STATE RESPONSIBILITY IN THE INTERNATIONAL LEGAL ORDER

State responsibility in international law is considered one of the cornerstones of the field. For a long time it remained the exclusive responsibility system due to the primacy of states as subjects of international law. Its unique position has nonetheless been challenged by several developments both within and outside the international legal order, such as the rise of alternative responsibility ideas and practices, as well as globalization and its consequences.

This book adopts a critical and holistic approach to the law of state responsibility and analyzes the functionality of the general rules of state responsibility in a changed international landscape characterized by the fragmentation of responsibility. It is argued that state responsibility is not equally relevant across the broad spectrum of international obligations, and that alternative constructions of responsibility, namely international criminal law and international liability, have increased in standing.

Dr Katja Creutz is a Senior Research Fellow at the Finnish Institute of International Affairs and an Affiliated Research Fellow at the Erik Castrén Institute of International Law and Human Rights at the Faculty of Law, University of Helsinki. She is a former Executive Editor of the Finnish Yearbook of International Law.

State Responsibility in the International Legal Order

A CRITICAL APPRAISAL

KATJA CREUTZ
Finnish Institute of International Affairs

CAMBRIDGE UNIVERSITY PRESS

CAMBRIDGE
UNIVERSITY PRESS

University Printing House, Cambridge CB2 8BS, United Kingdom

One Liberty Plaza, 20th Floor, New York, NY 10006, USA

477 Williamstown Road, Port Melbourne, VIC 3207, Australia

314–321, 3rd Floor, Plot 3, Splendor Forum, Jasola District Centre, New Delhi – 110025, India

79 Anson Road, #06-04/06, Singapore 079906

Cambridge University Press is part of the University of Cambridge.

It furthers the University's mission by disseminating knowledge in the pursuit of education, learning, and research at the highest international levels of excellence.

www.cambridge.org
Information on this title: www.cambridge.org/9781108494298
DOI: 10.1017/9781108637367

First published 2020

A catalogue record for this publication is available from the British Library.

Library of Congress Cataloging-in-Publication Data
Names: Creutz, Katja, 1973- author.
Title: State responsibility in the international legal order / Katja Creutz, Finnish Institute of International Affairs.
Description: Cambridge, United Kingdom ; New York, NY, USA : Cambridge University Press, 2020. | Based on author's thesis (doctoral - Helsingin yliopisto, 2015) issued under title: State responsibility in international law : from paradigm to periphery. | Includes bibliographical references and index.
Identifiers: LCCN 2019053306 | ISBN 9781108494298 (hardback) | ISBN 9781108736930 (ebook)
Subjects: LCSH: Government liability (International law) | Liability for human rights violations
Classification: LCC KZ4080 .C74 2020 | DDC 341.26--dc23
LC record available at https://lccn.loc.gov/2019053306

ISBN 978-1-108-49429-8 Hardback

Contents

Foreword

Like many international lawyers of my generation, I experienced the 1970s as the decade of the rise of international environmental law. The Stockholm Conference on the Human Environment (1972) led to the establishment of the United Nations Environment Programme (UNEP) and triggered an intensive push towards new treaties and all kinds of soft law instruments designed to combat the massive pollution of the atmosphere and the seas. Issues such as offshore mining and drilling, land-based marine pollution, and protection of shared natural resources engaged not only myself but many other international lawyers in an effort to rethink how the old rules could be applied to new problems. At the heart of the early instruments, and in the consciousness of the lawyers working with them, were Principles 21 and 22 of the Stockholm Declaration which dealt with responsibility and liability for damage caused by transfrontier pollution. According to Principle 21, 'States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.' Under Principle 22, the participating states promised to develop appropriate systems of liability and compensation to implement that responsibility.

It was no accident that it was these two provisions that drew the attention of lawyers and that the text of Principle 21 – and the idea of responsibility for transfrontier pollution – was repeated in countless environmental instruments and declarations in the course of the subsequent years. The idea and concept of 'responsibility' lies at the heart of juristic thinking, connoting somewhat ambiguously both the duty of carrying out one's obligations ('you are responsible for keeping the environment clean') and the consequences

of the breach of that obligation ('you must make good the damage you have caused'). But it is generally this second sense that has been predominant. When it was felt necessary to apply legal thinking to the protection of the human environment, international lawyers almost automatically grasped at the vocabulary of state responsibility. It was necessary to establish adequate obligations in that respect. But it was at least as important (and no doubt, many felt even more important) that those duties be accompanied by responsibility for breaches. Lawyers are famously people who are always looking to the dark side of human behaviour. They do this even when things move on correctly, as if obsessed by the prospect of a future breach – trying to imagine violations when they have not taken place. They do this by allocating blame and either seeking to punish those that they understand as 'guilty' or at least obliging them to compensate fully the damage they have caused. It is good to remember that this is not because law (or the lawyers) actually *wants* to punish. The deeper idea is that the presence of responsibility and liability would prevent the causing of damage by deterring people from engaging in the kinds of behaviour that the legislator has deemed harmful.

For lawyers, the substance of Stockholm Principles 21 and 22 contained the hard core of emerging international environmental law, the measure of its seriousness. Everyone can declare their good intentions. Such declarations provide, as the saying goes, photo opportunities for politicians and governments wishing to portray themselves as environment-friendly. They are easy to make. But taking action to avoid damage is hard and costly. The burdens of environmental measures fall differently upon different states and different human groups. It was therefore no surprise that efforts to give substance to environmental responsibility in the traditional legal way – as punishment and compensation – never really moved anywhere. After all, the principal sources of pollution emerged, as they still do, from activities that are not only lawful but often beneficial to communities where they originate. The idea that responsibility should *deter* could not therefore be meaningfully applied. The kinds of industrial or economic activities that created environmental harm could not – with few exceptions – be simply prohibited.

What about liability, then? The painful efforts to create a system of 'liability for the injurious consequences of acts not prohibited by international law' under the International Law Commission (that had its source in Stockholm Principle 22) led finally to rethinking the topic in an altogether new way as 'Principles on the Allocation of Loss in the Case of Transboundary Harm Arising Out of Hazardous Activities' (YbILC 2006, II/2). Comparing the documents from Stockholm 1972 with the ILC (Draft) declaration on 'allocation

of loss' over thirty years later, one discovers that the international environmental problem is now thought of primarily in economic rather than legal terms. Perhaps this was to be expected for a project which mostly took place in a time of neoliberal ascendancy. The system of buying and selling emission permits under the Climate Change treaty (Kyoto Protocol) is the most famous example. It is useful to note, however, that economics was there from the outset. In the 1970s, the Organisation for Economic Co-operation and Development (OECD) had declared the 'polluter pays principle' was not really a principle of legal responsibility but one having to do with the sharing of the costs of measures to protect the environment and to repair the damage. It was a cost-internalization technique intended to ensure that the bill for preventing or repairing harm would fall on those who also profited from the activity causing it – an understandable intention that created the massive challenges of how to both calculate 'costs' to the environment and find the appropriate causal chains within an increasingly global network of production and consumer preferences. In such debates, the vocabularies of breach, responsibility, and compensation began to appear hopelessly crude and old-fashioned – unable to take into account the varying interests and needs of human groups across the globe. Issues of development and historical justice were concerned.

State responsibility is a blunt tool. It has been impossible to apply it in a globally uniform way. This is why in practice, state responsibility has been taken over by special – often geographically limited – regimes. These seek to identify relevant actors and economic structures involved in operations with actual or potential harmfulness and then determine how possible liability might be calculated. Oil, nuclear energy, ozone-depleting substances, and climate change have each received their specific regimes of prevention, liability, and cost-sharing. Each regime has received a responsibility system tailored to its needs. This fragmentation has diffused the larger theme of responsibility. The Draft Articles on State Responsibility prepared by the ILC in 2001 do lay out general principles with regard to breach and accountability. But its general provisions have been largely replaced by specific regimes that usually talk about various kinds of preventive measures – about scientific and technical cooperation, information exchange, and measurement. Sometimes they also include economic arrangements to help our weaker actors or to coordinate preventive or restorative measures. The themes of breach and accountability – indeed the very issue of blameworthiness – are rarely broached, and even more rarely developed into any tangible system of reactions resembling domestic responsibility. The Draft Guidelines adopted in first reading by the ILC on the protection of the atmosphere (A/CN4/L.909 [6 June 2018]) discreetly but expressly set aside questions about 'common but

differentiated responsibilities' and 'the liability of states and their nationals'. The story that began in Stockholm 1972 has come to an end.

This is the development that is meticulously charted in this wonderful work by Katja Creutz, and not only in the environmental field. *State Responsibility in the International Legal Order* provides a welcome in-depth survey of the 'life and times' of one technical legal doctrine as well as provides tools for the assessment of the wider transformations of international law and the global institutional system in the past half-century. The work's subtitle – *A Critical Appraisal* – is particularly pertinent. The results of international cooperation in the past decades, especially cooperation at a global scale, have not been impressive, although the final assessment depends upon where one looks: environment, development, trade, human rights, war and peace, equality, and discrimination. The UN's sustainable development goals – Agenda 2030 – provide a mixed message. But the legal principle of 'state responsibility' has not played a visible role in any of the seventeen action areas covered by that programme nor in the formation of the many multilateral legal regimes that have arisen in the regulation of trade, environment, human rights, humanitarian law, the prevention of international crime, and so on.

In this work, Dr Creutz lays out many of the difficulties that lie in the way of operationalizing state responsibility as a regulatory instrument. Problems regarding causality and proof, identifying the actors, and finding the right threshold of breach are some of those difficulties. The connotation of blameworthiness may not be appropriate in finely tuned diplomatic contexts. The adversarial nature of responsibility and its formal, on/off quality are likewise difficult to apply at a global scale. As Dr Creutz points out, international lawyers still use the domestic analogy to think about the operation of global law. But as a regulatory context, the 'global' is quite different from the 'domestic'. Situations vary to the extent that uniform rules are in most cases impossible to establish – they will either be excessively indeterminate, and therefore without regulatory effect, or their application will seem unjust in some part of the world. One of the great merits of this work is that it takes a close look at the actual functions that state responsibility has, or could have, in the international world. Can it be employed to regulate and control the activities of states? What about its role as a device signalling shared values or uniting actors behind joint projects? These are the kinds of question that international lawyers too often fail to ask, perhaps owing to our predilection of thinking about international rules in the image of domestic ones, and assuming both are beneficial in the same way. The rise of special regimes should remind us of the much greater heterogeneity of the

international world as well as of the fact that there is no single project out there but rather many ambitious actors with different and often conflicting agendas. Dr Creutz's analysis of the development of state responsibility provides an insightful orientation into understanding why global progress is so difficult to achieve and why a formal doctrine such as state responsibility may never be quite adequate in grasping the complexity of world's injustices.

Martti Koskenniemi, FBA
Professor of International Law
Helsinki

Preface

This book represents an addition to the growing scholarship on the law of state responsibility within international law. It seeks to assess this body of law in a comprehensive and critical manner because such efforts have so far been relatively few. While the issues regulated by international law have expanded and diversified, as has the range of actors, state responsibility has remained a central institution of international law. These developments nevertheless motivate taking a fresh look at the law of state responsibility in order to ponder whether international lawyers need to adjust their thinking in this area.

My interest in state responsibility awakened in the aftermath of the abuses in the Abu Ghraib prison in 2004. International legal scholars tended to have different ideas about what state responsibility was supposed to achieve in this particular case and by what means. At times, remedying concrete wrongs appeared to be juxtaposed with the larger concerns for legality in the international legal order. Moreover, different opinions seemed to exist with regard to whether or not state responsibility had materialized with respect to the Abu Ghraib abuses. Around the same time, the International Criminal Court (ICC) became operative and promised a different approach to the most serious violations of international law. International responsibility expanded to encompass various practices and ideas of responsibility; yet, a comprehensive understanding of the developments occurring within responsibility in international law seemed to be missing.

This book strives to fill that gap by situating state responsibility within the broader framework of international responsibility. Hence, its focus lies on the big picture. By means of assessing the functionality of the general law of state responsibility separately, as well as against the background of alternative responsibility thinking grounded in international liability and international criminal law, this books seeks to highlight for discussion the fragmentation of responsibility and its consequences for the viability of the general rules of state responsibility. Needless to say, all errors in this effort are my own.

Acknowledgements

This book is grounded in my doctoral dissertation, which I defended in August 2015 at the Faculty of Law, University of Helsinki. I am indebted to my academic home, the Erik Castrén Institute of International Law and Human Rights, whose creative working atmosphere I was able to enjoy for nearly a decade, and where I wrote the dissertation. Professors Martti Koskenniemi and Jan Klabbers have been crucial in both the writing of the dissertation and the process of turning it into a book. Without their relentless support, this book would not have materialized.

I also wish to extend my gratitude to another inspiring working environment, the Finnish Institute of International Affairs. My position as a Senior Research Fellow at the Institute has enabled me to work on the book with the full support of the leadership, colleagues, and the administrative personnel. I especially wish to thank the former Director Teija Tiilikainen, Director Mika Aaltola, and all my colleagues at the Institute, especially those in the Global Security Programme. Research Assistant Anu Ruokamo's help has been invaluable, as has that of the Institute's librarian Johanna Meltti.

Over the years numerous colleagues and acquaintances from different research environments have provided me with guidance and support. It would be impossible to name them all, but I am especially grateful to Pekka Niemelä, Jarna Petman, Pamela Slotte, and Sanna Villikka for having supported me continuously. I am thankful to Grant White, PhD, for language editing. My gratitude also extends to Tom Randall, Gemma Smith, and others at Cambridge University Press for all their assistance, as well as the reviewers for providing both intrinsic and detailed comments that I greatly benefited from.

Besides the aforementioned institutional and collegiate backing, I am grateful to my parents Märta and Erkki for the support of my academic

endeavours throughout the years. The same applies to my parents-in-law. Those who have made this book possible are nevertheless my husband and my children, who have given me the time needed to write this book – whether in the evenings, at weekends, or in the summer holidays. They have shown enormous patience and never complained about my book project. There are no words to thank them. This book is dedicated to you, Henrik, Amanda, and Alexander.

Table of Cases

ARBITRAL AWARDS

PCIJ

ICJ

NATIONAL COURTS

IMT

ECCC

ECtHR

IACtHR

Case of Montero-Aranguren et al. (Detention Centre of Catia) *v.* Venezuela, Judgment (5 July 2006)

WTO DSB

Appellate Body Report, United States – Import Prohibition of Certain Shrimp and Shrimp Products, WT/DS58/AB/R (adopted 6 November 1998)

ICSID

CMS Gas Transmission Company *v.* Argentine Republic, ICSID Case No. ARB/01/8, Award (12 May 2005)

LG & E Energy Corp. and others *v.* Argentine Republic, ICSID Case No. ARB/02/1, Decision on Liability (3 October 2006)

ITLOS

Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area, Case No. 17, International Tribunal of the Law of the Sea, The Seabed Disputes Chamber, Advisory Opinion (1 February 2011)

Abbreviations

ADP	Articles on Diplomatic Protection
ARIO	Articles on the Responsibility of International Organizations
ASR	Articles on State Responsibility
CIA	Central Intelligence Agency
CTBT	Comprehensive Test Ban Treaty
ECCC	Extraordinary Chamber in the Courts of Cambodia
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ECJ	Court of Justice of the European Union
ECtHR	European Court of Human Rights
EEZ	Exclusive Economic Zone
EU	European Union
FAO	World Food and Agriculture Organization
GA	General Assembly
GAL	Global Administrative Law
IACtHR	Inter-American Court of Human Rights
IAEA	International Atomic Energy Agency
ICC	International Criminal Court
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
ICSID	International Centre for Settlement of Investment Disputes
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for former Yugoslavia
ILC	International Law Commission
IMO	International Maritime Organization
IMT	International Military Tribunal

IMTFE	International Military Tribunal for the Far East
ITLOS	International Tribunal for the Law of the Sea
JCE	joint criminal enterprise
LMO	living modified organism
NATO	North Atlantic Treaty Organization
NGO	non-governmental organization
OECD	Organization for Economic Cooperation and Development
OTP	Office of the Prosecutor at the International Criminal Court
P&I	Protection and Indemnity
PCIJ	Permanent Court of International Justice
PMSC	Private Military and Security Company
PPP	polluter pays principle
PTBT	Partial Test Ban Treaty
SC	Security Council
SDR	special drawing rights
UN	United Nations
UNCC	United Nations Compensation Commission
UNCLOS	United Nations Convention on the Law of the Sea
UNFCCC	United Nations Framework Convention for Climate Change
VCLT	Vienna Convention on the Law of Treaties
WHO	World Health Organization
WTO	World Trade Organization