemper and Ilias Plakokefalos (eds.), *The Practice of Shared Responsibility in International Law* (Cambridge: Cambridge University Press, 2017).

[38] Kristen E. Boon, 'Are Control Tests Fit for Future: The Slippage Problem in Attribution Doctrines' (2014) 15 *Melbourne Journal of International Law* 330–377 at 331, 376.

[39] Clyde Eagleton, *The Responsibility of States in International Law* (New York: The New York University Press, 1928), p. 218; Ilias Plakokefalos commenting on the use of force by non-state actors, 'The Use of Force by Non-State Actors and the Limits of Attribution of Conduct: A Reply to Vladyslav Lanovoy' (2017) 28 *European Journal of International Law* 587–593 at 593. Christina Voigt holds the same with respect to environmental regulation, 'State Responsibility for Climate Change Damages' (2008) 77 *Nordic Journal of International Law* 1–22 at 22.

that states generally want to follow the rules, but that in many instances they disagree as to their content. In other words, lawmakers ought to draft clearer rules. The difficulty of achieving such rules that would leave no room for interpretation seems to be ignored, as well as the indeterminacy of rules. As noted by Martti Koskenniemi, '[m]odern international law is an elaborate framework for deferring substantive resolution elsewhere: into further procedure, interpretation, equity, context, and so on.'[40] The same seems to apply to the law of state responsibility. While the value of clear legal rules should not be underestimated, this study proceeds from the understanding that primary rules do not end the political debate once and for all.[41] International lawyers must also be able to analyze those institutions that are portrayed as 'innocent victims' of the broader structural problems of international law.

The structure of this study is as follows: The first chapter sets the scene for the book by devoting attention to the role played by state responsibility law in the international legal order, as well as discussing contemporary challenges. In addition, this chapter dwells upon various analytical perspectives, and concludes by proposing *functionality* as the most suitable appraisal standard for the present study (Chapter 1). From there, the study moves to explore the historical evolution of state responsibility law from a law of arbitrations to the status of being the generally accepted primary system of responsibility in international law. An important component of this chapter is also its presentation of the ASR and their regulatory approaches, as these rules represent the best available statement on customary law of state responsibility (Chapter 2). Following this presentation of the general rules of state responsibility, the study will problematize the regulatory choices made by the ILC by way of conducting a functional analysis of the separate parts of the law: the basis for state responsibility, its content, and its implementation (Chapter 3). The final substantive chapter will introduce international criminal law and international liability into the picture by conducting a narrower thematic analysis of their respective capabilities for responding to functionality (Chapter 4). Finally, the study will discuss the shifting role of the law of state responsibility in international law (Conclusions).

CONCEPTUAL CLARIFICATIONS

From the perspective of this study, it is important to note that there are two distinct ways of using the concept of responsibility in international law, only one of which is relevant for the present undertaking. First, *responsibility* may

[40] Martti Koskenniemi, 'The Politics of International Law' (1990) 1 *European Journal of International Law* 4–32 at 28.
[41] Jan Klabbers, *International law* (Cambridge: Cambridge University Press, 2013), p. 14.