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## State Responsibility

### The General Part

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Annexed to GA Resolution 56/83 of 2001, the International Law Commission's Articles on the Responsibility for Internationally Wrongful Acts put the international law of responsibility on a sound footing. As Special Rapporteur for the second reading, James Crawford helped steer it to a successful conclusion. With this book, he provides a detailed analysis of the general law of international responsibility and the place of state responsibility in particular within that framework. It serves as a companion to *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (Cambridge University Press, 2002), and is essential reading for scholars and practitioners concerned with issues of international responsibility, whether they arise in interstate relations, in the context of arbitration or litigation or in bringing international claims.

JAMES CRAWFORD is **Whewell** Professor of International Law at the University of Cambridge and concurrently Research Professor of law, Latrobe University. From 1997-2001 he was the ILC Special Rapporteur on State Responsibility.

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And louder sing

For every tatter in its mortal dress.

W. B. Yeats, 'Sailing to Byzantium'.

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Frontmatter  
[More information](#)

---

Contents

<i>Preface and acknowledgements</i>	page xxi
<i>Abbreviations</i>	xxiv
<i>Table of cases</i>	xxxii
<i>Table of treaties and other instruments</i>	lv
<i>Reports of Special Rapporteurs</i>	lxxiii

<b>Part I The framework of responsibility</b>	
1	Historical development 3
1.1	Introduction 3
1.2	Intimations of responsibility in early international law writings 4
1.2.1	Italian precursors of Grotius: Belli and Gentili 4
1.2.2	Grotius: civil law obligations with no equivalent in the law of nations 8
1.2.3	Zouche: breaches of treaties 11
1.2.4	Pufendorf: a perfect system of natural law 12
1.2.5	Van Bynkershoek: the honour of the sovereign and <i>pacta sunt servanda</i> 15
1.2.6	Wolff and Vattel: elements of a law on responsibility 17
1.3	Nineteenth- and early-twentieth-century developments 20
1.3.1	Nineteenth-century writers: from Wheaton to Heffter 20
1.3.2	The early twentieth century: Triepel and Anzilotti 22
1.3.3	Borchard and Eagleton and the legacy of the Great War 24

Cambridge University Press

978-0-521-82266-4 - State Responsibility: The General Part

James Crawford

Frontmatter

[More information](#)

viii

## CONTENTS

1.3.4	The Hague Codification Conference of 1930	28
1.3.5	The Harvard Draft Research	32
1.3.5.1	The 1929 Draft	32
1.3.5.2	The 1961 Draft	34
1.4	The work of the International Law Commission	35
1.4.1	The first reading: 1949–1996	35
1.4.2	The second reading: 1998–2001	39
1.4.3	Responses to the 2001 Articles	42
2	Key concepts	45
2.1	The modern synthesis	45
2.1.1	The ILC's codification	45
2.1.2	The modern concept of state responsibility	49
2.2	The language of state responsibility	51
2.2.1	Typology of state responsibility	51
2.2.2	Prerequisites for the invocation of responsibility	54
2.2.2.1	The debate over 'damage' and 'injury'	54
2.2.2.2	The principle of 'objective responsibility'	60
2.2.3	'Delictual capacity'	62
2.2.4	'Responsibility' and 'liability'	62
2.2.5	Rights and obligations	64
2.2.5.1	'Primary' and 'secondary' obligations	64
2.2.5.2	'Obligations <i>erga omnes</i> ' and related concepts	66
2.3	Invocation and admissibility	67
2.3.1	Invocation of state responsibility: formal requirements	67
2.3.2	Certain questions as to the admissibility of claims	68
2.3.2.1	Nationality of claims	69
2.3.2.2	Exhaustion of local remedies	69
2.3.2.3	Waiver	70
2.3.2.4	Acquiescence	72
2.4	Diplomatic protection and its analogues	74
2.4.1	Public and private rights in international law	74
2.4.2	The institution of diplomatic protection	75
2.4.3	Functional and other protection (by international organizations or third states)	77
2.4.3.1	International organizations	77
2.4.3.2	Nationals of third states	78



	CONTENTS	ix
2.5	Responsibility of non-state actors	79
2.5.1	Individual criminal responsibility	79
2.5.2	Corporate criminal responsibility	80
2.5.3	International law claims against individuals and groups	81
2.6	Responsibility and accountability	83
2.7	The modern synthesis and its future	85
2.7.1	Governmental criticisms	85
2.7.2	Scholarly criticisms	87
2.7.3	A convention on state responsibility?	90
3	Corollaries of breach of an international obligation	93
3.1	Introduction	93
3.2	Breach of obligation and its corollaries	94
3.2.1	The components of a breach	94
3.2.2	The substantive corollary: reparation	94
3.2.3	The procedural corollary: claim and countermeasure	95
3.2.4	Dispute settlement in claims of responsibility	95
3.3	The applicable law in claims of responsibility	99
3.3.1	Overview	99
3.3.2	International law as the governing law	100
3.3.3	The <i>lex specialis</i> principle and ‘self-contained regimes’	103
3.3.4	Claims of responsibility arising under peremptory norms	106
3.3.5	State responsibility and the United Nations Charter	106
3.3.6	Other legal consequences of internationally wrongful acts	108
 <b>Part II Attribution to the state</b>		
4	Organs and entities exercising governmental authority	113
4.1	General principles of attribution	113
4.1.1	The process of attribution and its discontents	113
4.1.2	Bases of attribution in the ARSIWA	115
4.2	Organs of the state	116
4.2.1	Responsibility for the acts of state organs	116

x	CONTENTS	
	4.2.2 Defining an 'organ'	118
	4.2.2.1 The executive	119
	4.2.2.2 The legislature	120
	4.2.2.3 The judiciary	121
	4.2.2.4 Federal and other internal subdivisions	123
	4.2.3 De facto organs	124
4.3	Entities exercising governmental authority	126
	4.3.1 Attribution of acts of private parties	126
	4.3.2 Defining 'governmental authority'	129
	4.3.3 'Empowered by the law' of the state	132
4.4	Organs placed at the disposal of another state	132
	4.4.1 Defining 'disposal'	133
	4.4.2 Additional requirements	135
4.5	<i>Ultra vires</i> and personal acts	136
5	Direction or control by the state	141
	5.1 Development of the law	141
	5.1.1 Early cases	141
	5.1.2 The work of the International Law Commission	143
	5.2 Persons acting on state instruction	144
	5.3 Persons acting under direction or control	146
	5.3.1 'Effective control' versus 'overall control'	146
	5.3.2 <i>Nicaragua</i>	147
	5.3.3 <i>Tadić</i>	149
	5.3.3.1 The Trial Chamber	149
	5.3.3.2 The Appeals Chamber	151
	5.3.4 <i>Bosnian Genocide</i>	154
	5.4 State responsibility and terrorism	156
	5.4.1 The alleged inadequacy of the effective control test	156
	5.4.2 Alternate bases of state responsibility with respect to terrorism	157
	5.5 Attribution and state-owned corporations	161
6	Other cases of attribution	166
	6.1 Introduction	166
	6.2 Exercise of governmental authority in the absence of the state	166
	6.2.1 Foundations of ARSIWA Article 9	166
	6.2.2 Operation of the provision	168

	CONTENTS	xi
6.3 Responsibility for the acts of insurgents		170
6.3.1 ARSIWA Article 10 in the International Law Commission		170
6.3.2 Responsibility where the insurgency creates a new government		174
6.3.3 Responsibility where the insurgency creates a new state		176
6.3.4 Responsibility where the insurgency fails		179
6.4 <i>Ex post facto</i> adoption of conduct		181
6.4.1 ARSIWA Article 11 in the International Law Commission		181
6.4.2 Judicial consideration of <i>ex post facto</i> adoption		182
6.4.2.1 The <i>Lighthouses Arbitration</i>		182
6.4.2.2 The <i>Eichmann</i> case		183
6.4.2.3 The <i>Tehran Hostages</i> case		183
6.4.2.4 The <i>Gabčíkovo-Nagymaros</i> case		186
6.4.3 The operation of ARSIWA Article 11		187
6.5 State organs and international organizations		188
6.5.1 Early theory and practice of international organizations		190
6.5.2 Peacekeeping policy and DARIO Article 7		193
6.5.3 Judicial consideration of contributing state responsibility		197
6.5.3.1 <i>Behrami and Saramati</i>		197
6.5.3.2 <i>Al-Jedda</i>		200
6.5.4 The standard of 'effective control'		203
6.5.4.1 Defining the basic concept		203
6.5.4.2 Positive and negative conceptions of 'control': the <i>Dutchbat</i> case		205
6.5.5 Distinction between attribution of acts and secondary responsibility with regard to international organizations		210
<b>Part III Breach</b>		
7 Breach: the material element		215
7.1 Introduction		215
7.2 The autonomy of the primary obligation		216
7.3 Acts and omissions		217
7.4 The classification of obligations		219

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978-0-521-82266-4 - State Responsibility: The General Part

James Crawford

Frontmatter

[More information](#)

xii

## CONTENTS

7.4.1	Obligations of conduct and result	220
7.4.2	Due diligence and obligations of prevention	226
7.4.3	Substantive and procedural obligations	232
7.5	Specific issues	232
7.5.1	Anticipatory breach	233
7.5.2	Illusory obligations	235
7.5.3	'Non-violation complaints'	238
8	Breach: the temporal element	240
8.1	Introduction	240
8.2	The intertemporal law	241
8.2.1	Applications of the principle	241
8.2.1.1	<i>Island of Palmas</i> and Huber's restatement	241
8.2.1.2	The intertemporal law and the law of treaties	242
8.2.1.3	The intertemporal law and the ILC's work on responsibility	244
8.2.2	Some qualifications	245
8.2.2.1	Retrospective acceptance of responsibility	245
8.2.2.2	Evolutionary interpretation of treaties	246
8.2.2.3	New peremptory norms	250
8.2.3	Termination of the primary obligation	251
8.3	Duration of the breach	253
8.3.1	Instantaneous breaches	254
8.3.2	Continuing breaches	258
8.3.2.1	The concept of continuing breach	258
8.3.2.2	The distinction between instantaneous and continuing breach	262
8.3.2.3	Completion of the act	264
8.3.3	Composite breaches	265
8.3.3.1	The character of the composite breach	265
8.3.3.2	Determining the scope of the composite breach	268
8.3.4	Complex breaches	269
9	Circumstances precluding wrongfulness	274
9.1	Justifications and excuses in international law	274
9.1.1	The category of 'circumstances precluding wrongfulness'	274
9.1.2	Termination and suspension of obligations	281

	CONTENTS	xiii
9.2	General justifications and excuses	283
9.2.1	Consent	283
9.2.2	Self-defence	289
9.2.3	Countermeasures	292
9.2.4	<i>Force majeure</i>	295
9.2.5	Distress	301
9.2.6	Necessity	305
9.3	Further questions	315
9.3.1	Obligations arising under peremptory norms	315
9.3.2	Compensation for material loss	318
9.3.3	The burden of proof	320
 <b>Part IV Collective or ancillary responsibility</b>		
10	Responsibility in cases of joint or collective conduct	325
10.1	Introduction	325
10.1.1	Historical background: the work of the ILC and the Institut	326
10.1.2	The influence of private law analogies	328
10.2	Joint and collective conduct by states	333
10.2.1	Attribution to multiple states: the principle of independent responsibility	333
10.2.2	Implication in the act of another state: exceptions to the principle of independent responsibility	336
10.2.3	Conduct of joint organs	339
10.2.4	Other bases for solidary responsibility	341
10.3	Conduct within the framework of international organizations	343
10.4	Cognate questions	354
10.4.1	Guarantees and indemnities	354
10.4.2	Contribution between persons collectively responsible	355
10.4.3	International claims involving conduct of private parties	358
11	Responsibility for breaches of communitarian norms	362
11.1	Introduction	362
11.2	The International Law Commission's compromise	365
11.3	Invocation of communitarian norms	370

xiv CONTENTS

11.4	The relation between communitarian and other norms	376
11.5	Invocation and consequences of breaches of peremptory norms	378
11.5.1	Defining peremptory norms	378
11.5.2	Consequences of the serious breach of peremptory norms	380
11.5.2.1	The obligation of non-recognition	381
11.5.2.2	The obligation of non-assistance	385
11.5.2.3	The obligation of co-operation	386
11.6	Future prospects	389
	Excursus: international crimes of state	390
12	Ancillary and secondary responsibility	395
12.1	Responsibility of states for the conduct of other states and international organizations	395
12.1.1	The scope of ancillary or secondary responsibility	395
12.1.2	The standards of direction and control and coercion	397
12.2	Aid or assistance in the commission of a breach	399
12.2.1	ILC development and customary status	400
12.2.2	Defining ‘aid or assistance’	401
12.2.2.1	The terms of ARSIWA Article 16	401
12.2.2.2	Omissions as ‘aid or assistance’	403
12.2.2.3	‘Aid or assistance’: general principles?	405
12.2.3	The ‘subjective’ element of complicity	405
12.2.4	Complicity and the <i>pacta tertiis</i> rule	409
12.2.5	Complicity and international organizations	410
12.3	Direction and control over another state or international organization	412
12.3.1	The scope and relevance of ARSIWA Article 17	412
12.3.2	Defining ‘direction and control’	414
12.3.3	Additional considerations	416
12.3.3.1	Knowledge and opposability of obligation	416
12.3.3.2	Responsibility of the directed state	417
12.3.4	Direction and control of an international organization	417

	CONTENTS	XV
12.4	Coercion of a state or international organization	419
12.4.1	Defining 'coercion'	419
12.4.2	Other considerations	421
12.4.3	Coercion of an international organization	422
12.5	Member state responsibility for the acts of international organizations	422
12.5.1	Responsibility of member states	423
12.5.1.1	The basic rule	423
12.5.1.2	Judicial confirmation of the basic rule	424
12.5.2	Exceptions to the basic rule	428
12.5.2.1	Acceptance of responsibility	428
12.5.2.2	Injured party reliance	429
12.5.3	Abuse of the separate personality of international organizations	430
13	Succession to responsibility	435
13.1	Introduction	435
13.2	The negative succession rule	437
13.2.1	The early authorities	437
13.2.2	Defences and criticisms of the negative succession rule	438
13.3	Rebutting the negative succession rule: judicial consideration	442
13.3.1	<i>Lighthouses Arbitration</i>	443
13.3.2	The <i>Gabčíkovo-Nagymaros</i> case	446
13.4	Rebutting the negative succession rule: modern state practice	447
13.4.1	The role of state practice	447
13.4.2	Succession where the predecessor ceases to exist	448
13.4.2.1	The reunification of Germany	449
13.4.2.2	The dissolution of the Socialist Federal Republic of Yugoslavia	451
13.4.3	Succession where the predecessor continues to exist	452
13.4.3.1	Separation from the Union of Soviet Socialist Republics	452
13.4.3.2	The independence of Namibia	453
13.5	Conclusions	455

<b>Part V Cessation and reparation</b>	
14	Restoration of legal relations after breach 459
14.1	Introduction 459
14.2	Legal effects of the breach 460
14.2.1	The applicable secondary obligations 460
14.2.2	The continuation of the primary obligation 461
14.3	Cessation 461
14.3.1	Wrongful acts that are ‘continuing’ 462
14.3.2	The distinction between cessation and the continued duty of performance 464
14.3.3	The distinction between cessation and restitution 465
14.4	Assurances and guarantees against repetition 469
14.4.1	The status of the obligation to offer assurances and guarantees 469
14.4.2	The distinction between assurances and guarantees of non-repetition and reparation 475
14.4.3	Appropriate assurances and guarantees 476
15	Reparation 480
15.1	The basic principle 480
15.2	‘Full’ reparation 481
15.2.1	The position taken in the ARSIWA 481
15.2.2	Subsequent case law 483
15.3	The notion of injury 485
15.3.1	Injury defined 485
15.3.2	Material and moral injury 486
15.3.3	‘Legal injury’? 487
15.4	Questions of causation 492
15.4.1	An expanded rubric 492
15.4.2	Mitigation of damage and reparation 494
15.4.3	Concurrent causes 495
15.4.3.1	The applicable principles 495
15.4.3.2	Hard cases 498
15.4.4	Contribution to the injury 500
15.5	Plurality of injured states 503
16	Remedies 506
16.1	The link between reparation and remedies 506
16.1.1	The available forms of reparation 506



	CONTENTS	xvii
16.1.2	The right of election	508
16.1.3	A hierarchy of reparation?	509
16.2	Restitution	510
16.2.1	The basic principle	510
16.2.2	The forms of restitution	511
16.2.3	Limitations on the availability of restitution	512
	16.2.3.1 Material impossibility	512
	16.2.3.2 Disproportionate burden	514
16.2.4	A flexible approach	515
16.3	Compensation	516
16.3.1	The basic principle	516
16.3.2	The practice of the Permanent and International Courts	518
16.3.3	Quantification of damage	519
16.3.4	Loss of profits	522
16.3.5	Punitive damages	523
16.4	Satisfaction	527
16.4.1	The basic principle	527
16.4.2	Forms of satisfaction	527
16.4.3	Judicial declarations	529
16.4.4	Limitations on the availability of satisfaction	530
16.5	Interest	531
16.5.1	The basic principle	531
16.5.2	Pre-judgment and post-judgment interest distinguished	533
16.5.3	The period for which interest is payable	534
16.5.4	The rate of interest and mode of calculation	536
 <b>Part VI The implementation of responsibility</b>		
17	The claims process	541
17.1	Entitlement to claim	541
	17.1.1 The injured state	542
	17.1.2 Other injured parties	548
	17.1.3 Concerned states or other entities	549
17.2	The process of claim	553
17.3	Loss of the right to invoke responsibility	557
	17.3.1 Waiver and acquiescence	558
	17.3.2 Lapse of time	560
	17.3.3 Adjudication and settlement	563
	17.3.4 Effects on related or derivative claims	563

Cambridge University Press

978-0-521-82266-4 - State Responsibility: The General Part

James Crawford

Frontmatter

[More information](#)

## xviii CONTENTS

18	Claims on behalf of others: diplomatic and functional protection	566
18.1	Introduction	566
18.2	Diplomatic protection: an overview	567
18.2.1	The character and role of diplomatic protection	568
18.2.2	Title to protect: the nationality of claims	573
18.2.3	Exhaustion of local remedies	580
18.3	Diplomatic protection and individual and state invocation	584
18.3.1	Human rights	585
18.3.2	Investment protection	587
18.3.3	Other fields	592
18.4	Functional protection by international organizations and third states	593
19	Implementation of responsibility by judicial process	598
19.1	Introduction	598
19.2	Jurisdiction in matters of responsibility	599
19.2.1	The <i>Chorzów</i> principle	599
19.2.2	The distinction between cause of action and applicable law	603
19.2.3	Jurisdiction over counterclaims	609
19.3	Is there a remedial discretion?	615
19.4	Election of remedies	621
19.4.1	The claimant's right to elect and election in the course of proceedings	621
19.4.2	Fork-in-the-road clauses	624
19.4.3	The <i>non ultra petita</i> rule	626
19.5	Systematic remedies arising from individual cases	629
19.5.1	The ECHR: <i>Broniowski</i> and its progeny	630
19.5.2	Class actions in investment arbitration: <i>Abaclat v. Argentina</i>	637
19.5.3	Compensation as an incident of criminal proceedings	641
20	Invocation in cases involving multiple parties	644
20.1	Introduction	644
20.2	Multiple claimants	645

	CONTENTS	xix
20.3	Multiple respondents	648
20.4	Intervention by third states	650
20.5	The <i>Monetary Gold</i> principle: 'indispensable' third states	655
20.5.1	The scope of the principle	657
20.5.1.1	The <i>Monetary Gold</i> jurisprudence	658
20.5.1.2	Uncertainty of application	660
20.5.1.3	Further questions of scope	664
20.5.1.4	Conclusion	665
20.5.2	Possible exceptions	666
20.5.2.1	Defunct states	666
20.5.2.2	Criminal prosecution	667
20.5.2.3	Waiver	668
20.6	Other procedural incidents	669
20.6.1	Joinder of claims	669
20.6.2	The composition of the bench	671
20.6.3	The rule against double recovery	673
21	Implementation of responsibility by extrajudicial process	675
21.1	Overview	675
21.2	Unilateral self-help measures	676
21.2.1	Retorsion	676
21.2.2	The exception of non-performance ( <i>exceptio inadimpleti contractus</i> )	678
21.2.3	Suspension of obligations	682
21.2.4	Countermeasures by an injured state	684
21.2.4.1	The scope and object of countermeasures	686
21.2.4.2	Prohibited countermeasures	688
21.2.4.3	Proportionality	697
21.2.4.4	Procedural incidents of countermeasures	700
21.2.4.5	Termination of countermeasures	702
21.2.5	Collective countermeasures	703
21.3	Issues of responsibility in the Security Council and other international forums	706
<b>Appendices</b>		712
Appendix 1	ILC Articles on the Responsibility of States for Internationally Wrongful Acts (2001)	712

xx      CONTENTS

Appendix 2	General Assembly resolutions concerning the Articles on State Responsibility for Internationally Wrongful Acts	724
	General Assembly Resolution 56/83, 12 December 2001	724
	General Assembly Resolution 59/35, 2 December 2004	725
	General Assembly Resolution 62/61, 6 December 2007	726
	General Assembly Resolution 65/19, 6 December 2010	727
Appendix 3	ILC Draft Articles on Diplomatic Protection (2006)	728
Appendix 4	ILC Draft Articles on State Responsibility (as proposed by F. V. García-Amador, 1961)	733
Appendix 5	ILC Draft Articles on State Responsibility (as adopted on first reading, 1996)	743
Appendix 6	ILC Draft Articles on Responsibility of International Organizations (2011)	761
	<i>Bibliography</i>	778
	<i>Index</i>	808

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978-0-521-82266-4 - State Responsibility: The General Part

James Crawford

Frontmatter

[More information](#)

## Preface and acknowledgements

This book grows out of work I was privileged to do as the International Law Commission's fifth and final Special Rapporteur on State Responsibility. The State Responsibility project was conceived in the 1920s and was one focus of the League of Nations Conference for the Codification of International Law held at The Hague in 1930. That conference failed to produce any results. Following the creation of the International Law Commission (ILC) in 1948, the subject was identified as one of the initial topics for codification, and work on it resumed in 1955. Again, it got nowhere. The subject was reconceived under the inspired leadership of Roberto Ago in 1962, worked on (at times intensively, at times sporadically) in the period 1963–96 under Special Rapporteurs Ago, Riphagen and Arangio-Ruiz, and completed on first reading in 1996. The second reading process was completed during the years 1998–2001. It saw as its immediate outcome UN General Assembly Resolution 56/83 of 12 December 2001, which annexed the text of the ILC Articles on the Responsibility of States for Internationally Wrongful Acts (hereafter ARSIWA or 'the ILC Articles') and 'commend[ed] them to the attention of Governments without prejudice to the question of their future adoption or other appropriate action'. Three years later there was a further debate, leading to the adoption by consensus of General Assembly Resolution 59/35 on 2 December 2004, again deferring any decision on the final form of the Articles; similar debates occurred in 2007 and 2010. The texts of these resolutions form Appendix 2. The text of the ILC Articles themselves forms Appendix 1.

Subsequently the ILC moved to projects on diplomatic protection (completed in 2006) and the responsibility of international organizations (completed in 2010).

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James Crawford

Frontmatter

[More information](#)

## xxii PREFACE AND ACKNOWLEDGEMENTS

So far as the responsibility of states is concerned, the present book covers much the same subject matter as the ILC Articles. It is intended to provide an analysis and critical review of the present law and its functioning. Inevitably, there were many things the ILC did not say which need to be said, including matters where the ILC declined to deal with various issues – for example, the responsibility of states for the acts of international organizations.

In addition, this book covers certain issues of dispute settlement in relation to responsibility, and discusses questions concerning the connection between institutions and rules of responsibility, including the connection between action taken by international organizations, for example by the UN Security Council under Chapter VII of the UN Charter, and the link between the rules of responsibility and judicial settlement, for example in the context of countermeasures.

Like the ILC's work, this book does not attempt (except incidentally) to elaborate on the content of the primary international obligations breach of which gives rise to responsibility. It thus accepts the distinction between primary and secondary obligations, if not as fundamental then at least as a working device to limit the scope of the subject. The distinction itself and the criticisms that have been made of it are explored in Chapter 2.

Nor does this book examine in detail special features of the working of particular regimes in the field of responsibility (e.g. the human rights regimes, the World Trade Organization), except where this is useful in order to illustrate or shed light on the general law.

The book incorporates certain material from the author's four Reports on State Responsibility and other writings. But the attempt has been made to synthesise this material, together with subsequent developments and government comments on the ILC's work and to reflect on the resulting debate. At the same time, the work seeks to place the rules of state responsibility within the framework and dynamic of international law.

\* \* \*

A large number of people have contributed to this work, directly or indirectly. They include my colleagues on the ILC in the years 1998–2001 – especially the four chairs of the Drafting Committee, Bruno Simma, Enrique Candioti, Giorgio Gaja and Peter Tomka, and others including John Dugard, Gerhard Hafner, Djamchid Momtaz, my ever faithful adversary and friend Alain Pellet, Robert Rosenstock, Bernardo Sepúlveda, Chusei Yamada and the late Ian Brownlie. On the Secretariat,

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Frontmatter  
[More information](#)

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## PREFACE AND ACKNOWLEDGEMENTS      xxiii

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# Abbreviations

AC	Appeal Cases (UK)
ACHR	American Convention on Human Rights, 22 November 1969, OAS Treaty Series No. 36
ADP	Articles on Diplomatic Protection, ILC Report 2006, UN Doc. A/61/10
ADP Commentary	Commentary to Articles on Diplomatic Protection, ILC Report 2006, UN Doc. A/61/10
AFDI	<i>Annuaire français de droit international</i>
AJIL	<i>American Journal of International Law</i>
AJIL Spec. Supp.	<i>American Journal of International Law Special Supplement</i>
AJLH	<i>Australian Journal of Legal History</i>
Ann. de l'Inst.	<i>Annuaire de l'Institut de droit international</i>
APD	<i>Archives de Philosophie du Droit</i>
APIL	Australian Practice in International Law (as published in the <i>Australian Yearbook of International Law</i> )
Arb. Int.	<i>Arbitration International</i>
ARSIWA	ILC Articles on the Responsibility of States for Internationally Wrongful Acts, ILC Ybk 2001/II(2), 26
ARSIWA Commentary	Commentary to the ILC Articles on Responsibility of States for Internationally Wrongful Acts, ILC Ybk 2001/II(2) 31, reprinted in J. Crawford (ed.), <i>The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries</i> (Cambridge University Press, 2002)
ASIL	American Society of International Law
xxiv	



ASIL Proc.	<i>American Society of International Law Proceedings</i>
AU	African Union
Austrian RIEL	<i>Austrian Review of International and European Law</i>
AYIL	<i>Australian Year Book of International Law</i>
Berk. JIL	<i>Berkeley Journal of International Law</i>
Bevans	Treaties and Other International Agreements of the United States of America, 1776–1949, compiled under the direction of C. I. Bevans
BFSP	<i>British and Foreign State Papers</i>
BGBI	<i>Bundesgesetzblatt Jahrgang</i> (Germany)
<i>Brownlie's Principles</i>	J. Crawford, <i>Brownlie's Principles of Public International Law</i> (8th edn, Oxford University Press, 2012)
BUILJ	<i>Boston University International Law Journal</i>
BVerfGE	Bundesverfassungsgerichts (Federal Constitutional Court, Germany)
BVerwG	Bundesverwaltungsgericht (Federal Administrative Court, Germany)
BYIL	<i>British Yearbook of International Law</i>
Cal. Rptr	West's California Reporter
Calif. LR	<i>California Law Review</i>
Can. YIL	<i>Canadian Yearbook of International Law</i>
CCM	Convention on Cluster Munitions
Chicago JIL	<i>Chicago Journal of International Law</i>
Chin. JIL	<i>Chinese Journal of International Law</i>
CILJ	<i>Cornell International Law Journal</i>
CILSA	<i>Comparative and International Law Journal of Southern Africa</i>
CLF	<i>Criminal Law Forum</i>
Col. LR	<i>Columbia Law Review</i>
Conn. JIL	<i>Connecticut Journal of International Law</i>
CPIL	Canadian Practice in International Law (as published in the <i>Canadian Yearbook of International Law</i> )
CPUSIL	Contemporary Practice of the United States Relating to International Law (as published in the <i>American Journal of International Law</i> )
Crawford, First Report	J. Crawford, First Report on State Responsibility, ILC Ybk 1998/II(1), 1
Crawford, Second Report	J. Crawford, Second Report on State Responsibility, ILC Ybk 1999/II(1), 3

Crawford, Third Report	J. Crawford, Third Report on State Responsibility, ILC Ybk 2000/II(1), 3
Crawford, Fourth Report	J Crawford, Fourth Report on State Responsibility, ILC Ybk 2001/II(1), 1
CTS	Consolidated Treaty Series
DARIO	Draft Articles on the Responsibility of International Organizations, ILC Report 2011, UN Doc. A/66/10, 52
DARIO Commentary	Commentary to the Draft Articles on the Responsibility of International Organizations, ILC Report 2011, UN Doc. A/66/10, 67
Dep. State Bull.	<i>Department of State Bulletin</i> (US)
DJILP	<i>Denver Journal of International Law and Policy</i>
Draft Articles	ILC Draft Articles on the Responsibility of States for Internationally Wrongful Acts, as adopted in 1996, ILC Ybk 1996/II(2), 58
Draft Articles Commentary	Commentary to the ILC Draft Articles on the Responsibility of States for Internationally Wrongful Acts, as adopted in 1996:
	Arts. 1–35      S. Rosenne (ed.), <i>The International Law Commission's Draft Articles on State Responsibility: Part 1, Articles 1–35</i> (Dordrecht: Martinus Nijhoff, 1991)
	Art. 36(1)      ILC Ybk 1983/II(2), 42
	Art. 36(2)      ILC Ybk 1993/II(2), 54
	Arts. 37–9      ILC Ybk 1983/II(2), 42
	Art. 40      ILC Ybk 1985/II(2), 25
	Art. 41      ILC Ybk 1993/II(2), 55
	Art. 42(1)–(2), (4) ILC Ybk 1993/II(2), 58
	Art. 42(3)      ILC Ybk 1996/II(2), 65
	Arts. 43–6      ILC Ybk 1993/II(2), 61
	Arts. 47–8      ILC Ybk 1996/II(2), 65
	Arts. 49–50      ILC Ybk 1995/II(2), 64
	Arts. 51–3      ILC Ybk 1996/II(2), 65
	Arts. 54–60      ILC Ybk 1995/II(2), 75
DRC	Democratic Republic of the Congo
Duke JCIL	<i>Duke Journal of Comparative and International Law</i>

ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, 213 UNTS 221
ECommHR Ybk	<i>Yearbook of the European Commission of Human Rights</i>
ECommHR	European Commission of Human Rights
ECtHR	European Court of Human Rights
EECC	Eritrea–Ethiopia Claims Commission
EHRLR	<i>European Human Rights Law Review</i>
EJIL	<i>European Journal of International Law</i>
EPL	<i>Environmental Policy and Law</i>
ETS	European Treaty Series
EWHC	England and Wales High Court
F.3d	Federal Reporter, Third Series (US)
F.Supp.	Federal Supplement (US)
GA	United Nations General Assembly
Genocide Convention	Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, 78 UNTS 277
Geo. Wash. ILR	<i>George Washington International Law Review</i>
GST	<i>Transactions of the Grotius Society</i>
GYIL	<i>German Yearbook of International Law</i>
Hague Recueil	<i>Recueil des cours de l'Académie de droit international</i>
Hastings ICLR	<i>Hastings International and Comparative Law Review</i>
HHRJ	<i>Harvard Human Rights Journal</i>
HILJ	<i>Harvard International Law Journal</i>
HILR	<i>Harvard International Law Review</i>
Hous. JIL	<i>Houston Journal of International Law</i>
HRLJ	<i>Human Rights Law Journal</i>
HRLR	<i>Human Rights Law Review</i>
IACtHR	Inter-American Court of Human Rights
IBRD	International Bank of Reconstruction and Development (World Bank)
ICC	International Criminal Court
ICC Statute	Rome Statute of the International Criminal Court, 17 July 1998, 2187 UNTS 3
ICJ	International Court of Justice
ICJ Reports	Reports of Judgments, Advisory Opinions and Orders of the International Court of Justice

xxviii      ABBREVIATIONS

ICJ Statute	Statute of the International Court of Justice, 26 June 1945, 15 UNCIO 355
ICLQ	<i>International and Comparative Law Quarterly</i>
ICSID	International Centre for the Settlement of Investment Disputes
ICSID Convention	Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 18 March 1965, 575 UNTS 159
ICSID Rev.	<i>International Centre for the Settlement of Investment Disputes Review</i>
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
IDI	Institute of International Law (Institut de droit international)
IELR	International Environmental Law Reports
IJGLS	<i>Indiana Journal of Global Legal Studies</i>
IL	<i>International Lawyer</i>
ILA	International Law Association
ILA Rep. Conf.	International Law Association, <i>Report of Conference</i>
ILC	International Law Commission
ILC Report	<i>Annual Report of the International Law Commission</i>
ILC Ybk	<i>Yearbook of the International Law Commission</i>
ILDC	Oxford Reports on International Law, International Law in Domestic Courts
ILM	International Legal Materials
ILP	<i>International Law and Politics</i>
ILR	International Law Reports
IOLR	<i>International Organizations Law Review</i>
Iran–US CTR	Iran–US Claims Tribunal Reports
Is. LR	<i>Israel Law Review</i>
Is. YBHR	<i>Israel Yearbook of Human Rights</i>
ITLOS	International Tribunal for the Law of the Sea
JDI	<i>Journal du droit international</i>
JICJ	<i>Journal of International Criminal Justice</i>
JIEL	<i>Journal of International Economic Law</i>
JORF	<i>Journal officiel de la République française</i>
JWIT	<i>Journal of World Investment and Trade</i>
JWT	<i>Journal of World Trade</i>

KGZ	<i>Kokusaihō gaikō zasshi</i>
LJIL	<i>Leiden Journal of International Law</i>
LJN	<i>Landelijk Jurisprudentie Nummer</i> (Netherlands)
LNOJ	<i>League of Nations, Official Journal</i>
LNTS	<i>League of Nations Treaty Series</i>
McNair, Opinions	A. D. McNair, 1–3 <i>International Law Opinions</i> (1956)
Md LR	<i>Maryland Law Review</i>
Mich. JIL	<i>Michigan Journal of International Law</i>
Mich. LR	<i>Michigan Law Review</i>
MJIL	<i>Melbourne Journal of International Law</i>
Moore, <i>Int. Arb.</i>	J. B. Moore, <i>History and Digest of the International Arbitrations to which the United States has been a Party</i> (1898), 6 vols.
MPEPIL	R. Wolfrum (gen. ed.), <i>The Max Planck Encyclopedia of Public International Law</i> (Oxford University Press, 2012), available at <a href="http://www.mpepil.com">www.mpepil.com</a>
MULR	<i>Melbourne University Law Review</i>
NGO	non-governmental organization
NILR	<i>Netherlands International Law Review</i>
NJW	<i>Neue Juristische Wochenschrift</i> (Germany)
Nordic JIL	<i>Nordic Journal of International Law</i>
NRG	<i>Nouveau Recueil Général de traités et autres actes relatifs aux rapports de droit international</i>
NYIL	<i>Netherlands Yearbook of International Law</i>
OAS	Organization of American States
OAU	Organization for African Unity
ODIL	<i>Ocean Development and International Law</i>
OJ	<i>Official Journal</i> (European Union)
Ok. LR	<i>Oklahoma Law Review</i>
PAPhS	<i>Proceedings of the American Philosophical Society</i>
PAriS	<i>Proceedings of the Aristotelian Society</i>
PBA	<i>Proceedings of the British Academy</i>
PCA	Permanent Court of Arbitration
PCIJ	Publications of the Permanent Court of International Justice
Pol. YIL	<i>Polish Yearbook of International Law</i>
Pub. Ad.	<i>Public Administration</i>
QB	<i>Law Reports, Queen's Bench</i> (United Kingdom)
RBDI	<i>Revue belge de droit international</i>

xxx ABBREVIATIONS

RDI	<i>Rivista di diritto internazionale</i>
RDIPP	<i>Rivista di diritto internazionale privato e processuale</i>
RDISDP	<i>Revue de droit international, de sciences diplomatiques et politiques</i>
Rec. Lebon	Recueil des arrêts du Conseil d'État (France)
REDI	<i>Revue égyptienne de droit international</i>
RGDIP	<i>Revue générale de droit international public</i> (Paris)
RIAA	United Nations Reports of International Arbitral Awards
RJDA	<i>Recueil de jurisprudence du droit administratif et du Conseil d'Etat</i>
Rome Statute	Rome Statute of the International Criminal Court, 17 July 1998, 2187 UNTS 3
RQDI	<i>Revue Québécoise de Droit International</i>
RSDIE	<i>Revue Suisse de droit international et européen</i>
S. Af. YIL	<i>South African Yearbook of International Law</i>
S Ct	Supreme Court Reporter (US)
SC	United Nations Security Council
SCSL	Special Court for Sierra Leone
SLT	<i>Scots Law Times</i>
Tex. ILF	<i>Texas International Law Forum</i>
TIAS	Treaties and Other International Acts Series (US)
Tulane LR	<i>Tulane Law Review</i>
Tulsa JCIL	<i>Tulsa Journal of Comparative and International Law</i>
UCLA JILFA	<i>UCLA Journal of International Law and Foreign Affairs</i>
UCLA Pac. Basin LJ	<i>UCLA Pacific Basin Law Journal</i>
UKMIL	United Kingdom Materials on International Law (as published in the <i>British Yearbook of International Law</i> )
UKPC	United Kingdom Privy Council
UNCC	United Nations Compensation Commission
UN Charter	Charter of the United Nations
UNCHR	United Nations Commission on Human Rights
UNCIO	United Nations Conference on International Organization
UNCLOS	United Nations Convention on the Law of the Sea, 10 December 1982, 1833 UNTS 3
UNHCR	United Nations High Commissioner for Refugees
UNTS	United Nations Treaty Series
US	(in case citations) United States Supreme Court Reports