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2.1 INTRODUCTION

In this chapter I explore the process of change in the law of international responsibility. The main arguments developed in the chapter are that, first, the normal rules for determination of change in international law, reflected in the sources of international law, are only modestly helpful for determining change in the law of responsibility; second, for understanding change in the law of responsibility it is helpful to distinguish change in secondary rules from change in primary rules (that comprise substantive rights and obligations) and tertiary rules (that comprise procedural and institutional rules for the implementation of responsibility); third, change in the law of responsibility is to some extent driven by prior changes in primary rules; and, fourth, secondary rules have a logic and justification that are to some extent independent from primary rules.

While change in international law has often been the subject of inquiry, that is not the case for change in the law of responsibility. When political actors, civil society, or academics argue that international law should be changed on this or that point with a view to better responding to, say, climate change or pandemics, their focus is commonly on change in the substantive rights or duties of States or other actors, that is, change in the so-called primary rules. Alternatively, they may focus on change in the powers or procedures of institutions, including international courts and tribunals, with a view to allowing such institutions to better respond to instances where actors act in breach of rights or duties. Reflecting this focus, the topics of law making (that is concerned with change) and development of international institutions have

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become relatively common fields of inquiry. However, such inquiries rarely address questions of change in the law of responsibility.[1]

Moreover, while in the past decades a sizeable volume of studies has appeared on the law of responsibility, very little of this has shown any systematic concern for the question of how this body of law comes into being or how it changes.[2] It is not difficult to find discussions on the (progressive) development of particular principles of responsibility law. But these discussions are rarely placed in the more general context of change in the law, perhaps with the exception of discussions on the dividing lines between codification and progressive development in the work of the International Law Commission (hereafter ILC).[3]

Yet, the question of change in the law of responsibility is a relevant one. If actors contribute to a particular societal problem (say, human rights violations, climate change or a pandemic) and if the question is raised of how international law could be developed to better address such problems, it is not obvious that solutions are only to be found in a change in primary rules or in institutional structures. It may well be that nothing is wrong with the primary rules or the powers of institutions and that the problem rather lies in the law of responsibility. Indeed, there are ample examples where it appears that these secondary rules allowed States or other actors to circumvent their obligations, undermining the realization of interests for which primary rules were developed or that secondary rules prevented international courts from playing a more relevant role. It is therefore appropriate to explore the process of change in the law of responsibility and examine how its connection to changes in primary and tertiary rules can be understood.

This chapter will in particular draw on two areas of the law of responsibility that are subject to significant change, and that therefore lend themselves to the present inquiry. The first area is the change of the essentially private law-like nature of the law of responsibility – dominated by the protection of

[1] For instance, the two authoritative collections on the topic do not contain a separate entry on law making or sources in relation to the law of responsibility: Catherine Brölmann and Yannick Radi (eds.), *Research Handbook on the Theory and Practice of International Lawmaking* (Cheltenham: Edward Elgar, 2016); Samantha Besson and Jean d'Aspremont (eds.), *The Oxford Handbook of the Sources of International Law* (Oxford: Oxford University Press, 2017).

[2] There is no systematic discussion of the topic in James Crawford, Alain Pellet and Simon Olleson (eds.), *The Law of International Responsibility* (Oxford: Oxford University Press, 2010); Robert Kolb, *The International Law of State Responsibility: An Introduction* (Cheltenham: Edward Elgar, 2017).

[3] Thomas M. Franck and Mohamed ElBaradei, 'The Codification and Progressive Development of International Law: A UNITAR Study of the Role and Use of the International Law Commission' (1982) 76(3) *American Journal of International Law* 630–639.

subjective rights of States – to a body of law with public law features, aimed at the protection of the international rule of law and interests of the international community.[4] The second area is the change of a system based on the notion of independent responsibility – premised on the idea that each State or international organization is only responsible for its own individual conduct – to a system that allows for shared responsibility, that recognizes that actors can be responsible for contributions to harm in conjunction with conduct by other actors.[5] The traditional conception of the law of responsibility as laid down, almost 100 years ago, in the Harvard text[6] did not pay any particular attention either to the public law dimension or to the shared nature of international responsibility. However, propelled by fundamental changes in international society, the law of responsibility has changed in both dimensions, to some extent reflected in the ILC texts.[7]

It is in relation to such developments, where a particular field of the law of responsibility is subject to change, that the questions that this chapter sets out to address arise. To what extent can such change be explained by traditional sources doctrine? How is change in such areas of the law of responsibility related to change in primary and tertiary rules? And can change in the law of responsibility be explained by changes in primary rules, or is it (also) driven by independent considerations?

I will address these questions by synthesizing the insights that we can infer from prior research on change in the law of international responsibility and by drawing on recent practices and scholarship related to the development of public order dimensions of the law of responsibility and the law of shared responsibility.

One observation on the scope of the chapter is in order. The inquiry focuses on the general part of the law of international responsibility, rather than on

[4] The discussion of this topic builds on André Nollkaemper, 'Constitutionalization and the Unity of the Law of International Responsibility' (2009) 16(2) *Indiana Journal of Global Legal Studies* 535–563.

[5] The discussion of this topic builds on André Nollkaemper and Dov Jacobs, 'Shared Responsibility in International Law: A Conceptual Framework' (2013) 34(2) *Michigan Journal of International Law* 359–438.

[6] Harvard Law School, Research in International Law, 'Draft Convention on the Law of Responsibility of States for Damage Done in Their Territory to the Person or Property of Foreigners', reprinted in (1929) 23 (Supp. 5) *American Journal of International Law* 133–218.

[7] ILC, *Articles on the Responsibility of States for Internationally Wrongful Acts*, Adopted as a Resolution by the UN General Assembly, UNGA Res. 56/83 (12 December 2001) (hereafter ARSIWA); ILC, *Articles on the Responsibility of International Organizations*, Adopted as a Resolution by the UN General Assembly, UNGA Res. 66/100 (9 December 2011) (hereafter ARIO).

responsibility provisions in particular treaties. This is a significant limitation, since by its very nature change in the general part is a slow process and is much more difficult to observe than change through treaty making. However, it is also true that it has been quite rare for States to opt for treaty rules on responsibility law. In practice most questions of responsibility are determined by the general part of responsibility. In those cases where States do opt for change through *lex specialis*, this may or may not be indicative of a wider process of change in the general part.[8]

The chapter proceeds as follows. It starts with a brief survey of change in the law of responsibility since its origins (Section 2.2). It then addresses the four main questions of the chapter: how relevant sources doctrine is for understanding change in the law of responsibility (Section 2.3); the relation between change in the law of responsibility versus change in primary and tertiary rules (Section 2.4); the extent to which change in the law of responsibility can be understood and explained by prior changes in primary rules (Section 2.5); and the extent to which change in the law of responsibility is driven by independent considerations (Section 2.6). Section 2.7 concludes.

2.2 A BIRD'S EYE VIEW OF CHANGE IN THE LAW OF INTERNATIONAL RESPONSIBILITY

If one compares the law of responsibility as it was at the origin of international law with the law of responsibility as we know it now from the ILC texts, it is clear that this body of law has been subject to momentous change. The law of responsibility in, say, 1700, was barely recognized as such and, looking from the present, it is hard to identify its contours. For a long time, the concept of international responsibility was given scant scholarly attention. Scholars could write textbooks without using, let alone developing, a general concept of responsibility.[9] Of course, it was recognized that breaches of international law could have legal consequences. For instance, Francisco de Vitoria wrote: 'There is a simple and only just cause for commencing war, namely: a wrong

[8] Kristen E. Boon, 'The Role of *Lex Specialis* in the Articles on the Responsibility of International Organizations', in Maurizio Ragazzi (ed.), *Responsibility of International Organizations: Essays in Memory of Sir Ian Brownlie* (Leiden: Martinus Nijhoff, 2013), pp. 133–145.

[9] See, for an overview, James Crawford, *State Responsibility: The General Part* (Cambridge: Cambridge University Press, 2013), pp. 3–34.

received'.[10] But such propositions were not based on a sophisticated and developed concept of responsibility.[11]

For a long time, international responsibility was essentially a set of principles that allowed Western States to press claims for the protection of their nationals abroad, but without laying down any of the details that we currently find in the ARSIWA and the related Articles on the law of diplomatic protection.[12] Moreover, the 'original' law of responsibility allowed for forceful measures where they were needed to protect States' interests, a right that has now firmly been excluded from the law of responsibility, both conceptually and in terms of positive law.[13]

During the late nineteenth and early twentieth centuries, the concept of international responsibility that connected breaches of international obligations with the legal consequences thereof became the subject of a more refined scholarly exploration, for instance in the writings of Heinrich Triepel[14] and Dionisio Anzilotti,[15] and slowly acquired features that foreshadow the law as we now know it. However, many of the features of the current law of responsibility were not in sight at the time, including: its 'objective' character, excluding the role of injury in the determination of responsibility; the relatively refined rules of attribution of conduct by persons not belonging to the State apparatus; the rules on 'responsibility in connection with' the acts of others; the detailed conditions for countermeasures; not to speak of rules on invocation of responsibility in relation to interests protected by obligations *erga omnes* or the legal consequences of the violation of peremptory norms of international law. From this angle, there has been massive change over the past century or so.

We can also identify significant development and change if we shorten the time frame for comparison. Compare, for instance, our current understanding of the law with the 1929 Harvard Draft. That Draft contains many aspects that the ILC did not consider relevant to include. Conversely, defining features of

[10] Francisco de Vitoria, *De Indis et de Iure Belli, Relectiones*, ed. Ernest Nys, trans. John Pawley Bate (Washington: Carnegie Institution of Washington, 1917), Second Relectio, para. 13.

[11] Ian Brownlie, *System of the Law of Nations: State Responsibility, Part I* (Oxford: Clarendon Press, 1983), p. 4.

[12] ILC, 'Draft Articles on Diplomatic Protection', Adopted by the Drafting Committee on Second Reading, UN Doc. A/CN.4/L.684 (19 May 2006).

[13] Danilo Zolo, 'Hans Kelsen: International Peace through International Law' (1998) 9(2) *European Journal of International Law* 306–324.

[14] Heinrich Triepel, *Völkerrecht und Landesrecht* (Leipzig: Hirschfeld, 1899), p. 359.

[15] Dionisio Anzilotti, 'La responsabilité internationale des États à raison des dommages soufferts par des étrangers' (1906) 13 *Revue générale de droit international public* 5–29 and 285–309.

the 'ILC-law' were absent from the law as recognized in the Harvard text, including many of the conditions of attribution of conduct of non-State actors, responsibility for aid and assistance, conditions for invocation, and countermeasures. Responsibility of international organizations and of individuals was not in sight at all.

When we move forward the clock and compare the current law with the law of responsibility as envisaged by the first Special Rapporteur of the ILC, Francisco García Amador, the scope of the change that has occurred since 1956 (only some sixty-six years ago) remains huge. García Amador's conception of the law of responsibility was in essence the law for the protection of aliens, and it was, much more than the current law, a body of primary rules.[16] From this angle, the evolution of the law of responsibility is not only one of refinement and expansion of the body of secondary rules, but first and foremost the emergence of an entirely different conception of the law of responsibility, that excludes primary rules.[17] The biggest leap forward and the most significant change can then be located in the few years between the drafts of García Amador and the contours of the law as they emerged in the early reports of Roberto Ago. That change was more conceptual than anything else – it is unlikely that in that short time frame the law in practice changed as much. And there is certainly much in Ago's first reports that cannot be taken as indicative of the positive law as it was at that time.

The law as formulated in the later stages of the ILC's work, often remaining within the grey zone between codification and progressive development, reflected further changes. In this period (say 1990–2010), the law of responsibility was far from a stable body of law. Notable elements that were shaped in that era were the principle of complicity – considered a progressive development by the ILC in 2001 but accepted as customary law by the International Court of Justice (hereafter ICJ) only a few years later;[18] legal consequences of breaches of peremptory norms of international law – accepted by the ILC to be customary law on the basis of a few Security Council Resolutions;[19] and invocation in

[16] ILC, 'International Responsibility: First Report on State Responsibility, by Francisco V. García Amador, Special Rapporteur', *Yearbook of the International Law Commission* (1956) Vol. II, UN Doc. A/CN.4/96, pp. 173–235.

[17] Eric David, 'Primary and Secondary Rules', in James Crawford, Alain Pellet and Simon Olleson (eds.), *The Law of International Responsibility* (Oxford: Oxford University Press, 2010), pp. 27–33.

[18] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro)* (Merits) [2007] ICJ Rep. 43.

[19] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep. 136.

the general interest – proposed by the ILC in 2001 and accepted by the ICJ as part of general international law, without reference to the ILC, in 2012.[20]

In parallel, we witnessed the development of the law of responsibility of international organizations. The basis of that development remains a matter of uncertainty, given the lack of (uniform) practice among international organizations.[21] Yet, the enormous proliferation of international organizations after the Second World War, the expansion of their powers and practice, and the resulting increase in situations where such practice resulted in harm and claims, have led to a gradual development and change in this part of the law of responsibility.[22]

Momentous change also took place in relation to the responsibility of individuals. The basic principle of individual responsibility changed from its rudimentary forms in the beginning of the twentieth century, via the developments in Nuremberg, into a much more refined set of principles based on the practice of the International Criminal Tribunal for the former Yugoslavia (hereafter ICTY) and the International Criminal Tribunal for Rwanda (hereafter ICTR), and the negotiations and the early practice of the International Criminal Court (hereafter ICC).

The two focal points of the present chapter – the development of a public order conception of international responsibility and the emergence of a notion of shared responsibility – were part and parcel of these developments. They are key to many of the changes that were proposed, and to some extent recognized, in positive law, in relation to the law of State responsibility, the law of the responsibility of international organizations, and the law of individual responsibility.

In relation to public interests, the introduction of the notion of objective responsibility in the ARSIWA, the removal of injury as a condition for responsibility, the introduction of peremptory norms, and the recognition of standing 'in the public interest' all are relatively new additions to this corpus of law, signalling a quite radical change in only a few decades.

As to the emergence of shared responsibility, the increase in situations where States and other actors act jointly, and the corresponding increase in

[20] See *Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal)* (Merits) [2012] ICJ Rep. 422, paras. 64–70.

[21] José E. Alvarez, 'Revisiting the ILC's Draft Rules on International Organization Responsibility' (2011) 105 *Proceedings of the Annual Meeting (American Society of International Law)* 344–348.

[22] Daphna Shraga, 'The ILC Draft Articles on Responsibility of International Organizations: The Interplay Between the Practice and the Rule' (2011) 105 *Proceedings of the Annual Meeting (American Society of International Law)* 351–353; Sienho Yee, '"Member Responsibility" and the ILC Articles on the Responsibility of International Organizations: Some Observations', in Maurizio Ragazzi (ed.), *Responsibility of International Organizations: Essays in Memory of Sir Ian Brownlie* (Leiden: Martinus Nijhoff, 2013), pp. 325–336.

situations where third parties are on the receiving side of harm to which multiple parties have contributed, have led to significant changes in the law. The ILC included in Article 47 ARSIWA a principle (though somewhat awkwardly placed) that recognizes that if multiple States contribute to the same wrongful act, an injured State can invoke the responsibility of each of the responsible States. This bare principle left many questions unanswered, and since then we have seen a (rather fragmented) practice relating to questions such as shared responsibility for situations that are not covered by the heading 'single wrongful act' and shared responsibility for aid and assistance or concrete action, and we have been able to articulate a more refined understanding of how principles of reparation and invocation apply in such situations. The 2021 Guiding Principles on Shared Responsibility in International Law pull many of these developments together.[23]

Whether such later developments can be considered as part of international law, or whether these are just scholarly constructions that are not really connected to change in the law, remains a matter of speculation. It is this uncertainty that leads us into the inquiry in the next sections.

2.3 CHANGE IN THE LAW OF RESPONSIBILITY: A SOURCES PERSPECTIVE

The legal status of several principles relating to the broad areas that are the subject of the present inquiry (public order dimensions and shared responsibility) is contested. Examples are Article 48 ARSIWA in relation to obligations *erga omnes* outside treaty regimes, Article 16 ARSIWA (responsibility for aid and assistance), Article 17 ARIO (responsibility of international organizations based on decisions of such organizations), and much of Part Five of the ARIO (Member State responsibility in the context of international organizations). Some process of change seems to be ongoing, but observers have taken different positions as to whether this change has or has not led to an actual change in positive law.

One approach to assess such processes of change is to resort to the traditional sources of international law. These sources are commonly used to determine the existence of a particular right or obligation and its content, rather than to assess processes of change. But the distinction is a fine one, and the criteria for the determination of customary law, for the conclusion of

[23] André Nollkaemper, Jean d'Aspremont, Christiane Ahlborn, Berenice Boutin, Nataša Nedeski and Ilias Plakokefalos, 'Guiding Principles on Shared Responsibility in International Law' (2020) 31(1) *European Journal of International Law* 15–72.

treaties, and for the determination of general principles of (international) law can be used to assess whether a particular principle that is subject to change has, in a particular manifestation and at a particular moment in time, acquired the status of a legally binding principle, right or, obligation.

Adopting this perspective raises the question of how and whether the sources of international law perspective is suitable to be applied to secondary rules. This question has received remarkably little attention. Studies on the sources of international law generally do not distinguish between the sources of primary and secondary rules of international law and seem to assume that the criteria that are part of the sources of international law can and should be applied to all rules of international law. The ICJ does not appear to make a distinction either and has routinely applied, for instance, the criteria for the determination of customary international law to the law of responsibility and to the law of treaties.[24]

With regards to treaties, there is in principle no doubt that this source can be applied for realizing change in the law of responsibility. One might indeed think that the obvious way to effectuate change is to lay down new rules in a treaty, just like the Vienna Convention on the Law of Treaties[25] laid down some new rules, in addition to codifying well-established rules. In relation to the law of responsibility, this has so far only been done in specific areas of international law, notably outer space[26] and the law of the sea.[27] But this does not seem to be a realistic path for realizing change in the general law of responsibility in relation to public order dimensions and shared responsibility. There is ongoing talk on the possibility to transform the ARSIWA into a global treaty,[28] but the chances that this will be achieved in the short-term seem slim. The barriers to a treaty text that would be acceptable to all or most States appear to relate precisely to the principles that belong to the areas explored in the present chapter, for instance complicity, circumvention, the status and legal consequences of peremptory norms, and invocation and countermeasures in the general interest. For the ARIO, the prospect of a

[24] *Gabčíkovo-Nagymaros Project (Hungary* v. *Slovakia)* [1997] ICJ Rep. 7, para. 46.

[25] Vienna Convention on the Law of Treaties, 1155 UNTS 331 (adopted 23 May 1969, entered into force 27 January 1980).

[26] Convention on International Liability for Damage Caused by Space Objects, 961 UNTS 187 (adopted 29 March 1972, entered into force 1 September 1972).

[27] United Nations Convention on the Law of the Sea, 1833 UNTS 397 (adopted 10 December 1982, entered into force 16 November 1994), Article 139 and Article 6 of Annex IX.

[28] Federica Paddeu and Christian J. Tams, 'Dithering, Trickling Down, and Encoding: Concluding Thoughts on the "ILC Articles at 20" Symposium' (2021) *EJIL: Talk!* Available at: www.ejiltalk.org/dithering-trickling-down-and-encoding-concluding-thoughts-on-the-ilc-articles-at-20-symposium, last accessed 14 April 2022.

treaty is even smaller. Approaching the question of change from the perspective of the formation of treaties therefore is of little help. This also means that the process of treaty interpretation, which would normally be highly relevant for the process of change,[29] is of limited relevance.

In the absence of a treaty, the default position is to rely on customary law. Indeed, the constitutive elements of customary law (State practice and *opinio juris*) can easily be translated in criteria for assessing a particular process of change. They invite us to ask how much practice there is in relation to a particular principle, how much *opinio juris* there is on that point, and whether there is sufficient change on these criteria to allow us to identify a new (or changed) principle.

To some extent it has been common to assess the status of (and implicitly thus also the change in) particular principles in terms of customary international law. The 2019 compilation of decisions of international courts, tribunals and other bodies, prepared by the Secretary-General of the United Nations, demonstrates that on quite a few occasions international courts and tribunals have made such determinations.[30] Examples are principles of attribution of conduct,[31] breach of an international obligation,[32] the state of necessity,[33] and reparation.[34] This practice illustrates that judgments of international courts may provide shortcuts to the determination of the customary law of international responsibility and thereby also to assessments of change in the law of responsibility. The ILC indeed stated that decisions of international courts and tribunals, in particular of the ICJ, concerning the existence and

[29] See Georges Abi-Saab, Kenneth Keith, Gabrielle Marceau and Clément Marquet (eds.), *Evolutionary Interpretation and International Law* (Oxford: Hart, 2019).

[30] UN General Assembly, 'Responsibility of States for Internationally Wrongful Acts: Compilation of Decisions of International Courts, Tribunals and Other Bodies, Report of the Secretary-General' (23 April 2019) UN Doc. A/74/83.

[31] *Flemingo DutyFree Shop Private Limited* v. *The Republic of Poland*, PCA, Award (12 August 2016) [2016] IIC 883, para. 424; *Joseph Houben* v. *Republic of Burundi*, ICSID, Award (31 August 2018) Case No. ARB/14/4; *Thailand – Customs and Fiscal Measures on Cigarettes from the Philippines*, WTO, Panel Report (12 November 2018) WT/DS371/RW, paras. 7.636 and 7.771, and note 1654.

[32] *Maurice Tomlinson* v. *The State of Belize and The State of Trinidad and Tobago* [2016] CCJ 1 (OJ), para. 22 (Caribbean Court of Justice).

[33] *EDF International SA and Ors* v. *Argentina*, ICSID, Decision on Annulment (5 February 2016) Case No. ARB/03/23, para. 319.

[34] *Joseph Houben* v. *Republic of Burundi*, fn. 30, at 223–224; *Burlington Resources Inc.* v. *Republic of Ecuador*, ICSID, Decision on Reconsideration and Award (7 February 2017) Case No. ARB/08/5, para. 177.

content of rules of customary international law, 'are a subsidiary means for the determination of such rules'.[35]

However, this judicial practice, and indeed the customary international law criteria, are not of much help for recording and determining change in all parts of the law of responsibility. Claims that this or that principle of responsibility relating to the protection of community interests or shared responsibility is part of customary international law can rarely be backed up by well-documented practice or *opinio juris*. For most States nothing is known about their practice and mostly nothing at all is known about their *opinio juris* in relation to particular principles. It can be added that this also holds true to some extent for the principles that international courts have determined to be principles of customary law in the examples given in the previous paragraphs. It is therefore not surprising that, in the work of the ILC and the judicial decisions referred to, statements that a particular rule is customary international law are often only supported by a limited number of examples. This appears to be due not so much to a lack of research conducted, but to the lack of (documented) relevant practice. This applies even more to the law of responsibility of international organizations.

In many cases, the only way in which a plausible customary law argument could be made for particular principles is to argue that one or a few actors have engaged in a particular practice, and that the absence of any protest by other States would suffice to create customary law. This may happen occasionally. But the question is whether this is methodologically a sound approach. For why would States bother to protest to a particular responsibility-practice of other States that does not directly concern them? The practice of responsibility remains largely of a bilateral nature. Most practices are of little or no concern to other States, and it is not obvious that they would care enough to engage in protest. This holds even more for international organizations, which are largely autonomous from each other and have their own practices, connected to their own mandates and powers. It is not clear why one organization would bother to react to practices of other organizations that do not directly affect it. Therefore, it is not obvious that any legal weight could be attached to the absence of protest by States or international organizations.

Relying on judgments of international courts may beg the question of how courts come to their conclusions on the non-existence of a particular

[35] ILC, 'Identification of Customary International Law', Report of the International Law Commission, Seventieth Session (30 April–1 June and 2 July–10 August 2018), UN Doc. A/73/10 (2018), pp. 119–156, Draft Conclusion 13.

principle. Many of the ICJ's opinions on this matter seem to belong to the category of 'assertion' rather than being conclusions based on an in-depth analysis of practice and *opinio juris*.[36] For example, the ICJ's conclusion in the *Bosnia Genocide case* that the principle of responsibility for aid and assistance had risen to the level of customary law was based on the slimmest of supporting evidence.[37]

Weight could perhaps be attributed to the process of codification by the ILC, and the ILC itself indeed recognized its own authority in this respect. It stated that 'a determination by the Commission affirming the existence and content of a rule of customary international law may have particular value'; this would flow from

> the Commission's mandate as a subsidiary organ of the United Nations General Assembly, to promote the progressive development of international law and its codification and the thoroughness of its procedures (including the consideration of extensive surveys of State practice and *opinio juris*); and its close relationship with the General Assembly and States (including receiving oral and written comments from States as it proceeds with its work).[38]

However, the Commission also observed that 'the weight to be given to the Commission's determinations depends … on various factors, including the sources relied upon by the Commission, the stage reached in its work, and above all upon States' reception of its output'.[39] For the process of change in law of responsibility, in the areas examined here, it seems questionable whether the combination of sources and States' reception allows one to make firm conclusions on the customary nature of principles that affirm, for instance, the right of invocation of non-injured States, various forms of shared responsibility and the responsibility of international organizations. In any case, even leaving aside the fact that for many principles the responses were not conducive to determinations of custom, this would be a one-off approach that may have helped to clarify the law at one point in time but would not help to account for change after the finalization of the ILC's work.

Given the fact that a treaty is currently not a useful instrument to drive or record change, and given the limitations of the concept of customary

[36] Stefan Talmon, 'Determining Customary International Law: The ICJ's Methodology between Induction, Deduction and Assertion' (2015) 26(2) *European Journal of International Law* 417–443.

[37] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro)*, fn. 18, para. 419.

[38] ILC, 'Identification of Customary International Law', fn. 35.

[39] Ibid., p. 142.

international law in relation to the law of responsibility, the main remaining option is to explore whether change can be recorded in terms of general principles. Several international courts and tribunals have indeed made such determinations, notably the Permanent Court of International Justice (hereafter PCIJ) in the *Chorzów Factory case*,[40] as well as the ICC.[41]

Here the question that presents itself is how one comes to the conclusion that, due to some process of change, a general principle of (international) law emerges at one point. In the doctrine on general principles, this depends on the criterion of general recognition.[42] One option is to derive a general principle as a source of international law from the 'major domestic legal systems', as was done by Judge Bruno Simma in his Separate Opinion in the *Oil Platforms case* in relation to the principle of joint and several liability.[43] While this is indeed a possible route in some cases, it seems less suited to record change given the unlikeliness that major domestic legal systems would change in the same direction in areas of responsibility.

Another possible construction is to consider that general principles are derived in some way from the international legal system. This was the suggestion of the PCIJ in the *Chorzów Factory case*. The Court stated that 'the breach of an engagement involves an obligation to make reparation in an adequate form. Reparation, therefore, is the indispensable complement of a failure to apply a convention and there is no necessity for this to be stated in the convention itself'.[44] In this interpretation, the law of responsibility is a matter of systemic integrity. Reparation would be implicit in the notion of obligation and the structure of international law; attribution would be part and parcel of our understanding of the State, and so on. In this approach, one could argue that if the foundations of traditional international law change, the law of responsibility also changes. This argument, based on the inherent connection between substantive obligations on the one hand, and principles of the law of responsibility on the other, will be further explored in Sections 2.4–2.6.

[40] *Case Concerning the Factory at Chorzów (Germany* v. *Poland)* (Merits) [1928] PCIJ Ser. A No. 17.

[41] *Prosecutor* v. *Bosco Ntaganda* (Second Decision on the Defence's Challenge to the Jurisdiction of the Court in Respect of Counts 6 and 9) (No. ICC-01/04-02/06-1707) ICL 1730 (ICC 2017), para. 53 and note 131.

[42] ILC, 'First Report on General Principles of Law, by Marcelo Vázquez-Bermúdez, Special Rapporteur' (5 April 2019) UN Doc. A/CN.4/732.

[43] *Oil Platforms (Iran* v. *United States of America)* (Merits) [2003] ICJ Rep. 2003, Sep. Op. Judge Simma, pp. 324–361.

[44] *Factory at Chorzów*, fn. 40, p. 29.

But subject to what will be discussed on the 'systematic integrity approach', the traditional sources approach is of limited help to assess whether a particular principle of responsibility has changed and acquired new forms or meanings, or whether entirely new principles have emerged. The high thresholds of what is required for a globally applicable treaty or new customary rules may be said to bring some inertia into the system, resisting change.

The rigidity of the traditional sources of international law inevitably invites pushes for more flexible processes of change, for instance in the form of so-called informal law making.[45] The development of the Guiding Principles on Shared Responsibility in International Law can be seen in this light.[46] While these perspectives of accountability processes and informal law making below the radar of formal change in the law of responsibility have much value for the transformations examined here, they also have their limits. In particular, considerations of formality and legality carry much weight for the classic area of the law of responsibility. It should be recalled that responsibility is a basic feature of the notion of international law as such.[47] Martti Koskenniemi notes that 'most lawyers would not hesitate to affirm that "State responsibility" is a necessary aspect of international law being "law"'.[48] Paul Reuter notes that 'responsibility is at the heart of international law'.[49] And Alain Pellet notes that in the international legal order, responsibility is the corollary of law itself: 'no

[45] Joost Pauwelyn, Ramses A. Wessel and Jan Wouters (eds.), *Informal International Lawmaking* (Oxford: Oxford University Press, 2012); Joost Pauwelyn, Ramses A. Wessel and Jan Wouters, 'When Structures Become Shackles: Stagnation and Dynamics in International Lawmaking' (2014) 25(3) *European Journal of International Law* 733–763.

[46] Nollkaemper et al., fn. 23.

[47] James Crawford and Jeremy Watkins, 'International Responsibility', in Samantha Besson and John Tasioulas (eds.), *The Philosophy of International Law* (Oxford: Oxford University Press, 2010), pp. 283–298; H. L. A. Hart, *Punishment and Responsibility: Essays in the Philosophy of Law* (Oxford: Clarendon Press, 1968); Ronald Dworkin, *Taking Rights Seriously* (Cambridge, MA: Harvard University Press, 1977). See also Yee, fn. 22 (noting that 'A mature and fair international legal system would maintain a "circular whole", under which international legal relations are defined by rights and obligations and any rupture of those relations must be cured by restoring the status quo ante, or in a better way', p. 332).

[48] Martti Koskenniemi, 'Doctrines of State Responsibility', in James Crawford, Alain Pellet and Simon Olleson (eds.), *The Law of International Responsibility* (Oxford: Oxford University Press, 2010), pp. 45–51, p. 46.

[49] Paul Reuter, 'Trois observations sur la codification de la responsabilité internationale des États pour fait illicite', in *Le droit international au service de la paix, de la justice et du développement: Mélanges Michel Virally* (Paris: Pedone, 1991), pp. 389–398, p. 390, quoted by Alain Pellet, 'The Definition of Responsibility in International Law', in James Crawford, Alain Pellet and Simon Olleson (eds.), *The Law of International Responsibility* (Oxford: Oxford University Press, 2010), pp. 3–16, p. 3.

responsibility, no law'.[50] If there is weight in such positions, one should be careful before trading formal change in the law of responsibility for softer, more informal processes.

2.4 CHANGE IN THE LAW OF RESPONSIBILITY IN CONTEXT: PRIMARY, SECONDARY AND TERTIARY RULES

In many situations where we see a push towards change in international law that is relevant to the law of responsibility, that push is rarely limited to the law of responsibility itself. Whatever can be expected from or achieved by the law of responsibility is often intimately connected to, on the one hand, rights or obligations of States and, on the other hand, the procedures for implementing responsibility, including the powers of international institutions.

This three-fold distinction roughly corresponds to the distinction made in the work of the ILC between primary, secondary and tertiary rules, as articulated by Special Rapporteur Willen Riphagen in his fourth report to the ILC.[51] In this distinction, the categories of primary and secondary rules are relatively well established, though not without conceptual problems.[52] This is less so for the category of tertiary rules, which fell somewhat into disuse after the departure of Riphagen as Special Rapporteur. Tertiary rules can be conceptualized as that body of rules that provide for the process and machinery for the implementation of primary and secondary rules.

Clearly, the categories are complementary from the perspective of governance through international law. Holmes said that substantive and procedural law were both indispensable as tools for predicting when governmental force would be brought to bear.[53] This observation is likewise relevant to the three categories of primary, secondary and tertiary rules.

Moreover, the dividing lines between these three categories are not sharp. Several rules that are commonly treated as part of the law of responsibility (secondary rules) are in fact more akin to primary rules, as they stipulate conduct that may engage the responsibility of a State. The principles of

[50] Pellet, fn. 49.

[51] ILC, 'Fourth Report on the Content, Forms and Degrees of State Responsibility: Part 2 of the Draft Articles, by Willem Riphagen, Special Rapporteur', *Yearbook of the International Law Commission* (1983) Vol. II, Part One, UN Doc. A/CN.4/366 and Add.1, pp. 3–25.

[52] Jean Combacau and Denis Alland, '"Primary" and "Secondary" Rules in the Law of State Responsibility: Categorizing International Obligations' (1985) 16 *Netherlands Yearbook of International Law* 81–109.

[53] Oliver Wendell Holmes, 'Natural Law' (1918) 32(1) *Harvard Law Review* 40–44, at 42.

complicity[54] and circumvention[55] are examples. The principles of cessation[56] and continued performance[57] are in fact simply inherent in primary obligations. Further complicating the distinction is that some rules of responsibility are substantive in nature, as they articulate obligations (for instance the obligation to provide full reparation), and others are primarily procedural, in that they are concerned with the way claims can be brought. Riphagen would have treated the latter (procedural rules on invocation) as tertiary rather than secondary, while the ILC treated rules relating to the implementation of responsibility as secondary rules. Likewise, countermeasures, treated by the ILC as part of the law of responsibility, are more connected to the process of implementation of obligations (whether primary or secondary) than part of such obligations. In fact, conceptually it was always a questionable choice to include some of these rules, notably those on countermeasures, in the work on State responsibility. Also, rules dealing with the conditions under which international organizations can respond to breaches of international obligations are generally not treated as part of the law of responsibility, even though they may conceptually have much in common with rules on implementation of responsibility.[58]

Leaving aside precise questions of classification and delineation, separating the categories of primary, secondary and tertiary rules is a useful one for analytical purposes. From the perspective of change, it can sharpen the analysis if we clarify whether the change sought, or the change that we observe, concerns the substance of rights or obligations, the conditions under which the breach of a right or obligation entails the responsibility of an actor, the legal consequence of such responsibility, or the procedures (institutional or otherwise) for the implementation of such consequences. For instance, rethinking how international law can better respond to pandemics may address changes in primary rules (e.g., rules on notification of virus outbreaks or on cooperation), secondary rules (e.g., relating to the proportionate responsibility of States that contribute to part of the harm), and tertiary rules (e.g., the powers of the World Health Organization (WHO) in response to States that contravene the International Health Regulations). Likewise, rethinking options to strengthen the climate change regime may involve a combination of different obligations on emission reductions or cooperation (primary rules), rules on shared responsibility for climate change (secondary rules), and rules

[54] Article 16 ARSIWA; Article 14 ARIO.
[55] Articles 17 and 61 ARIO.
[56] Article 30 ARSIWA; Article 30 ARIO.
[57] Article 29 ARSIWA; Article 29 ARIO.
[58] Martti Koskenniemi, 'Breach of Treaty or Non-Compliance? Reflections on the Enforcement of the Montreal Protocol' (1992) 3(1) *Yearbook of International Environmental Law* 123–162.

on the powers of international institutions such as the Security Council, the Secretariat of the United Nations Framework Convention on Climate Change (UNFCC), the World Trade Organization (WTO), or the International Civil Aviation Organization (ICAO) in relation to States whose emissions exceed agreed emission targets. These options are closely related, but each will have its own legal, procedural and often political dimensions and it is helpful to be cognizant of such differences and of the interactions between them.

A particular reason for explicating the analytical distinction between primary, secondary and tertiary rules is that it allows us to identify whether and, if so, in what way change in one set of rules shapes change in other sets of rules. A useful way to frame this is to start from a situation where primary rules change in response to some perceived societal problem. The question then is what this means for the secondary and tertiary rules that are connected to such primary rules. Do secondary and tertiary rules change when it is necessary to give proper effect to the change in primary obligations, or is the change in such rules subject to a separate, independent logic? I will explore these questions in Sections 2.5 and 2.6.

2.5 CHANGE DRIVEN BY PRIMARY RULES

A first perspective is that the process of change in secondary and tertiary rules is shaped by prior changes in the substance of primary rules. In this respect, the relationship between primary rules, on the one hand, and secondary and tertiary rules, on the other, can be compared to the relation between substantive and procedural rules.[59] It has been said that the role of procedure is to facilitate the implementation of substantive law: 'whatever else procedure might do, its primary goal is to generate quality outcomes measured by the substantive law'.[60] Bentham advanced the idea that the 'course of procedure ought to have in every instance, for its main and primary end at least, the accomplishment of the will manifested in the body of substantive laws'.[61]

This perspective can be applied to the process of change in secondary and tertiary rules. This can be illustrated by key changes in the two areas on which

[59] André Nollkaemper, 'International Adjudication of Global Public Goods: The Intersection of Substance and Procedure' (2012) 23(3) *European Journal of International Law* 769–791.

[60] Robert G. Bone, 'Making Effective Rules: The Need for Procedure Theory' (2008) 61(2) *Oklahoma Law Review* 319–340, at 329.

[61] Jeremy Bentham, 'Principles of Judicial Procedure with the Outlines of a Procedure Code', in John Bowring (ed.), *The Works of Jeremy Bentham*, Vol. 2 (Edinburgh: William Tait, 1838–1843), p. 6.

the present chapter focuses: the increasing public law nature of the law of responsibility, and the growing importance attached to shared rather than individual responsibility. In analyzing the developments in these parts of the law of responsibility, four comments can be made on the connection between primary and secondary rules.

First, the law of responsibility has to a certain extent allowed for the implementation of changes in primary rules, without requiring change in secondary rules. This demonstrates that change in primary rules does not necessarily require change in secondary rules; in some cases, new primary rules can work within the existing structures. This can for instance be seen in relation to the law of shared responsibility. The international law of responsibility has proven to be a flexible body of law that can be applied in, and adjusted to, several situations involving shared responsibility. This is for instance evident for the principles that address breaches of international obligations[62] and the principles relating to attribution. These principles are generally flexible and allow for a determination of shared responsibility,[63] in particular when one accepts the possibility of dual attribution of conduct.[64] They have enabled, for instance, shared responsibility in situations involving joint organs – as supported by the *Nauru*[65] and *Eurotunnel*[66] cases. Both the ARSIWA and the ARIO also leave open the possibility of attributing responsibility to one actor for the internationally wrongful conduct by another actor, thus allowing for shared responsibility.[67] The principle of complicity is the

[62] Andrea Gattini, 'Breach of International Obligations', in André Nollkaemper and Ilias Plakokefalos (eds.), *Principles of Shared Responsibility in International Law: An Appraisal of the State of the Art* (Cambridge: Cambridge University Press, 2014), pp. 25–59.

[63] Francesco Messineo, 'Attribution of Conduct', in André Nollkaemper and Ilias Plakokefalos (eds.), *Principles of Shared Responsibility in International Law: An Appraisal of the State of the Art* (Cambridge: Cambridge University Press, 2014), pp. 60–97.

[64] Tom Dannenbaum, 'Dual Attribution in the Context of Military Operations', in Ana Sofia Barros, Cedric Ryngaert and Jan Wouters (eds.), *International Organizations and Member State Responsibility: Critical Perspectives* (Leiden: Brill, 2017), pp. 114–138; Stian Øby Johansen, 'Dual Attribution of Conduct to Both an International Organisation and a Member State' (2019) 6(3) *Oslo Law Review* 178–197.

[65] *Certain Phosphate Lands in Nauru (Nauru* v. *Australia)* (Preliminary Objections) [1992] ICJ Rep. 240.

[66] *Eurotunnel Arbitration (Channel Tunnel Group Ltd. & France-Manche S.A.* v. *United Kingdom and France)*, PCA, Partial Award (30 January 2007) 132 ILR 1.

[67] James D. Fry, 'Attribution of Responsibility', in André Nollkaemper and Ilias Plakokefalos (eds.), *Principles of Shared Responsibility in International Law: An Appraisal of the State of the Art* (Cambridge: Cambridge University Press, 2014), pp. 98–133.

paradigmatic example of a principle that enables shared responsibility.[68] The principles pertaining to reparation appear to be similarly flexible. While the ILC Articles are silent on the issue of shared responsibility stemming from different wrongful acts, this does not mean that they cannot accommodate such questions. D'Argent rightly notes that 'this silence is best explained by the fact that no specific rule is actually required in such cases and that the question of the allocation of the obligation to make reparation is simply governed by the orderly and reasoned application of the usual rules'.[69]

The second point to make is that in other respects – where the existing law of responsibility did not have the required flexibility – international law of responsibility has developed in tandem with changes in primary rules. As for the public order dimensions of international law, we can observe that the changes in primary rules that reflect the transformation from a purely bilateral model to a system that is more characterized by multilateral obligations and the recognition of common interests (for instance, in the form of obligations *erga omnes* and recognition of a hierarchy of norms)[70] are to some extent mirrored in the law of international responsibility. The traditional focus of the law of responsibility on the interests of individual States, that placed the notion of legal injury to the rights of individual States at the heart of the concept of responsibility,[71] made the law of international responsibility rather ill-suited for

[68] Vladyslav Lanovoy, 'Complicity in an Internationally Wrongful Act', in André Nollkaemper and Ilias Plakokefalos (eds.), *Principles of Shared Responsibility in International Law: An Appraisal of the State of the Art* (Cambridge: Cambridge University Press, 2014), pp. 134–168.

[69] Pierre d'Argent, 'Reparation, Cessation, Assurances and Guarantees of Non-Repetition', in André Nollkaemper and Ilias Plakokefalos (eds.), *Principles of Shared Responsibility in International Law: An Appraisal of the State of the Art* (Cambridge: Cambridge University Press, 2014), pp. 208–250.

[70] See, e.g., Antônio Augusto Cançado Trindade, *International Law for Humankind: Towards a New Jus Gentium*, 1st ed. (Leiden: Brill, 2010), pp. 177–179; Anne Peters, 'Humanity as the A and Ω of Sovereignty' (2009) 20(3) *European Journal of International Law* 513–544; Sienho Yee, 'Towards a Harmonious World: The Roles of the International Law of Co-Progressiveness and Leader States' (2008) 7(1) *Chinese Journal of International Law* 99–105, at 102 (coining the term 'co-progressiveness', defined as 'a society that is all encompassing (hence "co"), preoccupied with advancements in moral and ethical terms more than in other respects and having human flourishing as its ultimate goal (hence "progressiveness")').

[71] Richard Wright, 'The Grounds and Extent of Legal Responsibility' (2003) 40(4) *San Diego Law Review* 1425–1531, at 1433; Brigitte Stern, 'A Plea for "Reconstruction" of International Responsibility Based on the Notion of Legal Injury', in Maurizio Ragazzi (ed.), *International Responsibility Today: Essays in Memory of Oscar Schachter* (Leiden: Brill, 2005), pp. 93–106, pp. 94–95; Dionisio Anzilotti, *Teoria generale della responsabilità dello Stato nel diritto internazionale*, reprinted in *Scritti di diritto internazionale pubblico, Volume II, T. 1* (Padua: CEDAM, 1956), cited in ILC, 'Second Report on State Responsibility: The Origins of State Responsibility, by Roberto Ago, Special Rapporteur', *Yearbook of the International Law Commission* (1970) Vol. II, UN Doc. A/CN.4/233, pp. 177–197, p. 195, para. 54.

public order problems. Driven by changes in primary rules (and the underlying factors that explain changes in primary rules), we have seen a distinct change in the law of responsibility.[72]

At the heart of this shift is the elimination of the notion of legal injury as a condition for international responsibility: responsibility can arise regardless of legal injury to any particular State.[73] The law of international responsibility thus does not only protect the rights of injured parties, but protects the international legal order as such.[74] One consequence is that the obligations of cessation, continued performance, and reparation are not contingent on invocation by an injured State.[75] On paper at least, this may redress the weaknesses of the traditional law of international responsibility identified: the fact that the absence of invocation rendered the law of responsibility ill-suited to respond to acts that upset the international legal order. In addition to this general recognition of the public order dimensions of the law of responsibility, transformation towards a public order model can be identified in more concrete areas. Key examples are the recognition of legal consequences of serious violations of peremptory norms; the introduction in the ARSIWA of the possibility that States that are not injured can invoke the responsibility of a State for the protection of a collective interest of the group, or of the international community as a whole;[76] and the development of

[72] See, e.g., Pierre Klein, 'Responsibility for Serious Breaches of Obligations Deriving from Peremptory Norms of International Law and United Nations Law' (2002) 13(5) *European Journal of International Law* 1241–1255; Alain Pellet, 'Can a State Commit a Crime? Definitely, Yes!' (1999) 10(2) *European Journal of International Law* 425–434; Dinah Shelton, 'Righting Wrongs: Reparations in the Articles on State Responsibility' (2002) 96(4) *American Journal of International Law* 833–856, at 841; Eric Wyler, 'From "State Crime" to Responsibility for "Serious Breaches of Obligations under Peremptory Norms of General International Law"' (2002) 13(5) *European Journal of International Law* 1147–1160.

[73] Alain Pellet, 'Remarques sur une révolution inachevée, le projet d'articles de la CDI sur la responsabilité des États' (1996) 42 *Annuaire français de droit international* 7–32, at 10–11.

[74] Stern, fn. 71, p. 95.

[75] Alain Pellet, 'The ILC's Articles on State Responsibility for Internationally Wrongful Acts and Related Texts', in James Crawford, Alain Pellet and Simon Olleson (eds.), *The Law of International Responsibility* (Oxford: Oxford University Press, 2010), pp. 75–94, pp. 76–77. See also ILC, 'Third Report on State Responsibility, by James Crawford, Special Rapporteur', *Yearbook of the International Law Commission* (2000) Vol. II, Part One, UN Doc. A/CN.4/507 and Add. 1–4, pp. 3–111 [hereafter Third Crawford Report], p. 18, para. 26: '[T]he 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'.

[76] Article 48 ARSIWA. See Edith Brown Weiss, 'Invoking State Responsibility in the Twenty-First Century' (2002) 96(4) *American Journal of International Law* 798–816; and see generally

individual criminal responsibility, that allows prosecution of individual State agents to be a sanction against the State itself.[77]

One can also see a synergy between changes in primary rules and changes in secondary rules with regard to shared responsibility. The large body of primary rules that provides for cooperation and joint action in relation to common interests[78] has to some extent been matched by changes in the law of responsibility, for instance in relation to the recognition of aid and assistance and circumvention.

The third point to make is that, even though there is a parallel development, it cannot be presumed that there is a causal relationship between changes in primary rules and secondary rules. It is probably more accurate to say that the explanatory variables lie at a more fundamental level, for instance in interdependence, globalization and perception and recognition of common interests.[79] Such more fundamental developments in turn drive primary and secondary rules. Yet, recognition of the role of more fundamental drivers do not exclude an understanding in which secondary rules are, or should be, construed, interpreted and developed in a way that allows for the implementation of primary rules.

It may also be possible to identify a reciprocal effect between changes in primary and secondary rules. The discourse on the 'public nature' of the law of responsibility followed and gave concrete meaning to trends in State practice that indicated an increasing support among States and other actors for multilateralization and protection of community interests. It thereby

Christian J. Tams, *Enforcing Obligations Erga Omnes in International Law* (Cambridge: Cambridge University Press, 2005).

77 Pierre-Marie Dupuy, 'International Criminal Responsibility of the Individual and International Responsibility of the State', in Antonio Cassese, Paola Gaeta and John R. W. D. Jones (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Vol. II (Oxford: Oxford University Press, 2002), p. 1085 (noting that 'the promoters of the various international criminal courts undoubtedly intended, by punishing individuals, also to punish the actions of the State to which the acts may be attributed'). See also Otto Triffterer, 'Prosecution of States for Crimes of State' (1996) 67 *Revue internationale de droit pénal* 341–364, at 346 (noting that the crimes within the jurisdiction of the *ad hoc* tribunals are 'typically committed at least partly by persons who act as government representations on behalf of the State or with the silent toleration or even active support of the State' and that a judgment of individual criminal responsibility in many cases 'implies an obiter dictum' about the engagement of the State itself in these crimes).

78 André Nollkaemper and Ilias Plakokefalos (eds.), *The Practice of Shared Responsibility in International Law* (Cambridge: Cambridge University Press, 2017).

79 Ernst-Ulrich Petersmann, 'International Economic Law, "Public Reason", and Multilevel Governance of Interdependent Public Goods' (2011) 14(1) *Journal of International Economic Law* 23–76.

contributed to the dominance of the idea that there was such a thing as emergent community interests.

The fourth and final point to make is that the parallel between primary and secondary rules and the possibility of some causal relationship between the two sets of rules do not provide an answer to whether secondary rules need to be grounded in the sources of international law in the same manner as is required for primary rules, or whether they can be derived from and validated by pre-existing primary rules. The approach of the PCIJ in the *Chorzów Factory case*, that inferred a principle of responsibility from the system of international law as such,[80] could suggest that principles of responsibility may be implicit in obligations, and that a change in obligations automatically leads to a change in the principles of responsibility. The question remains whether this construction can reasonably be applied to the connection between primary and secondary rules in relation to public interests and shared responsibility in international law.

In any case, two problems with this argument can be identified. First, while it is not so difficult to extract rules at a very high level of generality from the system of international law (say, the principle of reparation, or the principle of attribution of organs' conduct to States), this is far less plausible for rules of a higher degree of specificity. It is one thing to say that it is a general principle that the breach of an obligation implies the obligation to provide reparation. It is quite another to say that when two actors act in concert and commit a wrong, they are obliged to provide reparation in proportion to their respective roles or contributions, or to articulate the scope of a right of recourse that may apply in situations of joint and several responsibility.[81]

The second problem with the systemic approach to the emergence of and change in principles of public order and shared responsibility is that it may neglect the autonomous role of the law of responsibility. The development of the law of responsibility reflects political choices that allocate responsibility to some actors and not to others.[82] There is nothing automatic or neutral about the establishment of principles of responsibility. In many respects, it is not so much a matter of inferring the rules from a system, but a matter of designing the law in a particular way for particular objectives. Responsibility is not just a neutral connector between a breach and legal consequences of such a breach

[80] *Factory at Chorzów*, fn. 40, p. 29.

[81] For instance, as provided for in the Guiding Principles on Shared Responsibility: see Nollkaemper et al., fn. 23.

[82] Philip Allott, 'State Responsibility and the Unmaking of International Law' (1988) 29(1) *Harvard International Law Journal* 1–26.

but entails certain normative choices. The fact that some acts of some persons are attributable to the State and others are not; that a course of conduct which satisfies the criteria of necessity does not engage the responsibility of a State; that two persons causing harm in the course of a joint operation do not as a matter of general international law incur joint and several responsibility; that non-injured States can invoke responsibility; and that injured States have considerable leeway to initiate countermeasures against wrongdoing States, all reflect normative choices. Such choices constitute dividing lines between legality and illegality, which may be quite different from the dividing lines formulated by primary rules of international law. All of this is far from being neutral and raises fundamental normative questions about the substantive justification of change in the law of responsibility. Here Phillip Allott's discussion of the political nature of the concept of secondary rules, as designed by the ILC like a black box that separates and hinders the automatic connection between breaches of obligations and liability,[83] is highly relevant and indeed limits the degree to which we can infer secondary rules from prior existing primary rules.

2.6 THE AUTONOMOUS VALUES OF SECONDARY RULES

It follows that the instrumental perspective is only part of the story of change in the law of responsibility. It is therefore useful to consider an alternative perspective, in which secondary rules have their own logic and justification which may, but need not, pull in the same direction as securing full performance of primary obligations. Here also, the parallel between procedural rules and substantive rules is relevant. Tom Franck observed that substantive and procedural aspects of fairness 'may not always pull in the same direction'.[84] This also holds true to some extent for primary rules, on the one hand, and secondary/tertiary rules, on the other. The law of responsibility provides an independent normative space that protects values that may be distinct from those protected by primary rules.

From the perspective of change in the law of international responsibility, three points should be highlighted. First, there are plenty of examples where change in primary rules has not been followed by a corresponding change in

[83] Ibid.

[84] Thomas M. Franck, 'Fairness in the International Legal and Institutional System: General Course on Public International Law' (1993) 240 *Collected Courses of the Hague Academy of International Law* 9–498; revised and reprinted as *Fairness in International Law and Institutions* (Oxford: Oxford University Press, 1998), p. 7.

the law of responsibility. For instance, there is no full match between the recognition of *erga omnes* obligations as a matter of primary obligations, on the one hand, and the fact that States in whose interests such obligations were developed have only limited rights of reparation and have not clearly recognized the right to take countermeasures to protect common interests, on the other hand.[85]

There is also no match between the interests protected by *erga omnes* obligations and peremptory norms, on the one hand, and the powers of the Security Council, on the other. Potentially, such powers could serve to support the performance of international obligations aimed at the public interest. Many Security Council resolutions indeed 'determine' non-performance of international obligations by one or more States and aim to secure their performance.[86] However, the procedural rules of the Security Council clearly have their own logic and justification, and they are designed in a way that opens space for political decisions. Though the ILC has explored the link between these public order principles and the institutions of the United Nations,[87] the ARSIWA do not incorporate any institutional mechanisms, and have not been translated into new powers for United Nations organs.

States and international organizations do not seem to address public order questions, which may arise from breaches of primary norms that have been articulated with a view to protecting community interests, in terms of responsibility.[88] This is well expressed by Simma, who notes that

> the observer is frequently torn between feelings of satisfaction because international law is finally being invested with some of the social accountability long developed in domestic law, and fears that the still primitive, still essentially bilateralist infrastructure upon which the new, more progressive edifices rest will turn out to be too weak to come to terms with the implications of such community interest.[89]

[85] Denis Alland, 'Countermeasures of General Interest' (2002) 13(5) *European Journal of International Law* 1221–1239.

[86] Vera Gowland-Debbas, 'The Security Council and Issues of Responsibility under International Law' (2012) 353 *Collected Courses of the Hague Academy of International Law* 185–443.

[87] ILC, 'Eighth Report on State Responsibility, by Gaetano Arangio-Ruiz, Special Rapporteur', *Yearbook of the International Law Commission* (1996) Vol. II, Part One, UN Doc. A/CN.4/476, pp. 1–13.

[88] Jutta Brunnée, 'International Legal Accountability Through the Lens of the Law of State Responsibility' (2005) 36 *Netherlands Yearbook of International Law* 21–56.

[89] Bruno Simma, 'From Bilateralism to Community Interest' (1994) 250 *Collected Courses of the Hague Academy of International Law*, 217–284, at 249.

The second comment to make is that the interests served by the law of responsibility are not only separate from those served by primary rules, but that they also are much less open to change. They protect in particular the sovereignty and independence of States. The less than perfect alignment between primary and secondary obligations may not be simply a time-lag, but may reflect the continuing impact of bilateral structures, which are based on individual rather than community interests.

A useful example are rules on attribution of conduct that determine which conduct of which actors a State is or is not responsible for and needs to secure cessation and reparation. From the perspective of securing full performance of primary obligations and realizing the aims of such obligations, wide attribution rules might be said to be preferable, and indeed the relatively wide net introduced by Article 5 ARSIWA, for instance, might be said to serve precisely that purpose. However, attribution rules also serve to prevent States from being held responsible and incurring secondary obligations of cessation and reparation for a conduct that is *not* their own. It might be said that the law of responsibility thereby aim to protect States' independence, which would otherwise be disregarded if a State could be held responsible for the acts of another State. This is illustrated by the high threshold for attribution of acts by private persons to States. As the ICJ explained in the *Bosnia Genocide case*:

> [T]he 'overall control' test has the major drawback of broadening the scope of State responsibility well beyond the fundamental principle governing the law of international responsibility: a State is responsible only for its own conduct, that is to say the conduct of persons acting, on whatever basis, on its behalf. ... [T]he 'overall control' test is unsuitable, for it stretches too far, almost to breaking point, the connection which must exist between the conduct of a State's organs and its international responsibility.[90]

A similar analysis can be made of the disconnect between the development of primary rights and obligations that call for cooperation and joint action, on the one hand, and the development of the law of shared responsibility, on the other. One example is a situation where one State aids or assists another State in the commission of an internationally wrongful act. Under the ARSIWA, the aiding State will not be responsible if it is not bound by the same obligation as the State to which aid is given. Vladyslav Lanovoy notes that 'the strong bilateral pull of the ARSIWA' here manifests itself through the requirement that the assisting State must be bound by the obligation breached by the

[90] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro)*, fn. 18, para. 406.

assisted State, which, as he argues, would undermine the legality function of international responsibility.[91] This may be true from the perspective of the interests protected by the breached obligations, but at the same time the requirement of opposability serves to ensure that States are not bound by obligations to which they have not consented, and will not be responsible for the breach of such obligations.[92]

An example in the sphere of tertiary rules are the rules of jurisdiction and admissibility applicable to international courts and tribunals, which may hinder or even impede the invocation and implementation of responsibility of a plurality of States and/or international organizations.[93] The *Monetary Gold* principle[94] provides that 'where the legal interests of a third State, which itself is not subject to the jurisdiction of the respective tribunal, forms the very subject-matter of the dispute, the case cannot be heard and decided. Such third State is considered a "necessary third party" to the case, the interests of which form the very core of the underlying dispute'.[95] This principle, if broadly interpreted, would severely limit the possibility for courts to decide cases in situations of shared responsibility. At the same time, it would protect the interests underlying the principle of consent.[96] Certainly the latter interest is not automatically overridden by whatever value that may underlie the primary rule.[97]

The third point to make is that the separate interests served by secondary rules do not only limit the impact of change in primary rules (as they cannot be the basis of responsibility-claims), but can even influence the meaning and status of such primary rules: secondary and tertiary rules may be

[91] Lanovoy, fn. 68.

[92] ILC, 'Second Report on State Responsibility, by James Crawford, Special Rapporteur', *Yearbook of the International Law Commission* (1999) Vol. II, Part One, UN Doc. A/CN.4/498 and Add.1–4, pp. 3–100.

[93] See the collection of papers in the Themed Section: 'Procedural Aspects of Shared Responsibility in International Adjudication' (2013) 4(2) *Journal of International Dispute Settlement* 277–405.

[94] *Monetary Gold Removed from Rome in 1943 (Italy* v. *France, United Kingdom and United States)* (Preliminary Question) [1954] ICJ Rep. 19, p. 32 (refusing to decide a dispute implicating Albania because Albania had not consented to the Court's jurisdiction and was not present to the suit).

[95] Andreas Zimmerman, 'International Courts and Tribunals, Intervention in Proceedings', in Rüdiger Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law* (Oxford: Oxford University Press, 2006) ('4. Intervention and the Concept of "Necessary Third Parties"').

[96] *Larsen* v. *Hawaiian Kingdom*, PCA, Award (5 February 2001) Case No. 1999-01, para. 11.17.

[97] This can be compared to the relationship between the jurisdictional immunities of States and *jus cogens*: see the discussion in *Jurisdictional Immunities of the State (Germany* v. *Italy: Greece Intervening)* [2012] ICJ Rep. 99.

co-determinative of the substance of primary rules. The construction of substantive law (primary rules) may be informed by expectations related to the availability of rules to assign and implement responsibility.[98] The more general point is that the absence of secondary rules, because it will lead to a situation where it is difficult to bring claims for breach of primary norms, may cast doubt on the status and meaning of primary rules. In this respect, primary and secondary rules and different modalities of change to which they are subject may work in opposing directions.

2.7 CONCLUSIONS

The law of responsibility has undergone massive change over the past centuries. While in key areas such change is well established and accepted as customary law or general principles, in the major transformations from a private to a public law model and from independent to shared responsibility huge grey zones can be identified, where the depth and scope of change, and its support in practice, remain uncertain.

The chapter has argued that our understanding of such change can be helped by exposing the connections, and the sometimes-competing pulls of change, in the law of responsibility, on the one hand, and change in primary and tertiary rules, on the other. Change in the law of responsibility should be assessed on its own merits and it cannot be assumed that it automatically follows change in the substantive rules.

This makes it even more important to articulate clearly the criteria we can use to ascertain change in the law of responsibility. Here existing scholarship has surprisingly little to offer but it is clear that the traditional sources approach is not always helpful to identify change. Perhaps for this reason there is a significant push to keep the practice relating to these transformations outside of the law of international responsibility proper and to create a second reality, more political, more flexible and more informal. However, the formal function of responsibility as a dividing line between legality and illegality and perhaps even as a defining feature of legal personality and law, resists blurring these boundaries. This sets up a permanent and to some extent inevitable tension between change in primary rules and slower change and resistance in secondary rules.

[98] Thomas O. Main, 'The Procedural Foundation of Substantive Law' (2010) 87(4) *Washington University Law Review* 801–841, at 802.