2 Key concepts

2.1 The modern synthesis[1]

2.1.1 The International Law Commission's codification

The ILC Articles represent the modern framework of state responsibility. The fifty-nine Articles are divided into four parts and ten chapters. Part One, Chapter I sets out certain general principles of state responsibility which are well established – even axiomatic. For example, Article 3 provides that a state may not rely on its internal law to justify failure to comply with its international obligations. That principle emerged first in the *Alabama* arbitration in 1872,[2] and thus was present at the beginning of the modern era of international dispute settlement. Part One, Chapter II deals with the important topic of attribution of conduct to a state – in effect defining the public sector for the purposes of responsibility. Article 4 states the basic rule that conduct of any state organ is attributable to that state as a matter of international law. Article 5 deals with persons or entities empowered to exercise elements of governmental authority. Article 6 addresses the special situation in which the organs of one state are placed at the disposal of another state. Article 7 deals with ultra vires acts of organs or entities: conduct by a state organ, person or entity exercising governmental authority is to be considered an act of state under international law even if it exceeds its authority or disobeys instructions. Articles 8–11 deal with additional cases in which conduct is attributable by analogy with the concept of agency (though the term 'agent' is not used).

[1] See also Crawford, 'State responsibility', (2006) MPEPIL; *Brownlie's Principles*, Chs. 25–27.

[2] *Alabama Arbitration (Great Britain* v. *US)* (1872), in Moore, 1 *Int. Arb.* 495. Further: Bingham, (2005) 54 ICLQ 1.

Part One, Chapter III is concerned with certain general aspects of the breach of international obligations. Article 12 defines in an abstract way what may be considered the breach of an obligation by a state – that is, when an act is not in conformity with an obligation incumbent on that state under international law. Article 13 sets out the principle that a state is only responsible for a breach if the obligation in question was in force for the state at the time at which the act was committed. Article 14 introduces the concept of continuing breach of obligations. Article 15 deals with breaches consisting of composite acts, a significant topic when considering systemic conduct such as certain war crimes,[3] crimes against humanity[4] and genocide.[5]

Part One, Chapter IV is concerned with additional elements of state responsibility in connection with the acts of other states – what under systems of municipal law would be described variously as aiding and abetting, complicity and so on. Article 16 deals with the provision of aid or assistance by one state with a view to assisting in the commission of a wrongful act by another state. Article 17 is concerned with the situation where a state exercises direction or control over another state in the commission of a wrongful act, Article 18 dealing with the more extreme case of outright coercion between states. Article 19 affirms that the attribution of responsibility to an assisting, directing or coercing state is without prejudice to the responsibility of the state that actually committed the internationally wrongful act.

Part One, Chapter V establishes six 'defences' – circumstances precluding the wrongfulness of conduct which would otherwise be in breach of a state's international obligations. These are to be distinguished from the grounds for suspension or termination of the obligation itself, for example suspension or termination of a treaty obligation under the law of treaties.[6] These exculpatory grounds are: consent (Article 20), self-defence in conformity with the UN Charter (Article 21), countermeasures in accordance with Part Three, Chapter II (Article 22), *force majeure* (Article 23), distress (Article 24) and necessity (Article 25).

Part Two of the ARSIWA, entitled 'Content of the international responsibility of a State', is concerned with the consequences which flow by operation of law from the commission of an internationally wrongful

[3] Further: Rome Statute of the International Criminal Court, 17 July 1998, 2187 UNTS 3, Art. 8.
[4] Ibid., Art. 7. [5] Ibid., Art. 6.
[6] Further: Vienna Convention on the Law of Treaties, 22 May 1969, 1155 UNTS 331, Pt V, §§3–5.

act. Chapter I expresses certain – largely uncontroversial – basic principles: the responsible state is under a duty to continue to perform an obligation breached (Article 29) and to cease the wrongful act (Article 30). That state must make full reparation for any injury suffered, whether material or moral, that flows from its wrongful conduct (Article 31). Consistent with Article 3, it may not plead the provisions of its internal law as a defence (Article 32). It is affirmed that the obligations set out in Part Two may be owed by the responsible state to another state, to several or many states, or to the international community as a whole (Article 33).

Chapter II of Part Two is concerned with the various aspects of reparation for injury suffered, addressing the forms of reparation (Article 34), restitution (Article 35), compensation (Article 36), satisfaction (Article 37), interest (Article 38) and the contribution of the injured state to the eventual injury (Article 39).

Chapter III concerns the controversial subject of serious breaches of peremptory norms of international law, the compromise reached by the ILC following the conclusion that the concept of 'international crimes' contained in Draft Article 19 (1996) was functionally unworkable. Article 40 sets out the scope of the chapter, and is followed by provisions regarding consequences of breach under the chapter (Article 41), which include obligations on all states: (1) to bring any continuing situation caused by the breach of a peremptory norm to an end through lawful cooperation; and (2) to withhold recognition of any such continuing situation as lawful.

Part Three concerns the implementation of the international responsibility of a state. Chapter I is concerned with the invocation of responsibility itself – an issue which might be analogized to municipal law concepts of standing or the possession of an actionable claim or cause of action. Article 42 proved a point of controversy during the second reading. It provides that a state is entitled to invoke the responsibility of another state where the norm allegedly breached is owed: (a) to that state individually; or (b) to a group of states including that state (a multilateral norm) or to the international community as a whole (a communitarian norm or obligation *erga omnes*) and the breach of the obligation (i) specifically affects that state, or (ii) is of such a character as radically to change the position of all other states to which the obligation is owed with respect to the future performance of the obligation. It is paired conceptually with Article 48, which reiterates the capacity to claim for breach of multilateral or communitarian norms, but limits the remedies

available to non-injured states to cessation of the unlawful act combined with assurances of non-repetition; a non-injured state may only claim reparations in the interest of an injured state or any beneficiary of the obligation breached. The balance of the chapter deals with consequential and procedural issues – including notice of claim (Article 43), admissibility (Article 44), waiver and acquiescence (Article 45), joint claims (Article 46) and joint responsibility (Article 47).

Part Three, Chapter II deals with countermeasures. The subject proved a vexed one, with some states questioning the wisdom of including them in the ILC's work at all. Countermeasures are measures, otherwise unlawful, taken against another state in response to an unlawful act by that state and with a view to obtaining cessation and/or reparation. This definition was not included in the final text, but Article 49 sets out the object and limits of countermeasures, restricting them in paragraph (2) to 'the non-performance *for the time being* of international obligations of the State taking the measures towards the responsible State' (emphasis added), language that emphasizes the temporary and remedial character of countermeasures. Article 50 reserves several categories of international obligations – that is, human rights, humanitarian and peremptory norms – from suspension by way of countermeasures and affirms that countermeasures do not relieve the suspending state from any obligation of dispute settlement with the target state. Article 51 stipulates that countermeasures must be proportionate, and Article 52 places further conditions on the taking of countermeasures. Article 53 deals with the termination of countermeasures. The right of 'non-injured' states to take countermeasures under Article 48(1) is expressly reserved in Article 54.

Part Four contains certain general provisions. Article 55 provides that the ARSIWA do not prevail over any *lex specialis*, that is to say any more specific provision, dealing with an issue otherwise covered by the Articles but in terms or in a manner which indicates that the special provision is to prevail. Article 56 is a saving clause, providing that the international law rules of state responsibility continue to govern questions of state responsibility to the extent not regulated by the ARSIWA. Articles 57 and 58 note that the content of the ARSIWA is without prejudice to the question of responsibility for international organizations[7]

[7] The ILC concluded its work on the responsibility of international organizations for internationally unlawful acts in 2011, adopting a set of draft articles with commentary: DARIO and Commentary.

and individuals under international law.[8] Article 59 reserves issues arising under the United Nations Charter.

2.1.2 *The modern concept of state responsibility*

The essential premise of the ARSIWA – the concept of state responsibility itself – is introduced in Article 1:

> Every internationally wrongful act of a State entails the international responsibility of that State.

On an initial reading, Article 1 seems to state the obvious. But there are several things it does not say, and its importance lies in these silences. First, it does not spell out any general preconditions for responsibility in international law, such as 'fault' on the part of the wrongdoing state, or 'damage' suffered by any injured state.[9] Second, it does not identify the state or states, or the other international legal persons, to which international responsibility is owed.[10] It thus does not follow the tradition of treating international responsibility as a secondary legal relationship of an essentially bilateral character (a relationship of the wrongdoing state with the injured state or, if there happens to be more than one injured state, with each of those states separately). Rather, it appears to present the situation of responsibility as an 'objective correlative' of the commission of an internationally wrongful act.

Before turning to these two aspects, certain less controversial points may be noted about Article 1. First, the term 'internationally wrongful act' is intended to cover all wrongful conduct of a state, whether it arises from positive action or from an omission or a failure to act.[11] This is

[8] The position of the individual in international law has not as yet been taken up by the ILC as a whole, though it has considered and concluded draft articles on certain related sub-topics, notably on questions of nationality, including statelessness: ILC Ybk 1954/II, 147. For a review of the question as whole, see Parlett, *The Individual in the International Legal System* (2011).

[9] These silences pertain to ARSIWA, Art. 2, as much as, or even more than, Art. 1, since they relate to the question whether there has been a breach of an international obligation. For the sake of convenience, the issues are discussed here.

[10] Although phrased in terms of statehood, this basal notion is applicable to all international legal persons; thus, in its work on the responsibility of international organizations, the ILC has used precisely the same formulation as ARSIWA, Art. 1. Those entities which are not as such subjects of international law – i.e. individuals, corporations and non-governmental organizations – are not yet covered by the general regime.

[11] Draft Articles Commentary, Art. 1, §14. The Draft Articles were adopted sporadically during the tenures of Special Rapporteurs Ago, Riphagen and Arangio-Ruiz, and while the commentary to Part I is collected in Rosenne (ed.), *The International Law Commission's*

more clearly conveyed by the French and the Spanish than by the English text, but the point is made clear also in Article 2, which refers to 'conduct consisting of an action or omission'.

Second, conduct which is 'internationally wrongful' entails international responsibility. ARSIWA Articles 20–25 deal with circumstances which exclude wrongfulness and, thus, international responsibility in the full sense. Article 27(b) reserves the possibility that compensation may be payable for harm resulting from acts otherwise unlawful, the wrongfulness of which is precluded under certain of these articles. The commentary to Draft Article 1 went further, suggesting that it leaves open the possibility of '"international responsibility" – if that is the right term – for the harmful consequences of certain activities which are not prohibited by international law'.[12] Since 1976 the ILC had grappled with the question of 'liability' for harmful consequences of acts not prohibited by international law. Its relative lack of success in that endeavour was due, in part at least, to the failure to develop a terminology in languages other than English which is capable of distinguishing 'liability' for lawful conduct causing harm, on the one hand, and responsibility for wrongful conduct, on the other. That experience tends to suggest that the term 'state responsibility' in international law is limited to responsibility for wrongful conduct, even though Article 1 was intended to leave that question open. Obligations to compensate for damage not arising from wrongful conduct are best seen either as conditions on the lawfulness of the conduct concerned, or as discrete primary obligations to compensate for harm actually caused. In any event, except in the specific and limited context of Article 27(b), such obligations fall outside the scope of the ARSIWA.[13]

Third, in stating that every wrongful act of a state entails the international responsibility of *that* state, ARSIWA Article 1 affirms the basic

Draft Articles on State Responsibility: Part 1, Articles 1–35 (1991), the commentary to Parts II and III is scattered throughout the yearbooks from 1983 to 1996, as listed in the table of abbreviations.

[12] Draft Articles Commentary, Art. 1, §13.

[13] Between 1974 and 1997, the ILC considered the topic of international liability for injurious consequences arising out of acts not prohibited by international law. The topic was eventually subdivided into two further topics: the prevention of transboundary damage from hazardous activities (draft articles and commentary adopted in 2001: ILC Ybk 2001/II(2), 144), and international liability in case of loss from transboundary harm arising out of hazardous activities (draft articles and commentary adopted in 2006: ILC Report 2006, UN Doc. A/61/10, 101). For commentary see Boyle, in Crawford, Pellet and Olleson (2010) 95.

principle that each state is responsible for its own wrongful conduct. The commentary notes that this is without prejudice to the possibility that another state may also be responsible for the same wrongful conduct, for example if it has occurred under the control of the latter state or on its authority.[14] Some aspects of the question of the involvement or implication of a state in the wrongful conduct of another are dealt with in Articles 16 to 18. There is also the possibility of concurrent responsibility between a state and an international organization.[15]

2.2 The language of state responsibility[16]

2.2.1 Typology of state responsibility

Municipal legal systems will often distinguish types or degrees of liability according to the source of the obligation breached – for example crime, contract, tort or delict.[17] No such general distinction appears in international law. As was said in *Rainbow Warrior*,

> [T]he general principles of International Law concerning State responsibility are equally applicable in the case of breach of treaty obligation, since in the international law field there is no distinction between contractual and tortious responsibility, so that the violation of a State of any obligation, of whatever origin gives rise to State responsibility ...[18]

[14] Draft Articles Commentary, Art. 1, §§7, 11.

[15] E.g. the decisions of the Hague Court of Appeal in *Nuhanović* v. *Netherlands*, LJN: BR5388, 5 July 2011; *Mustafić* v. *Netherlands*, LJN: BR5386, 5 July 2011; DARIO, Arts. 14–18, 48, 58–62.

[16] The Draft Articles were expressed in terms of 'the State which has committed an internationally wrongful act'. Aside from being cumbersome, this terminology was deficient in that its tense impliedly captured only those acts which had already occurred, while excluding situations created by illegal actions which had commenced but had not been abated, e.g. the occupation of territory unlawfully acquired. The Court in *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, ICJ Rep. 1997 p. 7, 52, 56, preferred the term 'wrongdoing State'; the ILC settling on 'responsible State', which has the further advantage that it does not seem to prejudice the question of wrongdoing. See Crawford, First Report, 24–6.

[17] Cf. the division of obligations in Roman law between contract, delict and quasi-contract/unjust enrichment: 'Iuris praecepta sunt haec: honeste vivere, alterum non laedere, suum cuique tribuere' ('The precepts of the law are these: to live honestly, to injure no one, and to give every man his due'): *Institutes of Justinian* (533), Bk 1, Title 1, §3 (trans. Moyle, 5th edn, 1913).

[18] *Rainbow Warrior (New Zealand/France)*, (1990) 82 ILR 500, 551. For the arguments of the parties: ibid., 547–50. See also *Gabčíkovo-Nagymaros*, ICJ Rep. 1997 p. 7, 38–9: 'when a State has committed an internationally wrongful act, its international responsibility is likely to be involved whatever the nature of the obligation it has failed to respect', citing what is now ARSIWA, Art. 12: 'There is a breach of an international obligation by a State

To this extent the rules of state responsibility form a single system, without any precise comparator in national legal systems. The fact is that international law has to address a wide range of needs on the basis of a few basic tools and techniques. For example, treaties may perform a variety of functions – legislative or quasi-constitutional (e.g. by establishing international institutions or organizations in the global public interest) or contractual (e.g. via a bilateral trade or loan agreement). The obligation arises from the same species of legal instrument; unlike national law, there is no categorical distinction between the legislative and the contractual.

The tribunal in the *Rainbow Warrior* arbitration[19] and the International Court in *Gabčíkovo-Nagymaros*[20] both held that in a case involving the breach of a treaty obligation, the general defences available under the law of state responsibility coexist with the rules of treaty law, laid down in the Vienna Convention on the Law of Treaties (VCLT). However, the two perform different functions. The rules of treaty law determine when a treaty obligation is in force for a state and what it means – that is, how it is to be interpreted. Conversely, the laws of state responsibility determine the legal consequences of the breach in terms of such matters as reparation. A state faced with a material breach of a treaty obligation may choose to suspend or terminate the treaty in accordance with the applicable rules of treaty law, thereby freeing itself from the burden of reciprocity,[21] but such an act does not prevent it from making a claim for reparation flowing from the breach.[22]

National legal systems commonly distinguish 'civil' from 'criminal' responsibility, although the relations between the two differ markedly between various systems and may well overlap – particularly in fields such as competition law and other 'regulatory' spheres. By contrast, there is little or no state practice to support 'punitive' or 'penal' consequences for breaches of international law. Although the ILC's Draft Articles as adopted on first reading in 1996 sought to introduce a notion of 'international crimes' of states in Draft Article 19, the concept was not supported by state practice, and caused substantial disagreement within the Commission and in the UNGA Sixth (Legal)

when an act of that State is not in conformity with what is required of it by that obligation *regardless of its origin or character*' (emphasis added).

[19] (1990) 82 ILR 500, 551. [20] ICJ Rep. 1997 p. 7, 8–9.

[21] VCLT, Art. 60.

[22] Thus a state may terminate a treaty for breach while claiming damages for breaches which have already occurred: VCLT, Arts. 70(1)(b), 72(1)(b), 73.

Committee.[23] The concept was set aside in 1998 and dropped definitively in 2001, clearing the way for the ARSIWA to be adopted without opposition. This episode again suggests that state responsibility eschews any division between 'criminal' and 'civil' illegality. That approach was explicitly endorsed by the International Court in the *Genocide* case in the following passage:

> The different procedures followed by, and powers available to, this Court and to the courts and tribunals trying persons for criminal offences, do not themselves indicate that there is a legal bar to the Court itself finding that genocide ... [has] been committed. Under its Statute the Court has the capacity to undertake that task, while applying the standard of proof appropriate to charges of exceptional gravity ... Turning to the terms of the Convention itself, the Court has already held that it has jurisdiction ... to find a State responsible if genocide ... [is] committed by its organs, or persons or groups whose acts are attributable to it ... Any other interpretation could entail that there would be no legal recourse available under the Convention in some readily conceivable circumstances: genocide has allegedly been committed within a State by its leaders but they have not been brought to trial because, for instance, they are still very much in control of the powers of the State including the police, prosecution services and the courts and there is no international penal tribunal able to exercise jurisdiction over the alleged crimes; or the responsible State may have acknowledged the breach. The Court accordingly concludes that State responsibility can arise under the Convention for genocide and complicity, without an individual being convicted of the crime or an associated one.[24]

But this does not prevent international law from responding appropriately to different kinds of breach and their different impacts on other states, on people and on the international legal order. First, individual state officials have no impunity if they commit crimes against international law, even if they may not have been acting for their own individual ends but in the interests or perceived interests of the state. Second, the ARSIWA make special provision for the consequences of certain serious breaches of peremptory norms of international law: see Articles 40, 41. A breach is serious where it involves a 'gross or systemic

[23] No state has ever been accused of criminal conduct before an international court, even where the conduct in question was redolent of genocide, aggression or any other form of acknowledged international crime: de Hoogh, *Obligations* Erga Omnes *and International Crimes* (1996); Abi-Saab, (1999) 10 EJIL 339; Jørgensen, *The Responsibility of States for International Crimes* (2000); Pellet, (2001)-32 NYIL 55; J. Crawford, 'International crimes of states', in Crawford, Pellet and Olleson (2010) 405.

[24] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro)*, ICJ Rep. 2007 p. 43, 119–20. See also *Prosecutor* v. *Blaškić*, Objection to the Issue of *Subpoenae Duces Tecum*, (1997) 110 ILR 607.

failure by the responsible State to fulfil' such an obligation.[25] The main consequence of such a breach is the obligation of all other states to refrain from recognizing as lawful the situation thereby created, or from rendering aid or assistance in maintaining it.[26] In addition, states should co-operate to bring the serious breach to an end 'through any lawful means'.[27] The principal avenues for such co-operation are the international organizations, most notably the UN Security Council, whose powers to take non-forcible and even forcible measures to restore international peace and security substantially overlap with these provisions.[28] But the possibility remains of individual state action seeking remedies against states responsible for such serious breaches as genocide, war crimes, or the denial of fundamental human rights.[29]

2.2.2 Prerequisites for the invocation of responsibility

2.2.2.1 The debate over 'damage' and 'injury'

A key question in the drafting of the ARSIWA was that of the prerequisites to the invocation of responsibility – that is, the extent of the harm, damage or injury required for a state to invoke the responsibility of another state for an internationally wrongful act. Although the responsibility of a state arises independently of its invocation by another state, it is necessary to specify what other states faced with a breach of an international obligation may do to secure the performance of the obligations of cessation and reparation incumbent on the responsible state.

Following the adoption of Part I of the Draft Articles during Ago's tenure as Special Rapporteur, it became clear that the two terms 'damage' and 'injury' were problematic. Both terms were ultimately preserved in the ARSIWA, which use 'injury' and 'injured State' throughout; with 'injury' defined (perhaps not very felicitously) in Article 31(2) to include 'any damage, whether moral or material, caused by the internationally wrongful act of a State'. As to the basic distinction between 'injury' and

[25] ARSIWA, Art. 40(2). [26] ARSIWA, Art. 41(2).

[27] See further *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ Rep. 2004 p. 136, 200.

[28] Further Koskenniemi, (2001) 72 BYIL 337.

[29] E.g. states may adopt measures which are not inconsistent with their international obligations (retorsion). In addition, a right may exist allowing states which themselves are not injured to take countermeasures in the case of breach of certain types of obligations. See e.g. the catalogue of state practice discussed in the commentary to ARSIWA, Art. 54(3) and (4), which may be evidence of such a customary rule. The question was ultimately left open by the ILC for future development in Art. 54. See Chapter 11.

'damage', it is clear that 'injury' involves the concept of *iniuria* – that is, infringement of rights or legally protected interests – whereas the term 'damage' refers to material or other loss suffered by the injured state. Thus the term 'damage' is used to refer to actual harm suffered;[30] a further distinction, drawn between 'economically assessable damage' and 'moral damage' in Draft Articles 44 and 45, was eventually discarded.[31] Equally clearly, an injured state is one whose individual right has been denied or impaired by the internationally wrongful act or which has otherwise been particularly affected by that act.

Following the adoption of Part I, a number of governments questioned whether a specific requirement of actual 'damage' should not be included in the basic definition of state responsibility in Draft Articles 1 and/or 3[32] – put another way, whether the mere breach of an international obligation should be considered as not actionable per se. In the view of Argentina,

> in the case of a wrongful act caused by one State to another ... the exercise of a claim makes sense only if it can be shown that there has been real financial or moral injury to the State concerned. Otherwise, the State would hardly be justified in initiating the claim. In a similar vein, it has been stated that even in the human rights protection treaties ... the damage requirement cannot be denied. What is involved is actually a moral damage suffered by the other States parties ... [T]he damage requirement is, in reality, an expression of the basic moral principle which stipulates that no one undertakes an action without an interest of a legal nature.[33]

Similarly, France argued that responsibility could only exist vis-à-vis another injured state, which must have suffered moral or material injury. In relation to the Draft Articles, it stated:

> [T]he existence of damage is an indispensable element of the very definition of State responsibility ... International responsibility presupposes that, in addition to an internationally wrongful act having been perpetrated by a State, the act in question has injured another State. Accordingly, if the wrongful act of State A has not injured State B, no international responsibility of State A with respect to State B will be entailed. Without damage, there is no international responsibility.[34]

France thus proposed the addition to Draft Article 1 of the words 'vis-à-vis injured States', and a comprehensive redrafting of Draft Article 40 to incorporate the requirement of 'material or moral damage' in all cases except breaches of fundamental human rights.[35]

[30] See ARSIWA, Arts. 31, 36(1) and (2), 47. [31] Crawford, Third Report, 54.
[32] Later ARSIWA, Art. 2. [33] ILC Ybk 1998/II(1), 103. [34] Ibid., 101.
[35] Ibid., 101–2, 138–9.

A number of other governments, by contrast, approved the principles underlying what would become Articles 1 and 2. They included Austria, Germany, Italy, Mongolia, the Nordic countries and the United Kingdom. Germany, for example, regarded Draft Article 1 as expressing a 'well-accepted general principle'.[36] Similarly, the position taken in Draft Articles 1 and 3 was generally approved of in the literature on these articles following their initial adoption by the ILC in 1973.[37] The case law prior to the adoption of the Draft Articles as a whole was similarly supportive, the most directly relevant decision prior to 1996 being the *Rainbow Warrior*, which concerned the failure by France to keep two of its agents in confinement on the island of Hao, as had been previously agreed between France and New Zealand. It was argued by France that its failure to return the agents to the island did not entitle New Zealand to any relief. Since there was no indication that 'the slightest damage has been suffered, even moral damage', the argument ran, there was no basis for international responsibility. New Zealand referred, *inter alia*, to Draft Articles 1 and 3, and denied that there was any separate requirement of 'damage' for the breach of a treaty obligation. In oral argument France accepted that in addition to material or economic damage there could be 'moral and even legal damage'. The France–New Zealand Arbitration Tribunal held that the failure to return the two agents to the island 'caused a new, additional non-material damage ... of a moral, political and legal nature'.[38]

Although the *Rainbow Warrior* tribunal was thus able to avoid pronouncing directly on Draft Articles 1 and 3, the breadth of its formulation ('damage ... of a moral, political and legal nature') suggested that there was no logical stopping place between, on the one hand, the traditional and relatively narrow concept of 'moral damage' and, on the other hand, the broader conception of legal damage arising from the breach of a state's right to the performance of an obligation. The reasoning behind this conclusion is clear enough. It had at that stage long been accepted that states may assume international obligations on virtually any subject and having, in principle, any content.[39] Within those broad limits, how can it be said that a state may not bind itself,

[36] Ibid., 101 (Austria, Denmark on behalf of the Nordic countries), 102 (Germany, United Kingdom), 104 (Mongolia).

[37] See e.g. Reuter, in 2 *Estudios de derecho internacional: Homenaje al profesor Miaja de la Muela* (1979) 837; Tanzi, in Spinedi and Simma (1987) 1.

[38] *Rainbow Warrior (New Zealand/France)*, (1990) 82 ILR 500, 569.

[39] See e.g. *SS Wimbledon*, (1923) PCIJ Ser. A No. 1, 25: 'the right of entering into international engagements is an attribute of State sovereignty'.

categorically, not to do something? On what basis is that obligation to be reinterpreted as an obligation not to do that thing only if one or more other states would thereby be damaged? The other states that are parties to the agreement, or bound by the obligation, may be seeking guarantees, not merely indemnities. But as soon as that possibility is conceded, the question whether damage is a prerequisite for a breach becomes a matter to be determined by the relevant primary rule. It may be that many primary rules do contain a requirement of damage, however defined. Some certainly do.[40] But there is no warrant for the suggestion that this is necessarily the case, that it is an *a priori* requirement.

Similar reasoning was set out, albeit rather briefly, in the commentary to Article 31.[41] This pointed out that all sorts of international obligations and commitments are entered into covering many fields in which damage to other individual states cannot be expected, would be difficult to prove or is not of the essence of the obligation. This is not only true of international human rights (an exception allowed by France), or of other obligations undertaken by the state to its own citizens. It is true in a host of areas, including the protection of the environment, disarmament and other 'preventive' obligations in the field of peace and security, and the development of uniform standards or rules in such fields as private international law. For example, if a state agrees to take only a specified volume of water from an international river or to adopt a particular uniform law, it breaches that obligation if it takes more than the agreed volume of water or if it fails to adopt the uniform law, and it does so irrespective of whether other states or their nationals can be shown to have suffered specific damage thereby. In practice, no individual release of chlorofluorocarbons (CFCs) or other ozone-depleting substances causes identifiable damage: it is the phenomenon of diffuse, widespread releases that is the problem, and the purpose of the relevant treaties is to address that problem.[42] In short, the point of such obligations is that they constitute, in themselves, standards of conduct for the parties. They are not only concerned to allocate risks in the event of subsequent harm occurring.

[40] E.g. *Lac Lanoux (Spain* v. *France)*, (1957) 12 RIAA 281.

[41] ARSIWA Commentary, Art. 31, §12. .

[42] Vienna Convention for the Protection of the Ozone Layer, 22 March 1985, 1513 UNTS 324; Montreal Protocol on Substances that Deplete the Ozone Layer, 16 September 1987, 1522 UNTS 28. Further: Held, Fane-Hervey and Theros (eds.), *The Governance of Climate Change* (2011).

There is, however, a corollary, not pointed out in the commentary to ARSIWA Article 2. If damage were to be made a distinct prerequisite for state responsibility, the onus would be on the injured state to prove that damage, yet in respect of many obligations this may be difficult to do. A state could proceed to act inconsistently with its commitment, in the hope or expectation that damage might not arise or might not be able to be proved. This would tend to undermine and render insecure international obligations establishing minimum standards of conduct. There is also the question by what standard 'damage' is to be measured. Is any damage at all sufficient, or is 'appreciable' or 'significant' damage required? This debate already occurs in specific contexts;[43] to make damage a general requirement would inject it into the whole field of state responsibility.

It may be argued that failure to comply with international obligations creates a 'moral injury' for other states in whose favour the obligation was assumed, so that the requirement of damage is readily satisfied.[44] But the traditional understanding of 'moral damage' was much narrower than this. The reason why a breach of fundamental human rights is of international concern (to take only one example) is not because such breaches are conceived as assaulting the dignity of other states; it is because they assault human dignity in ways which are specifically prohibited by international treaties or general international law.

For these reasons the decision not to articulate in either ARSIWA Article 1 or 2 a separate requirement of 'damage' in order for there to be an internationally wrongful act was clearly right in principle. But too much should not be read into that conclusion for the following reasons:

[43] E.g. the United Nations Convention on the Law of the Non-navigational Uses of International Watercourses, GA Res. 51/229, 21 May 1997, Annex, Art. 5.

[44] Cf. the French response in *Rainbow Warrior*, (1990) 82 ILR 500, 545–7. In its comments on the Draft Articles, the French government noted that it:

> is not hostile to the idea that a State can suffer legal injury solely as a result of a breach of a commitment made to it. However, the injury must be of a special nature, which is automatically so in the case of a commitment under a bilateral or restricted multilateral treaty. By contrast, in the case of a commitment under a multilateral treaty, the supposedly injured State must establish that it has suffered special material or moral damage other than that resulting from a simple violation of a legal rule. A State cannot have it established that there has been a violation and receive reparation in that connection if the breach does not directly affect it. (ILC Ybk 1998/II(1), 138–9)

This amounts to saying that a state cannot guarantee its performance of a multilateral treaty – a doctrinal a priori if ever there was one.

(a) First, particular rules of international law may require actual damage to have been caused before any issue of responsibility is raised. To take a famous example, Principle 21 of the Stockholm Declaration of 1972 is formulated in terms of preventing 'damage to the environment of other States or of areas beyond national jurisdiction'.[45] This is consistent with *Lac Lanoux*: whether there should be responsibility for environmental risk if no damage occurs is a separate, vexed, question.[46]

(b) Second, Articles 1 and 2 do not take a position as to whether and when obligations are owed to 'not-directly injured States', or to states generally, or to 'the international community as a whole'. That question is dealt with in Article 48. The requirement of damage as a prerequisite to a breach could arise equally in a strictly bilateral context, as it did in the *Rainbow Warrior* arbitration.

(c) Third, Articles 1 and 2 do not, of course, deny the *relevance* of damage, moral and material, for various purposes of responsibility. They simply deny that there is a categorical requirement of moral or material damage before a breach of an international norm can attract responsibility.

The ILC's decision not to make mention of 'damage' in ARSIWA Articles 1 and 2 did not mean that it was not aware of the wider considerations of the concept. This may be seen from ARSIWA Article 42, which dealt with and thereby defined the concept of 'injured state'. Three cases were identified in Article 42. In the first case, in order for an injured state to

[45] Declaration of the UN Conference on the Human Environment, 16 June 1972, UN Doc. A/CONF.48/14/Rev. 1. Similar language is used in Principle 2 of the Rio Declaration on Environment and Development, 12 August 1992, UN Doc. A/CONF.151/26, Vol. I. Cf. the International Court's formulation of the principle in *Legality of the Threat or Use of Nuclear Weapons*, ICJ Rep. 1996 p. 226, 241–2.

[46] As the ARSIWA Commentary notes, '[i]n some cases what matters is the failure to take necessary precautions to prevent harm even if in the event no harm occurs': ARSIWA Commentary, Art. 31, §6. It will depend on the formulation of the primary obligations, but if a state is under an obligation not to cause *risk* of harm, and it causes risk, then it is in breach of its international obligations regardless of whether damage ultimately ensues. The ILC separated responsibility for risk from the main study of state responsibility because '[o]wing to the entirely different basis of the so-called responsibility for risk, the different nature of the rules governing it, its content and the forms it may assume, a simultaneous examination of the two subjects could only make both of them more difficult to grasp' (ILC Ybk 1970/II, 178). The principle of preventing and minimizing risk is of particular importance in the area of international environmental law; see e.g. Sands and Peel, *Principles of International Environmental Law* (3rd edn, 2012), 200–3, 217–28.

invoke the responsibility of another, that state must have an individual right to the performance of an obligation, in the way that a state party to a bilateral treaty has vis-à-vis the other state party (Article 42(a)). Second, a state may be specially affected – although not injured per se – by the breach of an obligation to which it is a party, even though it cannot be said that the obligation is owed to it individually (Article 42(b)(i)) – for example the pollution of the high seas in violation of the United Nations Convention on the Law of the Sea (UNCLOS)[47] Article 194 'may particularly impact on one or several States whose beaches may be polluted by toxic residues or whose coastal fisheries may be closed'.[48] Those states so affected would then be considered injured by the breach, independently of any general or collective interest of the states parties to UNCLOS. Third, it may be that the performance of the particular obligation by the responsible state is a necessary condition of its performance by all the other states (Article 42(b)(ii)): these are so-called 'integral' or 'interdependent' obligations.[49] In terms of multilateral treaties such obligations will usually arise under treaties establishing particular regimes, where the forbearance of each is based on the forbearance of all; for example, were one state party to the Antarctic Treaty[50] to claim sovereignty over the remaining unclaimed area of Antarctica contrary to Article 4, all other states parties would be considered injured thereby and equally entitled to seek cessation, reparation (in the form of the annulment of the claim) and assurances of non-repetition. Other commonly cited examples include treaties on disarmament or arms control, which are based on the assumption of similar obligations by the other contracting states.[51]

2.2.2.2 The principle of 'objective responsibility'

Throughout the period in which the Draft Articles were before the ILC, no government argued in favour of the specification of a general requirement of fault as a prerequisite to state responsibility.[52] The point was made, for example, by Denmark on behalf of the Nordic countries:

[47] 10 December 1982, 1833 UNTS 3. [48] ARSIWA Commentary, Art. 42, §12.

[49] The notion of 'integral' obligations was initially developed by Fitzmaurice as Special Rapporteur on the Law of Treaties, although he used the term as referring to non-reciprocal 'absolute' or 'self-existent' obligations, e.g. human rights or environmental law obligations, which are not owed on an 'all or nothing' basis: Fitzmaurice, ILC Ybk 1957/II, 16, 54. The terminology has accordingly given rise to confusion on occasion, and the term 'interdependent obligation' is more appropriate.

[50] 1 December 1959, 402 UNTS 71.

[51] For further on the concept of 'injured State' see Chapters 11, 15, 17 and 21.

[52] Crawford, First Report, 28.

To accept fault as a general condition in establishing responsibility would considerably restrict the possibility of a State being held responsible for the breach of an international obligation. Moreover, proof of wrongful intent or negligence is always very difficult. In particular, when this subjective element has to be attributed to the individual or group of individuals who acted or failed to act on behalf of a State, its research becomes uncertain and elusive. If the element of fault is relevant in establishing responsibility, it already follows from the particular rule of international law governing that situation, and not from being a constituent element of international responsibility.[53]

Nonetheless, the question of 'fault' figured prominently in the literature,[54] and was seen in 1998 as a question of the same order as the question whether 'damage' was a prerequisite for responsibility. Ultimately, the two questions were decided the same way, and no general requirement of fault was to be articulated.

A key factor behind this conclusion was that, following the abandonment of Draft Article 19, the Articles should not deal with the concept of international crimes of states. Were they to have done so, there would have been good reasons for spelling out a requirement of fault: a state could not possibly be considered responsible for a crime without fault on its part. Equally, there would be compelling reasons not to add any distinct requirement of damage or harm to other states. State conduct would not be considered criminal by reason of the damage caused to particular states but by reason of the character of the conduct itself.

Once more, it should be stressed, state responsibility is predicated on a principle of 'objective' liability,[55] in the sense that once the breach of an obligation owed under a primary rule of international law is established, this is *prima facie* sufficient to engage the secondary consequences of responsibility. Unless otherwise provided, no delinquency, *culpa* or *mens rea* need be proved, although certain manifestations of the 'intention' or 'design' behind state action may be relevant to the justifications and excuses contained within ARSIWA Articles 20–25, for example in cases of duress or coercion. And this conclusion is desirable as a matter of

[53] ILC Ybk 1998/II(1), 101.

[54] See Brownlie, *System of the Law of Nations: State Responsibility, Part I* (1983), 38–48, and authorities there cited.

[55] The term itself is regrettable, and appears nowhere in the ARSIWA: it is – owing to the lack of a viable opposite number in the sense of a 'subjective' responsibility – generally to be avoided. The correct view is that there is no such thing as 'objective' responsibility or 'subjective' responsibility – there is only responsibility properly so called. See further Chapter 3. On the theory of responsibility see Crawford and Watkins, in Besson and Tasioulas (eds.), *The Philosophy of International Law* (2010) 283.

policy, since the 'intention' underlying state conduct is a notoriously difficult idea, quite apart from questions of proof.

2.2.3 *'Delictual capacity'*

On their adoption in 1996, the Draft Articles contained Draft Article 2, which provided that '[e]very State is subject to the possibility of being held to have committed an international wrongful act entailing its international responsibility.' This curious formulation, concerning the possibility of responsibility rather than responsibility itself, was a truism: by definition no state can be immune from the principle of international responsibility. Any proposition to the contrary would be a denial of international law and a rejection of the principle of state equality.

The commentary to Draft Article 2[56] discussed a range of questions: the problem of 'delictual capacity' in international law (cf. the position of minors in national law); the responsibility of the component units of a federated state; and the responsibility of a state on whose territory other legal actors are operating. It concluded – obviously enough – that none of these situations constituted an exception to the general principle of state responsibility.

As to the first of these, the ILC decided in 1973 not to formulate Draft Article 2 in terms of 'delictual capacity'; it was paradoxical to assert that international law could confer the 'capacity' to breach its own rules.[57] A further difficulty with the notion was the undue focus on the question of breach. In the case of non-state entities, a bundle of questions about their legal personality, to what extent international law applies to them and their international accountability for possible breaches do indeed arise. But insofar as states are concerned, the position is clear: all states are responsible for their own breaches of international law, subject to generally available defences enumerated in ARSIWA Part One, Chapter V. As the ARSIWA deal only with states, it was unnecessary to discuss the wider questions raised by Draft Article 2: the provision was accordingly deleted.[58]

2.2.4 *'Responsibility' and 'liability'*

Lawyers in the civilian tradition sometimes consider the common law to contain two separate concepts, responsibility and liability.[59] The first

[56] Draft Articles Commentary, Art. 2. [57] Ibid., Art. 3, §9.

[58] See Crawford, First Report, 31; ILC Ybk 1998/I, 199–200.

[59] For example, UNCLOS, Art. 263 is entitled 'Responsibility and liability', and the English text makes reference to the two terms – apparently interchangeably – throughout. The other language texts, however, make reference only to one term apiece, thus in French

term is thought to mean legal responsibility in the ordinary sense; the second to mean responsibility for which no *culpa* or fault need be identified: what in the common law would be referred to as 'strict' or 'absolute' liability. In fact, the presence of the term 'liability' on its own means no more or less than the term 'responsibility' would, and it is only the inclusion of an adjective that makes a difference. Thus contractual, tortious or criminal liability under the common law means exactly that: responsibility incurred under the law of contract, tort or crime.

The ARSIWA make no reference to 'liability', although the term does appear occasionally in the commentaries. Extensive reference was, however, made to 'liability' in the ILC's work on the prevention of transboundary harm from hazardous activities and the allocation of loss in the case of transboundary harm arising out of hazardous activities, both of which formed part of the primordial topic 'International liability for injurious consequences arising out of acts not prohibited by international law'.[60] As a purely linguistic matter, 'responsibility' as used in the ARSIWA and 'liability' as it appears in the ILC's work on transboundary harm bear the same meaning. As was noted in its commentary to the Draft Articles on the Prevention of Transboundary Harm from Hazardous Activities,[61] the topics were separated not due to any categorical distinction between 'responsibility' and 'liability', but to make it clear that state responsibility is concerned with acts which are unlawful under international law, whereas the ILC's work on transboundary harm was concerned with activities which *prima facie* are not, but which might give rise to harm in operations for which (absent due diligence) responsibility/liability might arise.[62]

and Spanish, respectively, 'Responsabilité' and 'Responsabilidad'. See further Boyle, (2008) 39 ICLQ 1, 8–10; Boyle (2010).

[60] For the history of the liability topic see Special Rapporteur Pemmaraju Sreenivasa, First Report, UN Doc. A/CN.4/531, 5–20; Boyle (2010), 95–7.

[61] ILC Ybk 2001/II(2), 150. See also ILC Ybk 1977/II(2), 6.

[62] For criticism of the terminological confusion underlying the 'liability' topic see e.g. Boyle (2010). One possibility – probably linguistically foreclosed – would be to confine the term 'liability' to those special cases where actual loss is compensable for the exercise of a legal right (sometimes referred to as qualified privilege): e.g. at common law, certain rights of entry on to land, or, in international law, the obligation to indemnify for losses incurred in searching an innocent vessel on the high seas (UNCLOS, Art. 110(3)).

2.2.5 *Rights and obligations*

2.2.5.1 'Primary' and 'secondary' obligations[63]

When it reconsidered the issue in 1962–3, the ILC saw state responsibility as concerning 'the definition of the general rules governing the international responsibility of the State', by which was meant responsibility for wrongful acts. The emphasis was on the word 'general'. The draft articles were to concern themselves with the *framework* for state responsibility, irrespective of the content of the substantive rule breached in any given case. The distinction between 'primary' and 'secondary' rules was formulated by Roberto Ago as follows:

> The Commission agreed on the need to concentrate its study on the determination of the principles which govern the responsibility of States for internationally wrongful acts, maintaining a strict distinction between this task and the task of defining the rules that place obligations on States, the violation of which may generate responsibility. Consideration of the various kinds of obligations placed on States in international law and, in particular, a grading of such obligations according to their importance to the international community, may have to be treated as a necessary element in assessing the gravity of an internationally wrongful act and as a criterion for determining the consequences it should have. But this must not obscure the essential fact that it is one thing to define a rule and the content of the obligation it imposes, and another to determine whether that obligation has been violated and what should be the consequence of the violation. Only the second aspect of the matter comes within the sphere of responsibility proper . . .[64]

The source of the distinction between primary and secondary rules within the terminology of state responsibility is unclear. Potential sources include an adaptation of H. L. A. Hart's famous distinction between primary and secondary rules,[65] continental jurisprudence,[66] or simply organic development within the ILC itself.

The distinction has had its critics. It has been said, for example, that the 'secondary' rules are mere abstractions, of no practical use; that the assumption of generally applicable secondary rules overlooks the possibility that particular substantive rules, or substantive rules within a particular field of international law, may generate their own specific

[63] See David (2010). [64] ILC Ybk 1970/II(2), 306.

[65] Hart, *The Concept of Law* (2nd edn, 1994), 79–99; cf. Kelsen, *General Theory of Law and State* (1945), 61 ('law is the primary norm, which stipulates the sanction').

[66] See Ross, *On Law and Justice* (1958), 209–10; and generally Goldie, (1978) 12 IL 63.

secondary rules, and that the Articles themselves fail to apply the distinction consistently, thereby demonstrating its artificiality.[67]

On the other hand, it is far from clear what alternative principle of organization could have been adopted, since the substantive rules of international law, breach of which may give rise to state responsibility, are innumerable and include substantive rules contained in treaties as well as under general international law. Given rapid and continuous developments in both custom and treaty, the corpus of primary rules is, practically speaking, beyond the reach of codification, even if that were desirable in principle.

The distinction between primary and secondary rules has a number of advantages. It allows some general rules of responsibility to be restated and developed without having to resolve a myriad of issues about the content or application of particular rules the breach of which may give rise to responsibility. Take, for example, the debate about whether state responsibility can exist in the absence of damage or injury to another state or states. If by damage or injury is meant economically assessable damages, the answer is clearly that this is not always necessary. On the other hand, in some situations there is no legal injury to another state unless it has suffered material harm.[68] The position varies, depending on the substantive or primary rule in question. It is only necessary for the ARSIWA to be drafted in such a way as to allow for the various possibilities. A similar analysis would apply to the question whether some *mens rea* or fault element is required to engage the responsibility of a state, or whether state responsibility is 'strict' or even 'absolute', or depends upon 'due diligence'.

There remains a question whether the ARSIWA are sufficiently responsive to the impact that particular primary rules may have. The regime of state responsibility is, after all, not only general but also residual. The issue arises particularly in relation to ARSIWA Article 55 concerning *lex specialis*.[69]

Finally, there is a question whether some of the articles do not go beyond the statement of secondary rules to lay down particular primary

[67] Special Rapporteur Riphagen remarked that the distinction, while methodologically useful, 'should not be carried so far as to dissimulate the essential unity of the structure of international law as a whole' (ILC Ybk 1981/II(1), 82 (§31); see further Bodansky and Crook, (2002) 96 AJIL 773, 779–81; Caron, (2002) 96 AJIL 857, 870–2; David (2010).

[68] See e.g. *Lac Lanoux*, (1957) 12 RIAA 281.

[69] See ARSIWA Commentary, Art. 55; Bodansky and Crook (2002), 774–5; Caron (2002), 872–3; Simma and Pulkowski, in Crawford, Pellet and Olleson (2010) 139.

rules. This was certainly true of the definition of 'international crimes' in the abandoned Draft Article 19. Another article which, it has been suggested, infringes the distinction between primary and secondary rules is ARSIWA Article 27(b), dealing with compensation in cases where the responsibility of a particular state is precluded by one of the circumstances dealt with in Articles 20–25.[70] On the other hand Article 27 is a without prejudice clause, and does not specify the circumstances in which such compensation may be payable. It can be argued that it thereby usefully qualifies the 'circumstances precluding wrongfulness' in Articles 20–25 – although whether it is equally applicable to each of those circumstances is an open question.

2.2.5.2 'Obligations *erga omnes*' and related concepts

ARSIWA Article 48 makes provision for the invocation of responsibility in the absence of any direct form of injury. Where the obligation breached is one protecting the collective interests of a group of states or the interests of the international community as a whole, responsibility may be invoked by states which are not themselves injured in the sense of Article 42. The existence of these 'communitarian norms' – also known as obligations *erga omnes* – was confirmed by the International Court in the *Barcelona Traction* case, when it noted that with respect to obligations owed to the international community as a whole, 'all States can be held to have a legal interest' in the fulfilment of those rights.[71]

Comments of governments on obligations *erga omnes* varied considerably during the second reading. France, for example, was generally critical of the notion, while not denying that in special circumstances a state could suffer legal injury merely by reason of the breach of a commitment. However, it asserted that 'in the case of a commitment under a multilateral treaty, the supposedly injured State must establish that it has suffered special material or moral damage other than that resulting from a simple violation of a legal rule'.[72] This apparently denied the possibility of obligations *erga omnes*, whose very effect, presumably, is to establish a legal interest of all states in compliance with certain norms. Germany, by contrast, saw in the clarification and elaboration of the concepts of obligations *erga omnes* and peremptory norms,

[70] Formerly Draft Articles, Art. 35: see ILC Ybk 1998/II(1), 135 (comments by France).

[71] *Barcelona Traction, Light & Power Company, Limited (Spain* v. *Belgium)*, Second Phase, ICJ Rep. 1970 p. 3, 32. See further Chapter 11.

[72] ILC Ybk 1998/II(1), 138–9.

in the field of state responsibility, a solution to the vexed problems presented by Draft Article 19.[73]

The United States took an intermediate position, supporting the clarification and in some respects the narrowing of the categories of 'injured State' in Draft Article 40, especially in relation to breaches of multilateral treaties, while accepting the notion of a general or community interest in relation to defined categories of treaty (e.g. human rights treaties). But it denied that injured states acting in the context of obligations *erga omnes* (or of an *actio popularis*) should have the right to claim reparation as distinct from cessation.[74] The United Kingdom likewise raised issues of the definition of 'injured state' in the context of multilateral treaty obligations. In particular it questioned the consistency of Draft Article 40(2) with VCLT Article 60(2)(c), which allows the parties to multilateral treaties to suspend the operation of the treaty in relation to a defaulting state only if the treaty is of such a character that a material breach of its provisions by one party 'radically changes the position of every party with respect to the further performance of its obligations under the treaty'.[75]

These views proved influential in developing a consensus model that is reflected in the terms of ARSIWA Article 48. Under the terms of paragraph (1), a non-injured state is permitted to invoke responsibility where the breach complained of concerns (a) an obligation owed to a group of states that includes the non-injured state, which is established for the protection of a collective interest of the group; or (b) an obligation owed to the international community as a whole (a communitarian norm or obligation *erga omnes*). Under paragraph (2), however, the remedies available in such a situation are limited. The non-injured state may only claim from the responsible state cessation of the internationally wrongful act and assurances of non-repetition. It may not claim reparation, save in the interest of an injured state or the beneficiaries of the obligation breached.

2.3 Invocation and admissibility

2.3.1 Invocation of state responsibility: formal requirements

Although state responsibility in principle arises independently of any claim by another state, if an interested party wishes to claim one of the remedies available to it under Part Two, Chapters II and III of the

[73] Ibid., 165. [74] Ibid., 120–1. [75] Ibid., 141–2.