IAN BROWNLIE

SYSTEM OF THE LAW OF NATIONS

STATE RESPONSIBILITY PART I

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Part I

BY

IAN BROWNLIE

Q.C., D.C.L., F.B.A.

Chichele Professor of Public International Law in the University of Oxford, Fellow of All Souls College, Oxford, Associé de l'Institut de Droit International

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PREFACE

This work is the first part of a study of the principles of state responsibility. The second part will be concerned with circumstances precluding wrongfulness, including the topic of lawful countermeasures. The study will cover the 'general principles' of state responsibility rather than particular areas of the incidence of state responsibility. At the same time the exposition necessarily involves considerable reference to matters of substance and in particular the question of 'causes of action' is taken up at some length. The writer has tried to keep a balance between the consideration of issues of 'pure' legal principle and necessary reliance upon the practice of states and the experience deriving from international judicial proceedings. The valuable work of the International Law Commission has been taken carefully into account.

The intention is to present an account of the issues which reflects the relevant experience and thus is not based upon a narrow or fashionable conception of what is important, and, moreover, to present a study which will be of practical value. Whilst the codification which may result from the work of the International Law Commission will be of benefit, it is not believed that such codification will remove the existing problems. The subject-matter of responsibility is closely bound up with the precise technical problems which have to be faced in the process of applying principles and concepts. The significance of categorical formulations is much reduced in the narrow defiles of particular claims and circumstances.

This volume forms part of a series of monographs on major aspects of the law of nations. That the first item to appear relates to state responsibility results from the casual fact that I have for long wanted an opportunity to expand on the treatment of the subject which appeared in my *Principles of Public International Law*, first published in 1966.

I would express my gratitude to Grotius Publications Ltd., publishers of the *International Law Reports* (ed. E. Lauterpacht, Q.C.), for permission to reproduce substantial passages from the Awards in the cases of *B.P.*v. *Libyan Arab Republic* and *Texaco* v. *Libyan Arab Republic*, contained in Volume 53 of the *Reports*. In addition the diplomatic material at pages 24–5 is taken from *British Practice in International Law*, of which Mr. Lauterpacht is the editor. The extracts from the *Italian*

Yearbook of International Law set out at pages 108–9 are reproduced with the permission of Editorial Scientifica s.r.l., whose kindness is gratefully acknowledged.

The text of the Award of the Arbitration Tribunal in the *Kuwait–Aminoil Arbitration* became available after the text of the present work had been completed: for the text of the Award see *International Legal Materials*, vol. 21 (1982), p. 976. Certain indications have been placed in the footnotes to Chapter XIII. In a general way (and as a matter of good fortune for the writer) the approach of the Tribunal to the problems of compensation confirms the approach to be found in the text of Chapter XIII. That is to say, the precise mode of settling problems of measure of damages (and the other issues of 'compensation') is intrinsically connected with the particular rules of substantive law bearing upon the particular case and the dealings of the parties.

Generally the text takes into account material available at the end of April 1982, but some later references have been added.

In conclusion I would thank Angela Blackburn, Hannah Brownlie, and Susan Prior for their assistance at the proof stage, and Derrick Wyatt for his kindness in undertaking to prepare the index.

Oxford,
25 May 1983.

IAN BROWNLIE

ABBREVIATIONS

A.J.	*American Journal of International Law*
Ann. Digest	*Annual Digest of Public International Law Cases*
Ann. français	*Annuaire français de droit international*
Annuaire de l'Institut	*Annuaire de l'Institut de Droit International*
Ann. suisse	*Annuaire suisse de droit international*
British Digest	C. Parry (ed.), *A British Digest of International Law*, 1965–7
B.Y.	*British Year Book of International Law*
Canadian Yrbk.	*Canadian Yearbook of International Law*
Grot. Soc.	*Transactions of the Grotius Society*
Hackworth, *Digest*	Hackworth, *Digest of International Law*, 8 vols., 1940–4
Hague Court Reports	Scott (ed.), Hague Court Reports
Hague *Recueil*	*Recueil des cours de l'Académie de droit international*
I.C.J. Pleadings	International Court of Justice: Pleadings, Oral Arguments, Documents
I.C.J. Reports	Reports of Judgments, Advisory Opinions and Orders of the International Court of Justice
I.C.L.Q.	*International and Comparative Law Quarterly*
I.L.M.	*International Legal Materials* (American Soc. of Int. Law)
Int. L.R.	International Law Reports, (ed.) Hersch and Elihu Lauterpacht
Ital. Yrbk.	*Italian Yearbook of International Law*
Kiss, *Répertoire*	*Répertoire de la Pratique Française en Matière de Droit International Public*, 5 vols.
McNair, *Opinions*	McNair, *International Law Opinions*, 3 vols., 1956
Moore, *Arbitrations*	Moore, *History and Digest of the International Arbitrations to which the United States has been a Party*, 6 vols., 1898
Moore, *Digest*	Moore, *Digest of International Law*, 8 vols., 1906
Parl. Deb.	Parliamentary Debates, United Kingdom
P.C.I.J.	Permanent Court of International Justice
Répertoire suisse	*Répertoire suisse de droit international*, 5 vols., 1975
Revue belge	*Revue belge de droit international*
R.G.D.I.P.	*Revue générale de droit international public*

R.I.A.A.	United Nations, Reports of International Arbitral Awards
Whiteman, *Digest*	Whiteman, *Digest of International Law*, 15 vols., 1963–73
Yrbk., I.L.C.	United Nations, *Yearbook of the International Law Commission*
Z.a.ö.R.u.V.	*Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*

CONTENTS

TABLE OF CASES

CHAPTER I

The History of State Responsibility

1. Perspective

In international relations, as in other social relations, the invasion of the legal interest of one subject of the law by another legal person creates responsibility in various forms. These forms will be determined by the given legal system and the customary forms of redress and self-help will vary from one historical period to another. The essential idea of responsibility is simple and has its basis both in religious thought and in the secular morality of which law is the outwork. It is the idea of being liable, answerable, accountable, for wrongdoing: hence the terminology: responsibility, *verantwortlichkeit, la responsabilité, la responsabilità.* Consequently, responsibility is an inherent element in any community based upon some system – perceived as such, however diffuse – of morality, religion, or law, or several of these.

Morality and law are concerned with damage not as such, but only when inflicted without justification: *damnum iniuria datum* was the condition for the action on the *Lex Aquilia* to lie.[1] The fundamental conception would remain the same whether the action or form of responsibility was 'penal' in nature, or was based upon fault, or involved 'strict liability', in which case the defendant would have the burden of exculpation. Similarly, in the development of the common law the legal terminology was that of contemporary morality: the terms used were *transgressio*, trespass, and misdemeanour.[2]

'Tracing the origins' of legal concepts and institutions can be an artificial and practically fruitless endeavour. Moreover, the more obsessive and persistent the enquiry, the more probable it is that the conclusions will be too ambitious and will involve solecism. In the case of state responsibility the task is complicated by two peculiarities of the genre. The first lies in the fact that the concept of responsibility is both very simple and yet sophisticated. It is both a fundamental moral idea

[1] Schulz, *Classical Roman Law*, Oxford, 1951, pp. 572, 587–91; Watson, *The Law of Obligations in the Later Roman Republic*, Oxford, 1965, pp. 236–41; De Zulueta, *The Institutes of Gaius, Part II, Commentary*, Oxford, 1953, pp. 212–16; Buckland, *Textbook of Roman Law*, 3rd ed. by Stein, 1963, pp. 585–7.

[2] Putnam, *Proceedings before the Justices of the Peace in the Fourteenth and Fifteenth Centuries*, 1938, introduction; Milsom, *Historical Foundations of the Common Law*, London, 1969, chapter 11.

common to laymen and lawyers, and a concept which in legal experience calls for considerable study and refinement, involving nice problems of measure of damages, liability for 'moral damage' and so forth. Secondly, in the earlier doctrine of the law of nations and even to some extent in the more recent past, the concept of state responsibility has been accorded a more or less latent role, and the existence of the concept has been a matter of assumption.

The successive editions of the well-regarded work of Hall, *International Law*, first published in 1880,[3] contain no general examination of the principles of state responsibility *as such* and no chapter or section devoted to the topic. The subject is treated in the context of sovereignty in relation to the territory of a state (Chapter IV) and the responsibility of a state for acts or omissions taking place in its territory (paragraph 65). However, Hall's discussion is far from negligible and he bears witness to the state of the doctrine thus: 'The subject of the responsibility of the state is not usually discussed adequately in works upon international law.'[4] There are more modern examples. The successful short treatment of Brierly,[5] *The Law of Nations*, contains no discussion of state responsibility as a category although there is some consideration of the duties owed in respect of aliens received on state territory.[6]

In spite of the difficulties, the origins of the developed concept of state responsibility are reasonably clear in the sources and they will be identified in the next section.

2. The Origins

The origins are multiple and the various strands will be examined separately. The order of treatment represents a certain historical sequence, but in a very general way.

(*a*) *The law of nations as a concept.*

By the sixteenth century the law of nations had, at least in respect of Europe (and states having regular relations with the principalities of Europe), evolved as a set of principles recognized in the practice of states and, eventually, in doctrine. Indeed, the 'set of principles' had been prefigured by political facts in that treaties were concluded outside

[3] For an earlier example: G. F. de Martens, *Précis du droit des gens moderne de l'Europe*, 2 vols., 1831.

[4] Hall, 2nd ed., 1884, p. 198 n. 1; 5th ed., 1904, p. 222 n. 1.

[5] 1st ed., 1928; 5th ed., 1955 (the last edition by the author). The treatment remains in the sixth edition by Sir Humphrey Waldock, published in 1963.

[6] pp. 136–45 (1928); 217–31 (1955). Reference should also be made to the treatment of reprisals: pp. 193–5 (1928); 321–6 (1955).