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Constitutionalization and the Unity of the Law of International Responsibility

André Nollkaemper*

Abstract

The law of international responsibility fulfills essentially two functions: reparation for injury and protection of the rule of law and global order. Notwithstanding the fundamental difference between these objectives, the law of international responsibility traditionally has been conceived in unitary norms consisting of a single set of principles that applies to all breaches of rules of international law. With the further development of international law that unity becomes difficult to maintain. On the one hand, there is an increasing need for a further refinement of liability principles for the determination of compensation for injury. On the other hand, the process of constitutionalization of international law poses entirely different accountability requirements to which the law of international responsibility should contribute. Maintaining unity may lead to inconsistencies and hinder the refinement of the law of international responsibility that is necessary to deal with the various types of responsibility and accountability issues of modern international law, thereby marginalizing the law of responsibility.

Introduction

This article will discuss the consequences that the process of constitutionalization may have on the unity of the law regarding international responsibility of states or international organizations. In view of its emerging constitutional dimensions, can the law of international responsibility maintain its traditional unity as a single set of principles that applies to all breaches of the rules of international law? The

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term "constitutionalization" will be discussed below, but it can be defined briefly as the emergence of constitutional aspects in international law that concern the organization of the international legal order.[1]

Traditionally, the law of international responsibility has been based on a unitary notion of responsibility. Its prime function was to repair injury caused to a person (primarily a state) whose subjective rights were infringed. It did not distinguish between private and public wrongs, but rather was depicted as sui generis, having both private and public dimensions.[2] In contrast, developed domestic legal orders distinguish between private and public wrongs[3] and thus do not employ a unitary conception of responsibility. Moreover, they provide the institutional conditions to make such a distinction meaningful.

Though it lacks the differentiation and refinement of many domestic legal orders, the law of the European Union (EU) shows that such distinctions are not confined to domestic law. The principles of liability for non-contractual damage caused by EU institutions are based on a tort model.[4] Few would say that these are mechanisms for protecting the public order. EU law has a set of relatively developed principles underlying infringement procedures, which are designed to determine non-compliance with obligations vis-à-vis the EU itself, and in that respect, maintain a public order.[5] These procedures have little to do with addressing direct injury of other member states. EU law also has a body of principles concerning political responsibility.[6]

In modern international law, there are several instances where the law of international responsibility has functioned in a public or constitutional capacity, rather

1. Anne Peters, *Compensatory Constitutionalism: The Function and Potential of Fundamental International Norms and Structures*, 19 LEIDEN J. INT'L L. 579, 582 (2006).

2. James Crawford & Simon Olleson, *The Nature and Forms of International Responsibility*, *in* INTERNATIONAL LAW 445, 451 (M. Evans ed., 2003).

3. These concepts relate to the distinction between private and public law. For a discussion of this distinction, see HARTMUT MAURER, ALLGEMEINES VERWALTUNGSRECHT 48–51 (2006).

4. Consolidated Version of the Treaty Establishing the European Community art. 228, Sept. 5, 2008, 2008 O.J. (C115) 1 [hereinafter EC Treaty], *available at* http://eur-lex.europa.eu/en/treaties/dat/12002E/pdf/12002E_EN.pdf (stating that "[i]n the case of non-contractual liability, the Community shall, in accordance with the general principles common to the laws of the Member States, make good any damage caused by its institutions or by its servants in the performance of their duties."). For a discussion of the relevant principles, see NON-CONTRACTUAL LIABILITY OF THE EUROPEAN COMMUNITIES (Henry G. Schermers et al. eds., 1988).

5. EC Treaty art. 226. *See generally* ANTHONY ARNULL, THE EUROPEAN UNION AND ITS COURT OF JUSTICE 34, 34–52 (2006).

6. Mark Bovens, *New Forms of Accountability and EU-Governance*, 5 COMP. EUR. POL. 104, 114 (2007).

than solely for the purpose of compensation for damage. For example, the case law of the European Court on Human Rights (ECtHR) has traditionally been premised on the requirement that legal injury was caused to a person, who thereby could qualify as a victim.[7] In recent case law, the ECtHR formulated remedies that are not contingent on individual injury, and ordered states to overhaul legislation that, in general, was deemed to be incompatible with the European Convention on Human Rights (Convention).[8] In the *Genocide* case, the International Court of Justice (ICJ) was confronted with the fact that genocide was not only an alleged wrong against Bosnia and Herzegovina, but that "the norm prohibiting genocide was assuredly a peremptory norm of international law (jus cogens)."[9] The International Law Commission (ILC) is currently transposing the principles of responsibility of states to the responsibility of international organizations, which in many respects concerns the allocation of powers, rather than providing reparation for injury.[10]

The law of international responsibility of states is contained in one document that, with few exceptions, applies across the board to all breaches of all norms of international law.[11] The Draft Articles on the Responsibility of International Organizations are heading in the same direction.[12] The question is whether this approach leaves proper room for the variety of functions that the law of international responsibility may need to fulfill. Can the law of international responsibility, as a unitary set of principles, serve both the traditional function of reparation for injury, and more constitutional functions that appear from the example given

7. Convention for the Protection of Human Rights and Fundamental Freedoms as Amended by Protocol No. 11, art. 34, Nov. 1, 1998, Europ. T.S. No. 155 [hereinafter ECHR].

8. *See, e.g.,* Broniowski v. Poland, 43 Eur. Ct. H.R. 1 (2006); Sejdovic v. Italy, 42 Eur. Ct. H.R. 360 (2006); *see also* Valerio Colondrea, *On the Power of the European Court of Human Rights to Order Specific Non-monetary Measures: Some Remarks in the Light of the Assanidze, Broniowski and Sejdovic Cases*, 7 HUM. RTS. L. REV. 396, 410–11 (2007).

9. *Case Concerning the Application of the Convention on the Prevention and the Punishment of the Crime of Genocide, (Bosnia and Herzegovina v. Serbia and Montenegro)*, ¶ 161 (Feb. 26, 2007), *available at* http://www.icj-cij.org/docket/files/91/13685.pdf; *see also Case Concerning the Application of the Convention on the Prevention and the Punishment of the Crime of Genocide, (Bosnia and Herzegovina v. Yugoslavia)*, 1996 I.C.J. (Preliminary Objections) 595, ¶ 31 (July 11).

10. The text of the articles (at the moment of writing) is contained in International Law Commission [ILC], Report of the ILC, Responsibility of International Organization, *The Internationally Wrongful Act of an International Organization*, ¶ 164, U.N. Doc. A/63/10 (Aug. 8, 2008).

11. The Articles on the Responsibility of States for Internationally Wrongful Acts [hereinafter Articles on State Responsibility] are contained in the Annex of G.A. Res. 56/83, U.N. Doc. A/RES/56/83 (Jan. 28, 2002).

12. The draft Articles generally follow the structure and main principles of the Articles on State Responsibility. *See, e.g.,* ILC, *First Report on Responsibility of International Organizations*, ¶¶ 35–36, U.N. Doc. A/CN.4/532 (Mar. 26, 2003) (*prepared by* Special Rapporteur Giorgio Gaja).

above? Is, for instance, the "responsibility" of an organization vis-à-vis its members that flows from an ultra vires act similar to the same responsibility as it applies in interstate relationships?[13] Or do we need to acknowledge that the former is of a different, perhaps more public law nature, and that the unitary nature of the law of international responsibility cannot be maintained?

Previously, the question of unity has, if at all, been discussed from the perspective of the possible introduction of the notion of "state crimes" into the law of state responsibility.[14] While the use of criminal law for the interpretation and application of the law of state responsibility does pose complex questions that are relevant to the unity,[15] the debate on state crimes has, at least temporarily, been put to rest. This article will, in principle, leave aside challenges that international criminal law may pose to the unity of the law of international responsibility, and instead focus on the possible impact of constitutionalization on the unity of the law of international responsibility. The notions of state crimes and of constitutionalization are to some extent related; the concept of serious breaches of peremptory norms of international law can as much be seen as an alternative to the notion of state crimes, as one element of the process of constitutionalization.[16]

The article will proceed as follows. First, Part I will briefly identify some key aspects of the process of "constitutionalization" insofar as this process may be relevant to the law of international responsibility. Part II will discuss the traditional "reparation for injury" nature of the law of international responsibility. Part III will identify constitutional elements in the law of international responsibility. Part IV will discuss whether, in view of these elements, it still makes sense to talk of the law of international responsibility as a unitary system.

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13. See the doubts expressed on this point by the International Monetary Fund, in ILC, *Responsibility of International Organizations, Comments and Observations Received from International Organizations*, 6–7, U.N. Doc. A/CN.4/545 (June 25, 2004).

14. The best volumes on the topic remain INTERNATIONAL CRIMES OF STATE: A CRITICAL ANALYSIS OF THE ILC'S DRAFT ARTICLE 19 ON STATE RESPONSIBILITY (J.H.H. Weiler et al. eds., 1989) and NINA H.B. JØRGENSEN, THE RESPONSIBILITY OF STATES FOR INTERNATIONAL CRIMES (2000).

15. Specific questions relating to the appropriateness of injecting criminal law notions into the law of international responsibility are further left out of consideration. Critical questions have been raised by the use of the criminal law concept of complicity in the International Court of Justice's judgment in the *Genocide* case. *See* Antonio Cassese, *On the Use of Criminal Law Notions in Determining Responsibility for Genocide*, 5 J. INT'L. CRIM. JUST. 875, 879 (2007).

16. *See infra* Part IV.

I. THE TERM "CONSTITUTIONALIZATION"

Although it remains contested whether it is possible or helpful to construe international law in constitutional terms, international law displays characteristics that can be associated with the term "constitutional law" in at least three respects that are relevant for appreciating the nature of international responsibility.[17] They are part of a process that can be described as constitutionalization, a term defined as "shorthand for the emergence of constitutional law within a given legal order."[18]

First, if one accepts that a key element of constitutional law is that it organizes and regulates political activity and relationships in a given global polity,[19] one need not object to using the term "constitutional" with respect to international law. In fact, several of the foundational principles of international law have a distinct constitutional element in this respect. What else is the function of sovereign equality than an allocation of legal power in the international legal order? The principle of supremacy of international law is another fundamental principle that fulfills a constitutional function in the international legal order.[20] International obligations to protect human rights constrain state power and therefore fulfill constitutional func-

17. *See, e.g.,* FRANCISCO ORREGO VICUNA, INTERNATIONAL DISPUTE SETTLEMENT IN AN EVOLVING GLOBAL SOCIETY: CONSTITUTIONALIZATION, ACCESSIBILITY, PRIVATIZATION (2004); Erika de Wet, *The International Constitutional Order*, 55 INT'L & COMP. L.Q. 51 (2006); Bardo Fassbender, *The Meaning of International Constitutional Law*, *in* TRANSNATIONAL CONSTITUTIONALISM: INTERNATIONAL AND EUROPEAN MODELS (Nicholas Tsagourias ed., 2007); Konrad Lachmayer, *The International Constitutional Approach: An Introduction to a New Perspective on Constitutional Challenges in a Globalizing World*, 1 VIENNA J. ON INT'L CONST. L. 91 (2007); Ernst-Ulrich Petersmann, *Justice in International Law? From the "International Law Among States" to "International Integration Law" and "Constitutional Law"*, 6 GLOBAL CMTY. Y.B. INT'L L. JURISPRUDENCE 105 (2006); Christian Walter, *Constitutionalizing (Inter) national Governance—Possibilities for and Limits to the Development of an International Constitutional Law*, 44 GERMAN Y.B. INT'L L. 170 (2001); Christian Walter, *International Law in a Process of Constitutionalization*, *in* NEW PERSPECTIVES ON THE DIVIDE BETWEEN NATIONAL AND INTERNATIONAL LAW 191 (Janne Nijman & André Nollkaemper eds., 2007); *see also* Peters, *supra* note 1.

18. Peters, *supra* note 1, at 582; *see also* de Wet, *supra* note 17, at 51 (referring to the constitutionalization of the international legal order as "the process of (re-)organization and (re-)allocation of competence among the *subjects* of the international legal order, which shapes the international community, its value system and enforcement") (emphasis added).

19. *See* Peters, *supra* note 1, at 585.

20. Gerald Fitzmaurice, *The General Principles of International Law Considered From the Standpoint of the Rule of Law*, *in* 92 ACADEMIE DE DROIT INTERNATIONAL DE LA HAYE: RECUEIL DES COURS 1957 II 1, 6 (1958).

tions. In the law of international organizations, these constitutional elements, in the sense of allocating and limiting power, are more obviously present.[21]

Second, constitutional law implies some form of control over illegality. This is a key feature of the rule of law as one of the organizing principles of constitutional government.[22] In a variety of somewhat unorganized ways, international law provides for control of illegality. This control ranges from practices of protest and non-recognition, to non-compliance procedures in the framework of international institutions,[23] to international courts and tribunals. As we will see below, this control also extends to the law of international responsibility.

Third, constitutional law is based on recognition of public interest norms that protect the interest of the polity as a whole, rather than only the interests of individual states.[24] Though the degree to which this is the case may be overstated,[25] international law recognizes a distinction between bilateral interest norms and public interest norms. This is seen most notably in the form of international human rights norms and the more general categories of erga omnes and jus cogens.[26]

In these admittedly narrow respects, we can say that international law displays certain constitutional elements. The term "constitutional" is not well-established in any of these respects. To the extent that legal scholars have deemed it useful to use such overarching concepts at all (rather than just dealing with the

21. It is thus no misnomer that the several treaties establishing international organizations carry the name of "constitution." *See, e.g.,* Constitution of the World Health Organization, July 22, 1946, 62 Stat. 2679, *available at* http://www.who.int/governance/eb/who_constitution_en.pdf; Constitution of the International Labour Organization, Treaty of Versailles, June 28, 1919, Part XIII, 49 Stat. 2713, *available at* http://training.itcilo.it/ils/foa/library/constitution/indexconst_en.html. *See generally* TETSUO SATO, EVOLVING CONSTITUTIONS OF INTERNATIONAL ORGANIZATIONS: A CRITICAL ANALYSIS OF THE INTERPRETATIVE FRAMEWORK OF THE CONSTITUENT INSTRUMENTS OF INTERNATIONAL ORGANIZATIONS (1996) (providing a common example of the use of the term in scholarship on international organizations).

22. *See* Peters, *supra* note 1, at 601.

23. *See generally* MAKING TREATIES WORK: HUMAN RIGHTS, ENVIRONMENT AND ARMS CONTROL (Geir Ulfstein et al. eds., 2007).

24. Peters, *supra* note 1, at 601; *see also* de Wet, *supra* note 17, at 57.

25. *Cf.* PHILLIP BOBBITT, THE SHIELD OF ACHILLES: WAR, PEACE, AND THE COURSE OF HISTORY 364, 805 (2002).

26. *See, e.g.,* CHRISTIAN TOMUSCHAT & JEAN-MARC THOUVENIN, THE FUNDAMENTAL RULES OF THE INTERNATIONAL LEGAL ORDER (2005); Bruno Simma, *From Bilateralism to Community Interest in International Law*, 250 ACADEMIE DE DROIT INTERNATIONAL DE LA HAYE: RECUEIL DES COURS, at 217 (1994). For the concept of erga omnes, see generally MAURIZIO RAGAZZI, THE CONCEPT OF INTERNATIONAL OBLIGATIONS *ERGA OMNES* (1997) and M. Giorgio Gaja, *Les Obligations et les Droits* Erga Omnes *en Droit International, in* 71 ANNUAIRE DE L'INSTITUT DE DROIT INTERNATIONAL 81 (2006). On jus cogens, see generally ALEXANDER ORAKHELASHVILI, PEREMPTORY NORMS IN INTERNATIONAL LAW (2006).

discrete issues of limits on power, control of illegality, and public interest norms), much of the recent academic discourse proceeds in terms of administrative law[27] or public law,[28] rather than constitutional law. No undue weight should be given to such distinctions. In the current stage of development, the international legal order may be too primitive to make proper distinctions between public law, as a general category, and administrative and constitutional law. As long as the term "constitutional" is not used with the same meaning as at the domestic level, but rather is shorthand for referring to certain organizational principles of international law, one need not object to its use in the context of international law.

II. THE TRADITIONAL LAW OF INTERNATIONAL RESPONSIBILITY

The traditional law of international responsibility is not commonly described in terms of constitutional (or public) law in any of the three dimensions identified above. Since the structure of the international legal system is essentially different from domestic legal systems, domestic notions of private or public law cannot be transposed easily to the international level. Alain Pellet rightly warned against undue domestic analogies when he wrote that international responsibility is neither public nor private, but "simply international."[29]

International responsibility is indeed something quite different from domestic, private or domestic public law, and is best treated as sui generis. It is also clear that there is no automatic connection between a wrong established at international level, and a wrong at domestic level. International law does not prescribe whether an international wrong should have an effect on either private or public law—this depends on the nature of the claim that is presented in a domestic court. A breach of international law can as easily take the form of a private law claim, as a criminal prosecution, or a judicial review under administrative law.[30] The domestic effects on U.S. law of the international wrong determined by the ICJ in

27. *See generally* Benedict Kingsbury et al., *The Emergence of Global Administrative Law,* LAW & CONTEMP. PROBS., Summer/Autumn 2005, at 15.

28. *See generally* GUS VAN HARTEN, INVESTMENT TREATY ARBITRATION AND PUBLIC LAW (2007).

29. Alain Pellet, *Can a State Commit a Crime? Definitely, Yes!*, 10 EUR. J. INT'L L. 425, 433–34 (1999).

30. This will be different in those cases in which a treaty as lex specialis prescribes compensation. *See* André Nollkaemper, *Internationally Wrongful Acts in Domestic Courts*, 101 AM. J. INT'L L. 760, 791–94 (2007). Compare this with the situation in the United Kingdom under the Human Rights Act in DUNCAN FAIRGRIEVE, STATE LIABILITY IN TORT: A COMPARATIVE LAW STUDY 54 (2003).

Avena,[31] or the effects in Dutch law of international wrongs determined by the ECtHR,[32] show that no correlation between the nature of an international wrong and its translation into domestic private or public wrongs.

A more specific reason why the law of international responsibility is not commonly described in terms of constitutional law is that, if one would borrow from domestic concepts at all, responsibility in international law has been based primarily on a private rather than a public law model. International responsibility traditionally serves interests of individual states rather than the general interest, and is characterized by equality rather than subordination.[33]

International responsibility serves to protect the subjective rights of one state against infringements by other states.[34] In that respect, it shares a dominant feature of private law.[35] The core of the traditional law of international responsibility is the notion of legal injury caused by a breach of the law.[36] Dionisio Anzilotti wrote that responsibility derives its raison d'être from the violation of a right of

31. Jogi v. Voges, 425 F.3d 367, 385 (7th Cir. 2005) (holding that Article 36(2) of the Vienna Convention, requiring that domestic law must enable full effect to be given to the purposes for which the individual rights are intended, meaning "that a country may not reject every single path for vindicating the individual's treaty rights." It then concluded that in the absence of any administrative remedy or other alternative to measures that it already had rejected (such as suppression of evidence), "a damages action is the only avenue left"). This decision was later withdrawn on other grounds in Jogi v. Voges, 480 F.3d 822 (7th Cir. 2007) (declining to discuss whether the Convention may be the source of such a remedy since Jogi could pursue his claim under 42 U.S.C. § 1983).

32. Netherlands/[Defendant], Hoge Raad der Nederlanden [HR] [Supreme Court of the Netherlands] 31 oktober 2003, NJ 2005/196, ¶ 3.3 (Neth.). After the ECtHR had determined that the Netherlands had violated article 3 of the Convention (protection against torture and inhumane and degrading treatment) but did not provide, in conformity with its usual practice, specific indications for remedies, the Supreme Court held that this violation constituted a wrongful act under Dutch law. It then noted that under the Convention, a state is obliged to provide for reparation, but that the state is free to determine how it will give effect to this obligation in its national legal order. The Supreme Court said that the reparation need not necessarily be provided in monetary form, and proceeded to allow early termination of detention as a remedy. Both options seem compatible with the general obligation to provide reparation under the Convention.

33. One may construe this in terms of the notion of states as moral persons, as postulated by Emerich de Vattell in preliminaries section 2 of his book THE LAW OF NATIONS (Edward D. Ingraham ed., T. & J. W. Johnson & Co. 1863) (1758), but embracing that conception is no condition for recognizing the structural horizontal similarity between states in international law and individuals in domestic law.

34. *See generally* Albert Bleckmann, *The Subjective Right in Public International Law*, 28 GERMAN Y.B. INT'L L. 144 (1985).

35. Richard Wright, *The Grounds and Extent of Legal Responsibility*, 41 SAN DIEGO L. REV. 1, 3 (2003) (discussing the concept of interactive justice).

36. Brigitte Stern, *A Plea for "Reconstruction" of International Responsibility Based on the Notion of Legal Injury*, *in* INTERNATIONAL RESPONSIBILITY TODAY: ESSAYS IN MEMORY OF OSCAR SCHACHTER 93, 94 (Maurizio Ragazzi ed., 2005).

another state.[37] In view of these structural similarities, Hersch Lauterpacht concluded that public international law "belongs to the genus private law"[38] and Thomas Holland said that international law is "private law writ large."[39]

Remarkable overlap exists between the key principles of international responsibility, as partly codified by the ILC, and the principles of European tort law—an authoritative set of principles that, to a large extent, are common to domestic systems in Europe.[40] Considerable similarities exist on such issues as causation,[41] contribution to the injury by the victim (state),[42] responsibility based on negligence or lack of due diligence,[43] defenses,[44] and reparations.[45] These similarities stem from the fact that both European tort law and the law of state responsibility deal with similar problems of injury caused between equals. It would be odd indeed if the law of state responsibility had developed without resorting to domestic precedents dealing with structurally comparable questions.[46]

The fact that the law of international responsibility does not deal with ultra vires acts by states illustrates its more traditional concern with protection of subjective rights than with illegality (which is more a public law or constitutional notion). Acts that transgress the legal power of a state, yet do not cause legal injury to another state, generally have not been treated as issues of international responsibility. An example is a claim for a territorial sea of more than twelve miles. Such a claim is in excess of the powers that international law allocates to states. Yet, since it does not cause damage (in a material or legal sense) to other states, it

37. *See generally* DIONISIO ANZILOTTI, TEORIA GENERALE DELLA RESPONSABILITÀ DELLO STATO NEL DIRITTO INTERNAZIONALE (1902).

38. H. LAUTERPACHT, PRIVATE LAW SOURCES AND ANALOGIES OF INTERNATIONAL LAW 81 (Lawbook Exch. Ltd. 2002) (1927).

39. THOMAS E. HOLLAND, STUDIES IN INTERNATIONAL LAW 152 (1898).

40. *See* PRINCIPLES OF EUROPEAN TORT LAW—TEXT AND COMMENTARY (2005), *available at* http://civil.udg.es/tort/Principles/.

41. *Id.* art. 3:101.

42. *Id.* arts. 3:106 and 8: 101. *But see* Articles on State Responsibility, *supra* note 11, art. 39.

43. PRINCIPLES OF EUROPEAN TORT LAW, *supra* note 40, arts. 4:101, 4:102. But see the general due diligence standards in international law as discussed by R. Pisillo-Mazzeschi, *The Due Diligence Rule and the Nature of the International Responsibility of States*, 35 GERMAN Y.B. INT'L L. 9 (1992).

44. PRINCIPLES OF EUROPEAN TORT LAW, *supra* note 40, art. 7:101. *But see* Articles on State Responsibility, *supra* note 11, arts. 20–27.

45. PRINCIPLES OF EUROPEAN TORT LAW, *supra* note 40, art. 10:101. *But see* Articles on State Responsibility, *supra* note 11, art. 31.

46. *See Case Concerning Oil Platforms (Islamic Republic of Iran v. United States of America)*, 2003 I.C.J. 161, 324 (Nov. 6) (separate opinion of Judge Simma). Note also the influence of domestic tort law on general principles.

does not give rise to a claim under the law of international responsibility. Such cases of illegality look more like public law problems, where a holder of public powers exceeds his competences. Because of a lack of competent institutions that can deal with such ultra vires acts, international law relies on such doctrines as protest and non-recognition.[47] But protest against an illegal act, or non-recognition of a situation created by an illegal act, is, in principle, separate from invocation of responsibility. The commentary to Article 42 of the Articles on State Responsibility stipulates:

> A State does not invoke the responsibility of another State merely because it criticizes that State for a breach and calls for observance of the obligation, or even reserves its rights or protests. For the purpose of these articles, protest as such is not an invocation of responsibility; it has a variety of forms and purposes and is not limited to cases involving State responsibility ... Such informal diplomatic contacts do not amount to the invocation of responsibility unless and until they involve specific claims by the State concerned, such as for compensation for a breach affecting it, or specific action such as the filing of an application before a competent international tribunal, or even the taking of countermeasures.[48]

The fact that the law of international responsibility primarily follows a private law model does not mean that it cannot have any constitutional functions. First, any body of private law may fulfill public functions. Just as domestic tort law or contract law may fulfill public functions (for example consumer law),[49] principles of international responsibility that protect one state from injury may also fulfill the larger public function of protection.

The second, and more constitutional, layer of the argument is that the law of international responsibility may fulfill an important role in maintaining the order in the international system by reinforcing the basic structure of sovereign equality. Public order relies on the law of responsibility not only for the protection of rights

47. IAN BROWNLIE, SYSTEM OF THE LAW OF NATIONS, STATE RESPONSIBILITY PART I, at 26–27 (1983).

48. Articles on State Responsibility, *supra* note 11, art. 42, ¶ 2.

49. Daniela Caruso, *The Missing View of the Cathedral: The Private Law Paradigm of European Legal Integration*, 3 EUR. L.J. 3 (1997); Martijn W. Hesselink, *The Structure of the New European Private Law*, 6.4 ELECTRONIC J. COMP. L. (Dec. 2002), http://www.ejcl.org/64/art64–2.html.

of individual states, but also for the protection of the integrity of the system.[50] Because of the dominant role of sovereign equality of states in the international legal order, states respond to breaches of international law based on legal injury, not only on material damage. Thus, international responsibility may serve a constitutional function in the guise of a private law model. In this respect, the responsibility of states and international organizations for internationally wrongful acts is a key element of the rule of law at the international level[51] and thereby of the international constitutional order.

While the law of international responsibility has already fulfilled certain constitutional functions, this constitutional role remains limited. Its focus on subjective rights of individual states makes the law of international responsibility rather ill-suited for social order problems. Since the traditional law of responsibility makes injury to another state a necessary component of responsibility,[52] and responsibility needs to be "invoked" by another state, the result is that no question of state responsibility arises as long as no other state invokes the responsibility of a wrongdoing state. All too often the requirements of damage and invocation make the law of state responsibility non-operational with respect to large parts of the breaches that undermine the international legal order.

III. THE EXPANSION OF CONSTITUTIONAL NOTIONS IN THE LAW OF INTERNATIONAL RESPONSIBILITY

The modern international law of responsibility has constitutional ambitions that go beyond the traditional, tort-like system of international responsibility. The emergence of these constitutional notions is discussed separately for general international law and then in particular treaty regimes.

A. General International Law

At the heart of the constitutionalization of the law of international responsibility is the elimination of the notion of legal injury as a condition for international responsibility. Modern international law of responsibility is said to be of an objective na-

50. F.V. Garcia Amador, *First Report on State Responsibility*, ¶¶ 54–57, U.N. Doc. A/CN.4/96 (1956) (citing Clyde Eagleton, *International Organization and the Law of Responsibility*, *in* 76 ACADEMIE DE DROIT INTERNATIONAL DE LA HAYE: RECUEIL DES COURS, at 423 (1950)).

51. IAN BROWNLIE, THE RULE OF LAW IN INTERNATIONAL AFFAIRS 213–14 (1988).

52. Stern, *supra* note 36, at 94.

ture—not in the sense of responsibility without fault or material damage, but in the sense that responsibility can arise regardless of legal injury of any particular state.[53]

Articles 1 and 2 of the Articles on State Responsibility stipulate two conditions for responsibility: breach of an obligation and attribution. Injury is not mentioned.[54] The Draft Articles on Responsibility of International Organizations follow the same approach.[55] Responsibility is not contingent upon showing that a disputed act has caused injury to a state or other person to whom an international obligation is owed, but is premised on the notion of an illegal act.[56] The law of international responsibility would not only protect rights of injured parties but would also protect the international legal order against acts that violate international law.[57]

The practical consequence of eliminating legal injury as a condition of responsibility is that the obligations of cessation, continued performance, and reparation are not contingent on invocation by a responsible state. Whereas the ILC in the first reading took the position that reparation was a right of an injured state, in the second reading it accepted that the obligation to provide reparation is not dependent on a prior invocation of responsibility.[58] This may redress one of the largest weaknesses of the traditional law of international responsibility as identified above: the fact that the absence of invocation (for political or other reasons) rendered the law of responsibility non-operational regarding acts that upset the international legal order. The law of responsibility, as drafted by the ILC, has introduced the protection of legality as a freestanding legal consequence. Indeed, the obligation of cessation,[59] and the

53. *See* Pellet, *supra* note 29, at 438.

54. *See* Articles on State Responsibility, *supra* note 11, Commentary to art. 2, ¶ 9, *available at* http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf.

55. ILC, *supra* note 12, art. 3.

56. John Gardner, *The Mark of Responsibility*, 23 OXFORD J. LEGAL STUD. 157, 164 (2003); Alain Pellet, *Remarques sur une révolution inachevée. Le projet d'articles de la CDI sur la responsabilité des Etats*, 42 ANNUAIRE FRANÇAIS DE DROIT INTERNATIONAL 7 (1996); Stern, *supra* note 36, at 101. Compare the discussion of principles of reparation by James Crawford, *Third Report on State Responsibility*, ¶ 26, U.N. Doc. A/CN.4/507 (2000) (stating that "the general obligation of reparation arises automatically upon the commission of the internationally wrongful act. That obligation is not, as such, contingent upon a demand or protest by any injured State, even if the form that reparation should take in the circumstances may be contingent.").

57. Stern, *supra* note 36, at 94 (noting that it would introduce a "review of legality through the institutions of international responsibility").

58. *See* Crawford, *supra* note 56, ¶ 26.

59. Articles on State Responsibility, *supra* note 11, art. 30(a).

obligation to provide guarantees of non-repetition,[60] have more to do with a return to legality than with reparation for injury.[61]

The fundamental nature of the shift in the law of international responsibility that is brought on by the introduction of the notion of objective responsibility was noted by France in its comments on the ILC draft articles. France commented that draft Article 1 of the Articles on State Responsibility was not acceptable because it attempts to set up an international public order and to defend objective legality instead of subjective state rights. The aims of the law of responsibility should not extend to protection of international law itself.[62] However, other states appear to have few problems with the notion and, therefore, this can be accepted as a statement of the law.

Responsibility, abstracted from any particular injured party who may seek relief, is a rather esoteric notion. What does it really mean (other than an obligation of cessation that already flows from the primary norm itself) to provide reparation, if there is no invocation of responsibility? It is not easy to see how a court or other institution could consider a case of responsibility, determine injury, and fashion appropriate relief, in the absence of injured parties.[63] Nonetheless, basing responsibility on illegality rather than injury is not an insignificant symbolic step toward a more public law and a constitutionally-oriented law of responsibility. It demonstrates that when a state breaches an international obligation, certain legal consequences flow from that act, irrespective of whether another state has the interest or political courage of invoking the responsibility of the wrongdoing state.

The platonic nature of the notion of responsibility as a constitutional concept is to some extent remedied by the introduction in the Articles on State Responsibility of the possibility that non-injured states can invoke state responsibility. While Article 42 grants a right to injured states to invoke responsibility, Article 48 discards the requirement of legal injury as a condition for invocation in regard to breaches of obligations owed either to a group of states that are established for the protection of a collective interest of the group or to the international community as a whole.[64] The same holds for Article 52 of the Draft Articles on the Responsibility of International

60. *Id.* art. 30(b).

61. Stern, *supra* note 36, at 102.

62. ILC, *State Responsibility, Comments and Observations Received From Governments*, U.N. Doc. A/CN.4/488 (Mar. 25, 1998); *see also* Stern, *supra* note 36, at 99, n.12.

63. Alain Pellet wrote that these public forms of international responsibility are platonic. NGUYEN QUOC DINH ET AL., DROIT INTERNATIONAL PUBLIC 765 (6th ed. 1999).

64. *See* Edith Brown Weiss, *Invoking State Responsibility in the Twenty-First Century*, 96 AM. J. INT'L L. 798 (2002).

Organisations. Upon breach of these norms, any state other than an injured state is entitled to invoke the responsibility of the wrongdoing state. When a treaty protects the collective interest of the parties, all states party to that treaty could invoke responsibility as if they were "private attorneys-general" and thereby fulfil a public function.[65] All states could also invoke the responsibility of a state that violates a jus cogens norm, such as the obligation to protect fundamental human rights or the prohibition of genocide, not because their subjective rights are affected or because they would suffer legal injury, but because they are empowered to enforce the interest of the international community.[66] This is a quintessentially constitutional construction based on the recognition of a category of public interest norms.

The decision of the ILC to not qualify the interests of these third-party states, in terms of legal injury, has been critiqued and may not have been necessary.[67] It probably was induced by the unfortunate decision to include countermeasures in the law of responsibility. Since the right to take countermeasures is restricted to injured states[68] and granting the right to take countermeasures to indirectly injured states is controversial,[69] the category of injured states must be restricted to what now is covered by Article 42.[70] While it would have been possible to qualify the interests covered by Article 48 in terms of legal injury, for present purposes it would not have made much of a difference. Either way, the law of international responsibility grants all parties to a treaty the right to invoke responsibility for the protection of a collective interest of the group, as well as the right to invoke responsibility for the protection of the international community as a whole.

The constitutional ambitions of the law of responsibility are particularly clear with regard to serious violations of peremptory norms. These are not only wrongful against a state entitled to performance of an obligation, but also vis-à-vis the international community of states as a whole. International law obliges all states to take measures to bring such wrongs to an end, and prohibits states from recognizing a

65. William B. Rubenstein, *On What a Private Attorney General Is—and Why It Matters*, 57 VAND. L. REV. 2129 (2004).

66. *See generally* CHRISTIAN J. TAMS, ENFORCING OBLIGATIONS *ERGA OMNES* IN INTERNATIONAL LAW (2005).

67. Stern, *supra* note 36.

68. Articles on State Responsibility, *supra* note 11, art. 49(1).

69. See the saving clause in *id.* art. 54. *See generally* Denis Alland, *Countermeasures of General Interest*, 13 EUR. J. INT'L L. 1221 (2002).

70. Julia Barboza, *Legal Injury: The Tip of the Iceberg in the Law of State Responsibility*, *in* INTERNATIONAL RESPONSIBILITY TODAY 7, 21 (2005).

situation created by such a breach as lawful.[71] These articles have been critiqued because they do not impose any obligation on the wrongdoing state apart from what any wrongdoing state would be obliged to do anyway. Still, this may not be the point. What Article 41 adds is an obligation of other states to take action to induce and secure a return to legality, quite irrespective of claims for reparation.

The reliance on individual states to seek return to legality is not what one would expect to find in domestic constitutional law. Though the ILC has explored the link between these public order principles and the institutions of the United Nations,[72] the adopted text does not incorporate any institutional mechanisms. Given the absence of proper international institutions that could enforce the law and secure legality (which in itself reflects the very modest stage of constitutionalization of international law), there were few other options. The default position was to add public order arrangements to a well-established set of principles devised for different problems, and to leave the protection of public order to the states.

Compared to the public order side effects of the traditional, bilateral law of responsibility, the removal of the concept of legal injury, the recognition of the rights of all states to invoke responsibility in case of breached norms protecting the collective interest, and the formulation of obligations on all states to respond to a serious breach of peremptory norms, have added a stronger constitutional nature to the law of responsibility. This strengthens the organizational power of the law of responsibility, adds to its power to control illegal acts, and at the same time reflects and contributes to the recognition of public interest norms in international law.

B. Treaty Regimes

While the emergence of constitutional notions in the law of international responsibility is to some extent a paper exercise, particular treaty regimes show that constitutional notions can have practical effects. One example is the European Convention on Human Rights. Traditionally, the system of the Convention was based on injury. Under the Convention, individuals whose human rights are violated may invoke the responsibility of the wrongdoing state.[73] This system is more analogous

71. Articles on State Responsibility, *supra* note 11, arts. 40–41. Similar provisions are contained in the Draft Articles on the Responsibility of International Organizations, *supra* note 12, arts. 44–45.

72. ILC, *Addendum to Eighth Report on State Responsibility*, U.N. Doc. A/CN.4/476/Add.1 (May 14, 1996) (*prepared by* Gaetano Arangio-Ruiz).

73. ECHR art. 34.

to public law remedies[74] than to tort-type claims, but in either construction the Convention depends on injury. The obligation to provide reparation that follows from the ECtHR's determination of wrongfulness concerns reparation to the injured victim. If insufficient reparation is provided at the domestic level, under Article 41, the ECtHR can order the state to provide just satisfaction to the victim.[75] Though its general approach is narrow, the ECtHR has always recognized the broader interests it served in its motivation and reasoning in the sphere of remedies.

In recent case law, the ECtHR has moved away from the injury-based model.[76] In cases like *Broniowski*[77] and *Sejdovic*,[78] the ECtHR departed from its traditional approach of doing justice in individual cases and determined what general measures were necessary to remove inconsistencies between the Convention and domestic law.

Although the ECtHR does not expressly formulate this approach in terms of principles of responsibility, its approach can be seen as an application of the obligation to provide guarantees of non-repetition. In interstate cases, guarantees of non-repetition are commonly sought when "the injured State has reason to believe that the mere restoration of the pre-existing situation does not protect it satisfactorily."[79] Repeal of legislation that allowed the breach to occur is one way to provide guarantees of non-repetition.[80] This is also applicable to international responsibility vis-à-vis individuals for human rights violations. The ECtHR has made clear that its orders for general measures are aimed at the future, not (as is the case for its orders under Article 41 of the Convention) at the past, and that they seek to remove the legislation that allowed the breach to occur. This would lead to future breaches without remedial action. In *Broniowski*, the ECtHR noted that:

> in view of the systemic situation which it has identified, the Court would observe that general measures at national level are undoubtedly called for in execution of the present judgment, measures

74. VAN HARTEN, *supra* note 28, at 145 (discussing public law remedies in the context of investment law).

75. ECHR art. 41.

76. Valerio Colondrea, *On the Power of the European Court of Human Rights to Order Specific Non-monetary Measures: Some Remarks in the Light of the* Assanidze, Broniowski *and* Sejdovic *Cases*, 7 HUM. RTS. L. REV. 396–411 (2007); Alexander Orakhelashvili, *The European Convention on Human Rights and International Public Order*, 5 CAMBRIDGE Y.B. EUR. LEGAL STUD. 237 (2004).

77. Broniowski v. Poland, 43 Eur. Ct. H.R. 1 (2006).

78. Sejdovic v. Italy, 42 Eur. Ct. H.R. 360 (2006).

79. JAMES CRAWFORD, THE INTERNATIONAL LAW COMMISSION'S ARTICLES ON STATE RESPONSIBILITY 198 (2002).

80. *Id.* at 199.

> which must take into account the many people affected. Above all, the measures adopted must be such as to remedy the systemic defect underlying the Court's finding of a violation so as not to overburden the Convention system with large numbers of applications deriving from the same cause.[81]

The ECtHR thus assumed the role of a quasi-constitutional court by verifying the compatibility of domestic law with the Convention, irrespective of individual injury.

Another example of a treaty regime that displays, in the application of principles of responsibility, certain constitutional features is the World Trade Organization (WTO) Dispute Settlement Understanding (DSU). The DSU does not provide for reparation for past injury, but instead aims at ensuring legality and compliance in the future.[82] Though there is room for discussion on whether the DSU could or should order retrospective remedies,[83] as it in fact it did in the *Australia-Leather* case,[84] this is not its primary aim. In terms of principles of responsibility, it is mostly concerned with return to legality through cessation and continued performance.

Moreover, under certain conditions, the DSU allows a wide category of states to bring a claim against a wrongdoing state. In *European Communities—Regime for the Importation, Sale and Distribution of Bananas*, the Appellate Body (AB) agreed with the panel that the DSU does not contain any explicit requirement that a member must have a "legal interest" as a prerequisite for requesting a panel.[85] It then held that, although the United States had "no legal right or interest" in the case, its interest in trade in bananas, together with the general interest in enforcement of WTO rules, were sufficient to establish a right to pursue a WTO

81. *Broniowski*, 43 Eur. Ct. H.R., ¶ 193.

82. Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, Legal Instruments—Results of the Uruguay Round, 33 I.L.M. 1123 (1994), *available at* http://www.wto.org/english/tratop_e/dispu_e/dsu_e.htm#3. *See generally* Marco Bronckers & Naboth van den Broek, *Financial Compensation in the WTO: Improving Remedies in WTO Dispute Settlement*, *in* REFORM AND DEVELOPMENT OF THE WTO DISPUTE SETTLEMENT SYSTEM 43 (2006).

83. *See generally* Joel P. Trachtman, *Building the WTO Cathedral*, 43 STAN. J. INT'L L. 127 (2007).

84. Panel Report, *Australia—Subsidies Provided to Producers and Exporters of Automotive Leather—Recourse to Article 21.5 of the DSU by the United States*, WT/DS126/RW (Jan. 21, 2000) (holding that Article 19.1 of the DSU does not limit remedies under Article 4.7 of the SCM Agreement to purely prospective action). *See generally* Gavin Goh & Andreas R. Ziegler, *Retrospective Remedies in the WTO After Automotive Leather*, 6 J. INT'L ECON. L. 545 (2003).

85. Appellate Body Report, *European Communities—Regime for the Importation, Sale and Distribution of Bananas*, ¶ 132, WT/DS27/AB/R (Sept. 25, 1997).

dispute settlement proceeding "since any deviation from the negotiated balance of rights and obligations is more likely than ever to affect them, directly or indirectly."[86] The use of the term "legal interest" is confusing; surely all states party to the treaty have a legal interest in seeking compliance with its rules.[87] In view of its reference to the potential stakes of the United States in the banana trade, the AB did not accept a general actio popularis, and provided for a narrower category of states that could invoke responsibility than Article 48 of the Articles on State Responsibility. Nonetheless, the AB accorded the United States a role as "private attorney-general" with the power to seek return to legality, at least in part based on the wider interest of a rule-based system.

The role of the DSU in seeking return to legality and the recognition of the right of all state parties to bring a case before it can be seen as part of the process that has led several commentators to speak of the WTO in constitutional terms.[88]

IV. INTERNATIONAL RESPONSIBILITY AS A UNITARY SYSTEM

The law of international responsibility may serve two interests: the protection of subjective rights of injured parties and the protection of the legal order.[89] The question to be considered now is whether both functions can be served by one unitary set of principles.

A. The Notion of Unity

The rules on the International Responsibility of States and the Responsibility of International Organizations form a single, unitary system.[90] International law subjects all breaches of any rule of international law, irrespective of the origin and contents of these rules, to a relatively uniform set of secondary principles. Contrary to many national systems, it does not distinguish between contractual and

86. *Id.* ¶ 136.

87. Joost Pauwelyn, *The Nature of WTO Obligations* (Jean Monnet Working Papers No. 1/02, 2002), *available at* http://www.jeanmonnetprogram.org/papers/02/020101.html; *see also* JOOST PAUWELYN, CONFLICT OF NORMS IN PUBLIC INTERNATIONAL LAW: HOW WTO LAW RELATES TO OTHER RULES OF INTERNATIONAL LAW (2003).

88. Jeffrey L. Dunoff, *Constitutional Conceits: The WTO's "Constitution" and the Discipline of International Law*, 17 EUR. J. INT'L L. 647 (2006); Markus Krajewski, *Democratic Legitimacy and Constitutional Perspectives of WTO Law*, 35 J. WORLD TRADE 167 (2001); Joel P. Trachtman, *The Constitutions of the WTO*, 17 EUR. J. INT'L L. 623 (2006).

89. Barboza, *supra* note 70, at 19–20.

90. Crawford & Olleson, *supra* note 2, at 451.

tortious responsibility, or between civil, criminal, or other forms of public law (administrative) responsibility.[91]

To say that all breaches of any rule of a particular system of law are subject to a unitary system of responsibility does not necessarily mean that system can only fulfill one function. Just as domestic tort law or domestic criminal law may fulfill a wide variety of functions without affecting its unitary status, the multiple functions of the law of responsibility do not in itself preclude its unitary nature.

To say that all breaches of any rule of a particular system of law are subject to a unitary system of responsibility also does not mean that such a system cannot make distinctions. In tort law, it is common to differentiate between liability based on fault and liability for particularly risky activities, which may be subject to strict liability.[92] This does not necessarily undermine the claim that the principles of European tort law are a unitary set of principles. Likewise, the mere fact that the law of state responsibility makes serious breaches of peremptory norms subject to a special regime[93] does not necessarily mean that such breaches cannot be part of the same system of responsibility.

Rather, what is meant by the law of responsibility as a unitary system is that the various forms of responsibility (strict liability, ordinary wrongs, wrongs arising out of serious breaches of peremptory norms) are subject to the same general principles of responsibility, and that they form a relatively coherent whole. Thus, although ultra-hazardous activities are subject to strict rather than fault liability, they are subject to the same principles of, among others, attribution, causation, and reparation. Because of the connecting effects of these common principles, they still may be thought of as part of a coherent system. Likewise, although somewhat controversial, it is thought that serious breaches of peremptory norms are subject to the same principles of attribution, defenses, and reparation as ordinary wrongful acts. In the *Genocide* case, the ICJ stated that the particular characteristics of genocide do not justify the ICJ in departing from the normal criteria for attribution as they apply under general international law:

> [t]he rules for attributing alleged internationally wrongful conduct to a State do not vary with the nature of the wrongful act in question

91. *See generally* Rainbow Warrior (N.Z. v Fr.), 20 R.I.A.A. 217 (1990); Crawford & Olleson, *supra* note 2, at 451–52.

92. *See generally* Franz Werro et al., *Strict Liability in European Tort Law: An Introduction*, *in* THE BOUNDARIES OF STRICT LIABILITY IN EUROPEAN TORT LAW 3 (Franz Werro &Vernon Valentine eds., 2004).

93. *See* Articles on State Responsibility, *supra* note 11, arts. 40–41.

> in the absence of a clearly expressed lex specialis. Genocide will be considered as attributable to a State if and to the extent that the physical acts constitutive of genocide that have been committed by organs or persons other than the State's own agents were carried out, wholly or in part, on the instructions or directions of the State, or under its effective control. This is the state of customary international law, as reflected in the ILC Articles on State Responsibility. [94]

By contrast, liability for injurious consequences of acts not prohibited by international law is subject to an altogether different set of principles.[95] Notably, one of the two foundations for international responsibility, breach of an international obligation, is not applicable at all. The Draft Principles on the Allocation of Loss in the Case of Transboundary Harm Arising Out of Hazardous Activities also contain nothing on circumstances precluding wrongfulness, and have an altogether different set of forms of reparation.

Whether or not two forms of responsibility do or do not form part of a unitary system, to some extent, is a relative matter. It depends first on how one defines the system. Second, on how many exceptions one allows before concluding that the exceptions overtake the common ground, resulting in two sets of principles rather than one unitary set. As with the example of strict liability in the principles of European tort law, some principles may be inapplicable without the body of law, as a whole, losing its unitary character. However, at some point, the exceptions overtake the principle and one unitary system may turn into two systems.

The location of the breaking point may depend on a wide variety of considerations. Coherence of a set of principles is one such consideration, though one that may lead to different conclusions for different observers. The ILC's decision to create a separate system for acts not prohibited by international law has been critiqued as conceptually unnecessary.[96] From the perspective of the drafters of the text, the

94. *Case Concerning the Application of the Convention on the Prevention and the Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, ¶ 401 (Feb. 26, 2007), *available at* http://www.icj-cij.org/docket/files/91/13685.pdf. For a brief discussion of the question whether attribution in cases of serious breaches of peremptory norms are governed by the same principles as ordinary wrongs, see André Nollkaemper, *Concurrence Between Individual Responsibility and State Responsibility in International Law*, 52 INT'L & COMP. L.Q. 615 (2003).

95. ILC, *Draft Principles on the Allocation of Loss in the Case of Transboundary Harm Arising Out of Hazardous Activities*, ¶ 66, U.N. Doc. A/61/10 (2006), *available at* http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/9_10_2006.pdf.

96. *See generally* Alan E. Boyle, *State Responsibility and International Liability for Injurious Consequences of Acts not Prohibited by International Law: A Necessary Distinction?*, 39 INT'L & COMP. L.Q. 1

acceptability of either one or two separate drafts will form an altogether different consideration. This may help explain why, even at the peak of the attempt to introduce the notion of state crimes in what are now the Articles on State Responsibility, the option to disconnect state responsibility from breaches of state responsibility for crimes was not high on the agenda. No general answers are available to the question of when a set of principles should cease to be a unitary whole and much will depend on context-specific considerations, including political ones.

B. Ruptures in the Law of Responsibility

The introduction of constitutional elements into the law of international responsibility undermines its unitary nature. Stern refers to this as a "rupture of responsibility" by introducing incompatible notions in what is supposed to be a coherent body of law.[97] The introduction of constitutional notions into the law of international responsibility appears to have created a separation between some principles that look primarily or exclusively to the "private law" function of reparation for injury, and other principles that look primarily or exclusively to the constitutional functions.

Large parts of the law of international responsibility, in particular the articles on reparation and countermeasures, remain rooted in the idea that responsibility is based on a breach of an obligation toward a person who is entitled to the performance of that obligation.[98] Somewhat paradoxically, in light of Articles 1 and 2 of the Articles on State Responsibility (that do not require injury as a condition for responsibility), the principles of reparation make clear that no remedy is provided for breaches of international obligations where no material or moral damage has occurred. In other words, there is no responsibility without injury.[99] Article 31 provides that there must be full reparation for the damage, whether material or moral, caused by the internationally wrongful act.

However, the protection of objective legality in Article 1, as well as the engagement of third states through Articles 48 and 41 is (at least as envisaged by the ILC)

(1990) (a critical discussion of the distinction).

97. Stern, *supra* note 36, at 99.

98. Arguably, any concept of international responsibility (or, more broadly formulated, accountability) requires a relationship between the wrongdoing actor and an *account-holder*, or *accountee*. *See* MARK BOVENS, THE QUEST FOR RESPONSIBILITY: ACCOUNTABILITY AND CITIZENSHIP IN COMPLEX ORGANIZATIONS 23–24 (1998); *see also* Stern, *supra* note 36, at 93. *But see* Gardner, *supra* note 56, at 164–65 (critiquing the relational conception of responsibility).

99. Barboza, *supra* note 70, at 9.

not premised on legal injury, but rather on protecting the public order. The coexistence of reparation-for-injury principles and protection-of-legality principles applies similarly in the Draft Articles on Responsibility of International Organizations.

In the latter articles, the ILC also accepted that transgression of the obligations of a foundational treaty would lead to responsibility of the organization to its member states. It is not easy to see that the responsibility that flows from ultra vires acts vis-à-vis member states, even though the acts certainly can violate the rights of member states, is necessarily of the same character as responsibility toward a third state to which an organization would cause damage. In the United Kingdom, ultra vires administrative acts that cause loss do not give rise to liability per se. Satisfying the conditions for annulment in a judicial review action does not necessarily equate with wrongfulness as expressed in the breach of a duty of care in negligence.[100] This may be equally true in international law. Indeed, it may be better to say that these are ultra vires acts, akin to a proclamation of a 100–mile territorial sea, that do not necessarily trigger responsibility.[101]

Many principles of international responsibility will be applicable to all forms of responsibility, thus to some extent maintaining the unity of the law of responsibility. However, this cannot be presumed. Consider the following example. In their responses to the ILC, several organizations referred to case law of administrative tribunals as support for the transposition of the principle of necessity, as adopted in the state responsibility articles, to the responsibility of international organization.[102] It is not obvious that this is really the same principle of necessity. Is the requirement of protection of a state against a "grave and imminent peril"[103] equally applicable to the relationship between an organization and an employee? The principle in its public law-type relationships would have a somewhat different form and meaning.

Despite the two quite different forms of logic that they embody, and the possible effects these differences have on the content of the "common" principle, mainstream opinion would still say that the principles of responsibility form a unitary whole. Given the flexibility of the concept of unity itself, one need not object. However, unity and common ground are limited and probably decreasing.

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100. FAIRGRIEVE, *supra* note 30, at 43; MARTINA KÜNNECKE, TRADITION AND CHANGE IN ADMINISTRATIVE LAW 174 (2007) (for the separate treatment of judicial review and liability as part of administrative law).

101. BROWNLIE, *supra* note 47, at 30.

102. International Labour Organization Administrative Tribunal, Judgment No. 2183 (Mar. 2, 2003), cited in ILC, *Responsibility of International Organizations—Comments and Observations Received From International Organizations*, 7–8, U.N. Doc. A/CN.4/568 (Mar. 17, 2006).

103. Articles on State Responsibility, *supra* note 11, art. 25(1)(a).

C. Mechanisms to Maintain Unity

The fact that ruptures, and certainly the inconsistencies in the law of international responsibility caused by the process of constitutionalization, have been relatively modest may be explained in part by the use of certain conflict-avoidance techniques. These techniques allow for differentiation in the law of responsibility without affecting the core principles.

One such conflict-avoidance technique is the strict separation between primary and secondary norms. For instance, by deferring the fundamental question of fault to primary rules, the law of international responsibility has been able to survive as a relatively narrow set of rules that is possibly applicable to all wrongful acts. If fault would have been maintained in the body of secondary rules, it would have been much harder to maintain the present text as a unitary set of principles.[104] Likewise, international law has been able to prevent recognizing a basic liability norm of the sort recognized by the Principles of European Tort Law ("[a] person to whom damage to another is legally attributed is liable to compensate that damage")[105] by relying on a general (primary) due diligence norm. Breach of that norm, in many respects, will lead to the same result as the result envisaged by the basic norm of the Principles of European Tort Law. However, by deferring it to the primary norms, it prevents the law of responsibility from acquiring an all too private law nature, which possibly would cause more conflicts with the emerging constitutionalization.

The use of lex specialis in the system of international responsibility has also allowed the law of international responsibility to largely maintain its unity.[106] This allows regimes such as the European Convention of Human Rights and the WTO to pursue their own constitutional ambitions without directly affecting the coherence of the general principles. In the law of responsibility of international organizations, "rules of the organization" provide an additional safety valve. For instance, Article 35(2) of the draft Articles on the Responsibility of International Organizations provides the general principle that a responsible international organization may not rely on its rules as justification for failure to comply with its obligations "is without prejudice to the applicability of the rules of an international organization in respect of the responsibility of the organization towards its member States

104. Even though fault has been removed entirely from the law of responsibility, see e.g., Gaetnao Arangio-Ruiz, *State Fault and the Forms and Degrees of International Responsibility: Questions of Attribution and Relevance*, *in* LE DROIT INTERNATIONAL AU SERVICE DE LA PAIX, DE LA JUSTICE ET DU DÉVELOPPEMENT 25, 25–26 (Mélanges Michel Virally ed., 1991).

105. PRINCIPLES OF EUROPEAN TORT LAW, *supra* note 40, art. 1:101.

106. Articles on State Responsibility, *supra* note 11, art. 55.

and organizations." This would seem to allow for the application of special rules of responsibility, which may deviate from the general law of responsibility.

A third reason why the law of international responsibility has largely been able to maintain its unity is that, in practice, states and international institutions prefer to handle public law aspects arising out of nonperformance of international obligations outside the law of international responsibility. This is quite obvious for highly political issues. One of the reasons for the demise of the concept of state crimes is the fact that states preferred to leave the consequences of serious violations of fundamental international norms to political organs, notably the U.N. Security Council.[107] It is also generally true that states and international organizations do not treat public order questions in terms of responsibility. They do not seem to consider nonperformance of obligations under international environmental treaties as a matter of international responsibility. Indeed, they are precisely a response to the limits of the conceptual structures and limitations of the classical doctrine of state responsibility.[108]

Reliance mechanisms of lex specialis and institutional solutions that are not qualified as issues of responsibility may save unity. As a consequence, the scope and practical effect of the core body of principles of international responsibility is marginalized. States, international organizations, and international courts may seek solutions for particular questions of responsibility outside the law of responsibility as codified by the ILC.[109]

D. Possible Costs of Hanging on to Unity

One might take the position that the question of whether or not a particular set of principles forms a unity is a matter of doctrinal interest only. However, in addition to the marginalization of the general part of the law of international responsibility as identified above, certain other costs may be involved.

First, the coexistence of "reparation for injury principles" and "consequences of illegality principles" may have institutional consequences. The emphasis that the ECtHR now places on guarantees of non-repetition, signaling its increasing constitutional role in the protection of legality, may eventually make the ECtHR

107. *See, e.g.*, ILC, *State Responsibility: Comments and Observations Received From Governments*, art. 41, U.N. Doc A/CN.4/515 (Mar. 19, 2001).

108. Jutta Brunnée, *International Legal Accountability Through the Lens of the Law of State Responsibility*, 36 NETH. Y.B. INT'L L. 21 (2005).

109. *Cf.* Christine Gray, *The Choice Between Restitution and Compensation*, 10 EUR. J. INT'L L. 413, 418, 422–23 (1999).

less accessible for compensation claims. This development is hardly compatible with the original injury-based approach of the ECtHR—and will not always help claimants find the relief they seek. These effects might be more a consequence of organizational problems of the ECtHR than a necessary consequence of the use of multiple principles and aims of responsibility. Indeed, there seems to be an inextricable link between the two.

Second, the coexistence of two sets of principles with different aims and different natures may lead to inconsistencies. One example is the relationship between the regime under Article 48 and the law of diplomatic protection.[110] Article 48(3) expressly makes the invocation of responsibility by an interested state subject to the same requirements as invocation by an injured state—requirements that are contained in Articles 43–45. Article 44(a) provides that a state may not invoke the responsibility of another if "the claim is not brought in accordance with any applicable rule relating to the nationality of claims." It deferred the definition of this rule to its work on diplomatic protection.[111] This is hard to reconcile with the ILC's claim, made in the commentary to its Draft Articles on Diplomatic Protection, that the invocation of responsibility by an interested State under Article 48(1)(b) is not subject to the conditions set out in Article 44, including the nationality of claims rule.[112]

The 2006 Draft Articles on Diplomatic Protection are predicated on the link of nationality and thus preclude the protection of non-nationals. This ensures that the "communitarian promise" of Article 48(1)(b) remains largely ineffective. This conclusion is supported by draft Article 8 on the protection of refugees.[113] Iain Scobbie

110. *See* Iain Scobbie, *Assumptions and Presuppositions: State Responsibility for System Crimes*, *in* SYSTEM CRIMINALITY IN INTERNATIONAL LAW (André Nollkaemper & Harmen van der Wilt eds., forthcoming 2009); *see also* Annemarieke Vermeer-Küunzli, *A Matter of Interest: Diplomatic Protection and State Responsibility Erga Omnes*, 56 INT'L & COMP. L.Q. 553 (2007).

111. *See* ILC, *supra* note 10, ¶ 2, n.683.

112. ILC, *Report of the International Commission, Draft Articles on Diplomatic Protection with Commentaries*, art. 16, ¶ 2, n.245, U.N. Doc. A/61/10 (2006). *But see* Enrico Milano, *Diplomatic Protection and Human Rights Before the International Court of Justice: Re-fashioning Tradition?*, 35 NETH. Y.B. INT'L L. 85, 103–08 (2004).

113. Article 8 provides:

> 1. A State may exercise diplomatic protection in respect of a stateless person who, at the date of injury and at the date of the official presentation of the claim, is lawfully and habitually resident in that State.
> 2. A State may exercise diplomatic protection in respect of a person who is recognized as a refugee by that State, in accordance with internationally accepted standards, when that person, at the date of injury and at the date of the official presentation of the claim, is lawfully and habitually resident in that State.

rightly asks "[i]f a State cannot seek remedies for non-nationals established within its territory for injuries caused by their national State, how can it seek the 'performance of the obligation of reparation' for those with whom it lacks all connection? How could it establish that it was acting in their interest?"[114]

Third, maintaining unity means that value is attached to protecting the common ground. However, protecting the common ground may go at the cost of refinement, detail, and progress in those areas where there is no common ground. Both the principles of responsibility applying to reparation for injury and the principles seeking a more constitutional function may remain relatively undeveloped as a result of the attempt to keep them together.

As to the former, although the law of international responsibility has largely followed a private law model, from the perspective of the interests that private law may need to serve, it remains rather undeveloped. Major issues that need to be addressed when tort claims have to be decided are barely developed. Examples are questions of extinctive prescription,[115] joint and several liability,[116] and causation.[117] Perhaps due to the fact that so few international claims actually lead to monetary damages, such lacune are mostly unnoticed at the level of general international law. The increasing judicialization of the law of international responsibility may make the need for a developed system of "private wrongs" for the handling of international claims more important. The rather undeveloped principles for handling civil claims were, for instance, felt in the determination of loss in the U.N. Compensation Commission,[118] the Ethiopia-Eritrea Claims Commission,[119] and in the virtual absence of "private law" principles that the International Criminal

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3. Paragraph 2 does not apply in respect of an injury caused by an internationally wrongful act of the State of nationality of the refugee.

ILC, *supra* note 113, art. 8.

114. Scobbie, *supra* note 110 (manu. at 30).

115. *See, e.g.*, KAJ HOBÉR, EXTINCTIVE PRESCRIPTION AND APPLICABLE LAW IN INTERSTATE ARBITRATION (2001).

116. *See, e.g.*, John E. Noyes & Brian D. Smith, *State Responsibility and the Principle of Joint and Several Liability*, 13 YALE J. INT'L L. 225 (1988).

117. *See, e.g.*, TAL BECKER, TERRORISM AND THE STATE: RETHINKING THE RULES OF STATE RESPONSIBILITY (2006); François Rigaux, *International Responsibility and the Principle of Causality*, *in* INTERNATIONAL RESPONSIBILITY TODAY: ESSAYS IN MEMORY OF OSCAR SCHACHTER 81 (Maurizio Ragazzi ed., 2005).

118. David D. Caron, *The UNCC and the Search for Practical Justice*, *in* THE UNITED NATIONS COMPENSATION COMMISSION 367, 377 (Richard B. Lillich ed., 1995).

119. Won Kidane, *Civil Liability for Violations of International Law: The Jurisprudence of the Eritrea-Ethiopia Claims Commission in The Hague*, 25 WIS. INT'L L. J. 23, 37–38 (2007).

Court can apply in handling claims by a victim.[120] Also, the ECtHR has been forced to develop its own lex specialis on several such issues.[121]

On the other hand, the constitutional dimensions of the law of international responsibility also remain relatively undeveloped. The recognition and development of public law or "constitutional" principles may have been hampered by the fact that states did not wish to label these principles in terms of legal responsibility, which would associate them with the traditional unitary responsibility. As long as only one unitary body of responsibility exists, the formulation of principles of responsibility either would have to occur within that paradigm or would be disconnected altogether. Choosing the latter has led to a grey area of practices and principles that are not qualified in terms of illegality, even though that is exactly what they are concerned with.

A wide variety of treaty mechanisms now provide for some form of "accountability short of responsibility" in response to treaty violations by states or international organizations.[122] While such processes do involve accountability, including in the sense that a "forum" assesses whether conduct is compatible with prior established rules or principles, and some form of sanction (formal or informal) may follow,[123] in terms of outcomes, such mechanisms do not involve a determination of responsibility.[124] That conclusion is not affected by the fact that some of these procedures, notably the compliance procedures under the Aarhuus Convention, do frequently refer to principles of responsibility.[125] Such procedures are not primarily concerned with making things good for victims, but are instruments to secure control of public power, to limit abuses of power, and to further the rule of law. They resemble more a public law concept of ultra vires acts and, in many respects, may be more akin to constitutional or administrative law principles.[126]

120. Gioia Greco, *Victims' Rights Overview Under the ICC Legal Framework: A Jurisprudential Analysis*, 7 INT'L CRIM. L. REV. 531, 533–34 (2007).

121. Matti Pellonpää, *Individual Reparation Claims Under the European Convention on Human Rights*, *in* STATE RESPONSIBILITY AND THE INDIVIDUAL: REPARATION IN INSTANCES OF GRAVE VIOLATIONS OF HUMAN RIGHTS 109 (1999).

122. *See* Geir Ulfstein et al., *Introduction* to MAKING TREATIES WORK: HUMAN RIGHTS, ENVIRONMENT AND ARMS CONTROL, *supra* note 23, at 6.

123. Deidre Curtin & André Nollkaemper, *Conceptualizing Accountability in International and European Law*, 36 NETH. Y.B. INT'L L. 3 (2005).

124. Martti Koskenniemi, *Breach of Treaty or Non-Compliance? Reflections on the Enforcement of the Montreal Protocol*, 3 Y.B. INT'L ENVTL. L. 123, 145–46 (1992).

125. *See* CASE LAW OF THE AARHUS CONVENTION COMPLIANCE COMMITTEE (2004–2008) (A. Andrusevych et al. eds., 2008).

126. Kingsbury, *supra* note 27, at 61.

In the framework of international organizations, actions taken by international organizations against member states in response to non-compliance by such members are probably best treated under the special regime of the rules of the organization, rather than under the concept of countermeasures as they apply in the general law of responsibility of international organizations.[127] The question of implementation of the responsibility of member states by international institutions has been treated neither in the law of state responsibility, nor in the law of international organization responsibility, leaving it generally to the rules of the organization and outside the law of responsibility.[128]

There has therefore emerged a body of principles and practices that deal with the core aspects of constitutionalization identified in Part I (organization, control of legality, and public interest values) separate from the law of international responsibility, and indeed not commonly discussed in terms of responsibility. While constitutionalization is partly reflected in the law of responsibility, the constitutional forms of responsibility and accountability are primarily developed outside this body of law. It is remarkable that so much ink has been spilled over Article 48 of the Articles on State Responsibility, whereas much less attention has been given to constitutional or administrative law principles in the framework of international institutions, which are of substantially more practical relevance.[129] Indeed, it seems that the effort to introduce public law notions into the law of responsibility, and to use that as the main vehicle for basic notions of constitutionalization, has led to the neglect of the need to develop a wider coherent body of legal principles that applies to the control of legality for the protection of public interest norms.

CONCLUSION

The process of constitutionalization has not left the law of international responsibility untouched. In certain limited, but distinct, dimensions, we can identify constitutional features of this body of law. This part of the law of responsibility is concerned with organizational principles, legality, and public interest norms, rather than legal injury of individuals or groups of states or international organizations. The manner in which the Articles on State Responsibility (and now the Articles on Responsibility of International Organizations) attempt to combine the traditional

127. ILC, *supra* note 10, at 255–56.

128. *Id.* at 261–63.

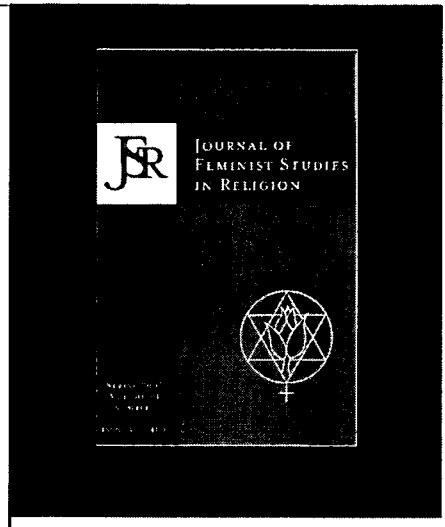
129. The notable exception is the work in the framework of the global administrative law project. Kingsbury, *supra* note 27.

model based on private law analogies with public law elements is rather incoherent and, in fact, pushes the unity to the breaking point. It still may be possible to consider the present law of international responsibility as a relatively unitary body that can fulfill two interests: the protection of rights of individual states and the preservation of public order. This unity can, in part, be preserved as a result of the fact that international courts have been able to fill, in an ad hoc manner, gaps in the private law dimension of international responsibility. It can also be preserved as a result of the fact that large areas of "public wrongs" are developed outside the law of responsibility, particularly in the form of a rapidly developing body of international administrative law, thereby marginalizing state responsibility.

It has been said that such practices should be brought within the law of responsibility, but that seems erroneous. It may be more fruitful to look more to comparative structures of domestic law, where constitutional and administrative law principles are quite separate from tort law. As yet, this is very poorly developed in international law. But that deficiency of international law cannot be solved by overburdening a body of principles of responsibility that was not and should not be developed to deal with this problem. Different problems call for different solutions.

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