DE GRUYTER OPEN

STUDIES IN LOGIC, GRAMMAR AND RHETORIC 52 (65) 2017

DOI: 10.1515/slgr-2017-0053

Przemysław Saganek
Polish Academy of Sciences,
Institute of Law Studies

INTERNATIONAL RESPONSIBILITY AND THE SYSTEMIC CHARACTER OF INTERNATIONAL LAW

Abstract. The question whether international law is a system is one of the modern topics discussed by specialists of international law. The text of P. Saganek poses this question with respect to the rules on international responsibility. The two aims are to establish whether the rules on state responsibility are a system themselves and whether they may prima facie support the idea of international law as such a system. The two prima facie answers are positive. Every violation of international law gives rise to state responsibility if it can be attributed to a state and no circumstance precluding wrongfulness is in place. In this sense the rules on state responsibility form a sub-system supporting the thesis on the systemic nature of international law. On a closer analysis one can encounter several doubts as to both answers. Paradoxically those rules are too ideal, too systemic. The author – without denying the necessity of several if not the majority of the identified rules – refers to a tendency of presenting as law some non-binding documents prepared by expert groups. This is a part of a wider process of 'paper-law'. In this sense expert groups engage in 'creating the language' in which the true subjects of international law are expected to speak.

Keywords: responsibility, sources of international law, general principles of law.

Introductory remarks

The very choice of the title of the present text requires a few words of justification. It refers to two phenomena. The first of them is the set of rules on the responsibility of states. This element requires thorough discussion but not necessarily any introduction in this part of the study. The second element has to do with the discussion whether international law is a system. It requires some introduction, however. The question whether international law is a system should be treated as one of a few general and theoretical attempts to grasp the essence of international law or at least to discover its peculiar characteristics. I must confess to have been very sceptical as

to the sense of such broad approaches. A few years ago I was confronted with a 'modern' discussion on the fragmentation and constitutionalization of international law. In my opinion, it was one of the worst choices of an umbrella topic for discussing international law. That is why I was more than sceptical as regards another candidate for 'modern' topic – that is, wondering whether international law is a system or not. I must say that I had to change my mind after having participated in a team headed by R. Kwiecień (2015). The task of this team was to analyse the systemic elements of international law from the perspective of its selected branches. Actually I did not deal with the responsibility of states but with recognition (Saganek, 2015). All the same the results were interesting enough to justify asking the same question in the context of state responsibility. I owe gratitude to M. Balcerzak, who was the author of the contribution on the matter of state responsibility (Balcerzak, 2015: 109–166). Of course, the present author takes full responsibility for all statements of the present text and all its possible vices.

It seems obvious that the two most pressing questions are the following. Firstly, do the rules on state responsibility resemble a system themselves? Secondly, do they support the thesis according to which international law is a system itself?

Rules on state responsibility as a system a priori

A priori the answers to both these questions seem to be positive. It is especially obvious if we compare the rules on responsibility with the ones on recognition. The emergence of a new state or an attempted emergence of it is perhaps the most a-systemic or even anti-systemic event in the field of international relations ruled by international law. A newly created actor has interest in showing its position, often pressing on others. Others often do their best to ignore or even to contradict the efforts of a new-comer. Last but not least, the hitherto sovereign can often exert great pressure – both on a new-comer and on other states ready to recognize it. Recognition of states may be looked at as an element introducing some stability, at least in the relations between the author of recognition and its beneficiary. All the same, the picture of e.g. 70 states recognizing and 120 states not recognizing a new entity could be an illustration of everything but a system.

On the other hand, the rules on responsibility of states seem to be an area of systemic solutions. Every violation of international law gives rise to state responsibility if it can be attributed to a state and no circumstance

precluding wrongfulness is in place. As J. Crawford put it 'the underlying concepts of State responsibility – attribution, breach, excuses, and consequences – are general in character" (Crawford in: Crawford, Pellet, Olleson 2010: 20). As R. Ago wrote in his third report, '(R)esponsibility (...) comprises relatively few principles, which often need to be formulated very concisely' (Third Report on State responsibility, 1971: 202).

There can be no wonder that e.g. P.-M. Dupuy looks at the theory of international state responsibility as 'a fundamental institution of the international legal system' (P.-M. Dupuy, 1989–1990: 108). Sometimes the authors use the term 'system of international responsibility' without feeling any special need to explain or define it in more detail (Crawford, Pellet, Olleson 2010).

Some persons may be ready, however, to see some artificiality or even hypocrisy in this picture. What is the practical value of the rules on responsibility if the most dangerous regimes will never accept the jurisdiction of any court or arbitrator? What if governments which are the strongest do the same? Let us assume that the bombing of Belgrade in 1999 was illegal. Is there anybody believing that the participants of the coalition will pay Serbia a single dollar? Let us assume that the second Iraqi war was illegal. How to apply the rules on restitution or reparation in the context of this breach of law?

Perhaps no lawyer would be very happy with such questions. On the other hand, lawyers are used to them and usually try to cut the discussion on them by pointing out the necessity not to mix law with reality. Especially the German language is apt to underline the difference between the two spheres of *Sollen* and *Sein*. Law belongs to the first one. It tells us what should be done rather than what is done in reality. Secondly, it would be a great mistake to make the rules on state responsibility hostage to the rules on dispute settlement. If one day all states deny accepting jurisdiction of any international courts or arbitrators, it does not mean that the rules on state responsibility are extinct.

There can be no doubt that there are some rules on state responsibility in public international law. Their existence must be however confirmed on the basis of true sources of public international law. It remains to be verified if all or any of the rules inserted into the 2001 ILC Articles on Responsibility of States for Internationally Wrongful Acts (Yearbook of the International Law Commission, 2001: 26–30) are an exact picture of those rules. All the same those articles can serve as a useful point of reference in our discussions.

If we look at the Articles prepared by the ILC, the thought about the presence of a system in this area is even more pressing. There is no doubt

that the articles are prepared and drafted in a very systematic way. It is visible already in the very structure of the document. It is divided into four parts. They deal with: the general principles, the content of the international responsibility of a state, the implementation of the international responsibility of a state, and general provisions. While the presence of the last part should be explained rather by the technicalities connected with the drafting of a document as such than by the substantive elements of international responsibility, the first three parts are of direct importance for the present text. There is a logical or systemic relationship among them. First of all it is necessary to know if responsibility is in place at all. Only then does a question on reparation emerge. Thirdly, we should decide what measures to take with respect to the perpetrator state.

This systematic attitude is visible also within the framework of different parts of the 2001 Articles. Especially the first part in a very systematic way discusses: the attribution of conduct to a state, breach of an international obligation, responsibility of a state in connection with the act of another state, and circumstances precluding wrongfulness. This systematic structure is less visible in other parts. This is rather due to the small number of chapters, however. Part two is divided into three chapters. They cover: general principles, reparation for injury, and serious breaches of jus cogens. All the same the presentation of the means of reparation looks like a system, comprising restitution, compensation, and satisfaction. As regards the third part, it covers only two chapters. They deal with: invocation of international responsibility of a state and countermeasures. In this sense it may be seen as a system as well, though very simple.

This way of approaching the question of the systemic character of international law of responsibility may give rise to doubts. There are many documents in the field of international law; some are drafted in a better and some in a worse way. One may doubt whether it has some role in answering the question of whether international law is a system.

All the same we must conclude that at least if the 2001 Articles reflect the rules of public international law, they strengthen rather than weaken the thesis on the systemic character of international law. What is more, even if the 2001 Articles simply develop the rules of public international law, the basic rules on state responsibility have the same function.

It is worthwhile to look for the reasons of that fact.

It seems to me that the basic and most important reason is to a high extent intuitive. If there are no rules on responsibility in international law there is no international law at all (Balcerzak, 2015: 322). This idea could be attributed to many lawyers (Ross, 1947: 241). For example, for

Ch de Visscher responsibility is a corollary of the equality of states (Quoc Dinh, Daillier, Pellet, 1994: 730). R. Ago referred to this matter in a longer passage

> 13. A justification for the existence of this fundamental rule has usually been found in the actual existence of an international legal order and in the *legal* nature of the obligations it imposes on its subjects. For it is obvious that if one attempts, as certain advocates of State absolutism have done in the past, to deny the idea of State responsibility because it allegedly conflicts with the idea of sovereignty, one is forced to deny the existence of an international legal order. (...) Others prefer to think that, in the international order, State responsibility derives from the fact that States mutually recognize each other as sovereign. The rule establishing responsibility would then be the necessary corollary to the principle of the equality of States (Second report on State responsibility, 1970: 179–180).

Law makes sense if its breach gives rise to adverse effects for the perpetrator. These effects should emerge at least in the field of law. This can justify the widely accepted division of rules into primary and secondary ones (Berber, 1964: 2). It will be referred to in the further part of the present text. All the same, even if the rules on state responsibility cannot be all qualified as secondary rules, it does not change the fact that they have system-building function.

What is more, any attempt to falsify them in entirety seems to be futile.

An element of special importance in this respect is however the place of the rules on state responsibility in the categories of sources of public international law. In this respect only custom and the general principles of law could be taken into consideration. What is even more difficult, some lawyers deny general principles of law the character of sources of international law. For the latter category of lawyers, the situation is of the "either-or" character. Either the rules on state responsibility are customary norms or there are no rules on state responsibility.

I must confess that I belong to the category of lawyers who are very sceptical of treating general principles as a separate category of sources of international law. In any case, I would have a problem with accepting the wording of the ICJ Statute as being the decisive argument. All the same I cannot see any possibility of denying that many customary norms take the form of those principles. What is more, it would be futile to expect the same forms of practice and opinio iuris which could be proved with respect to several rules of the law of the sea or diplomatic law. It must be stressed that all states accept the rules according to which a violation of international law is a source of international responsibility. In this respect the basic rules on

state responsibility can be compared to the principle *pacta sunt servanda*. In order to prove its presence in international law, it is not necessary to prove that there was a longer or shorter practice of all states respecting each and every agreement – the practice followed by opinio iuris. That is why it is not necessary to show that there was a magic period in the past during which all states violating international law paid compensation to victim states without being requested to do so and only then opinion iuris emerged as to it being the object of a legal duty.

In this respect 19th century writers were very pertinent in using the term 'ius necessarium'. It meant rules without which the law itself would be unthinkable. It does not mean however, that the basic rules of state responsibility would not pass the test required from customary norms. As A. Ross puts it, 'that a state is actually responsible if it fails in its duties appears unambiguously from the practice of the states and is implied in many judicial decisions' (Ross, 1947: 241). Also many other lawyers defend the customary character of norms of international law on responsibility (Quoc Dinh et al., 1994: 730). For many of them the case-law of the arbitrators is treated as an argument in favour of this character (Quoc Dinh et al., 1994: 730). On the other hand F. Berber opts for the presence of both customary rules and general principles as well (Berber, 1964: 4). K. Marek called it another branch of customary international law, and one particularly ill-suited to codification (Marek, 1978–1979: 460). R. Ago concluded the above-cited fragment of his report on possible justifications of the basic rule of state responsibility with the words 'But whatever its justification may be, the important thing to note here is that the fundamental rule, despite certain variations in its formulation, is expressly recognized, or at least clearly assumed by doctrine and practice unanimously' (Second report on State responsibility, 1970: 180).

If we point to the similarity between the principle *pacta sunt servanda* and the basic rules of state responsibility, one should also point out the differences. In my opinion, the basic difference has to do with the number of potential questions on details. It is obviously much higher as regards the law of state responsibility. For example, is a state responsible for judicial decisions? Is a state responsible for paramilitary organizations? Is a state responsible for insurrectional movements? The possible answers to those questions are dictated by logic. What is more, it is logic that dictates basic answers as regards the rules on circumstances precluding wrongfulness and the forms (and content) of responsibility. With respect to both those elements, also, analogy with private law instruments of numerous states suggests possible answers.

That is why the rules on state responsibility seem to be so obvious, despite the fact that many cases (especially important ones) escape judicial assessment. This latter fact is true in more than one meaning. Firstly, some states avoid and will avoid any kind of expression of consent for the jurisdiction of any international court or arbitrator. Secondly, it would be difficult to find unequivocal support for many rules from the 2001 Articles in recognized sources of international law or even in any case-law which could be treated as a precedent or at least a source of inspiration for future ones.

All the same the logic is much in favour to many of them. What is of special importance here are the views presented in the older legal literature, their authors not being inspired by the works of the ILC. I would like to draw attention to some views of A. Ross. So e.g. he had no doubt as to the responsibility of states for judiciary and legislative organs (Ross, 1947: 253–254). If it is a state that is a person in international law and not its organs as such, than it must be accepted that a state is responsible for all of them. On the other hand, had a state not been responsible for a given category of its organs, it would have been sufficient for a state to designate this organ to get rid of all elements of international law which turn out to be problematic for this state at a given moment. Similarly, A. Ross defends the thesis on the responsibility of states for actions carried out by their organs outside the scope of their powers (Ross, 1947: 252).

What is more, some elements discussed by the Articles and the doctrine are evidently of a system-looking and system-building nature. For example, if we accept the idea of attribution it is relatively easy to make some assumptions of future states of affairs. Even if made in abstracto, they may become a part of the discourse of international law and serve as a source of inspiration for future decision-makers and judges. A good example is given by J. d'Aspremont (d'Aspremont, 2009–2010: 451–472). As he writes, responsibility requires attribution to a state. If we cannot attribute a coup d'Etat to any state, no responsibility emerges (d'Aspremont, 2009–2010: 467–468). Similarly, A.Nollkaemper and D. Jacobs develop the idea of shared responsibility (Nollkaemper, Jacobs, 2012–2013: 359–438). They take as granted that 'The principles of international law on the basis of which responsibility among multiple actors is currently allocated are, in the words of Brownlie, "indistinct" and do not provide clear guidance' (Nollkaemper, Jacobs, 2012–2013: 363). They see as their task to 'identify the principles of international law that are applicable to cases of shared responsibility as well as gaps in the international legal framework and provide the building blocks for a new perspective that may be better able to grasp the legal complexities arising out of such situations' (Nollkaemper, Jacobs, 2012–2013: 364).

Those elements and many others similar to them not only strengthen the thesis on international law as a system but also could encourage some very bold statements. They would point to the clarity of this system, its coherence and may be even complete character. This is a proper place to raise some doubts.

Some weaknesses

In my opinion it would be futile to attempt to prove that the rules on state responsibility are as such a source of problems for those who defend the systemic nature of international law. All the same it seems justified to look for some elements which make the picture less ideal and therefore may be closer to the truth.

Some problems are more apparent in nature and are due more to the type of presentation of some matters than on their intrinsic characteristics. One can see e.g. that some older presentations of international law did not devote a separate chapter to responsibility. All the same it is not sufficient to equate it with the denial of it. There was and there can be no reasonable proposal that a state breaching international law should or can expect gratitude, respect, or the guarantee of preservation of all its rights and interests. It is a fact that conscience on matters of state responsibility and its general scope has grown progressively. As M. Balcerzak puts it, interest in the matter grew in parallel with the works of the ILC (Balcerzak, 2015: 328).

One matter which is strictly connected has to do with the overall picture of this responsibility. One can observe that there was a tendency to limit the scope of responsibility or at least its doctrinal treatment to the very protection of aliens. E.g. the famous book of Fenwick's contains just one chapter on responsibility, entitled 'The International Responsibility of a State for the Protection of Resident Aliens' (Fenwick, 1948: 275 ff). This attitude was adopted by the first ILC special rapporteur, F. V. Garcia-Amador. As is known this attitude was not accepted by the Commission. It must be stressed however that it was already in the earlier legal literature that the traditional approach was criticised. So e.g., A. Ross stressed that the treatment of aliens had to do with the material rules of conduct and not the formal rules of state responsibility (Ross, 1947: 254).

In fact the first report of J. Crawford presents a little bit different type of justification. For him, "the Commission initially approached the subject by considering the substantive law of diplomatic protection (protection of the persons and property of aliens abroad). But it became clear that

this area was not ripe for codification" (First report on State responsibility, 1998: 6).

It does not change the fact that the peculiarities of the treatment of aliens may have some importance for more general concepts of state responsibility. They may serve as a useful point of departure for many thoughts not only on state responsibility in general and treatment for aliens, but also on human rights, investment law, subjects of law, the importance of case-law for international law, and the very nature of the latter. M. Balcerzak writes that Garcia-Amador was the kind of man who oversees the future of international law (Balcerzak, 2015: 331). All the same the elimination of the topic of diplomatic protection from the scope of the general topic of state responsibility rather strengthens than weakens the systemic character of international law or at least its picture as reflected in the 2001 Articles.

The second element has to do with the tendency of many authors of the books and manuals preceding the 2001 Articles to stress the ambiguities and lack of clarity of the rules on state responsibility. They can be found in the works of F. Berber (Berber, 1964: 2), N. Quoc Dinh (Quoc Dinh et al., 1994: 730), Ch. Fenwick (Fenwick, 1948: 275). Also R. Ago noting a small number of concise principles of state responsibility added that "the possible brevity of the formulation is by no means indicative of simplicity in the subject-matter" (Third Report on State responsibility 1971: 202). That is why it would be strange to accept such a rapid change of the law – from unclear before 2001 to very clear and systematic from that year, unless we accept that documents of the ILC form an additional source of international law. Suffice to say that the latter view is not advocated in the present text.

The third element has to do with some differences of terminology which were and which are used to describe the rules on state responsibility. What can be seen in the older literature are numerous references to injury. Some authors went so far as to introduce it into the very definition of responsibility. So e.g. according to W. L. Gould 'responsibility arises when a state has a duty to make reparation to another state for injury to the state or its nationals' (Gould, 1957: 507). In any respect we have rather to do with the evolution of the views on responsibility than responsibility itself. There can be no doubt that the most important cases of responsibility have to do with injury. The question of inserting the latter into the very definition of responsibility is another, relatively independent matter. A. Ross was sure that damage does not have to be of a material kind for responsibility to emerge (Ross, 1947: 255).

Also the problem of fault attracted the attention of the doctrine. E.g. A. Verdross and B. Simma went so far as to deny the temporary

conclusions of the ILC as regards the objective nature of responsibility (Verdross, Simma, 1984: 852). A. Ross gives the example of a state not being responsible for the incidental shooting of a foreigner by a policemen (Ross, 1947: 258). All those voices are however easily reconcilable with the 2001 Articles. The question of whether fault is or is not necessary is not as such denied. It is simply shifted into the domain of primary rules rather than the law of state responsibility.

This very division of rules into primary and secondary ones requires attention as well. A few doubts may be expressed (Berber, 1964: 2). In fact it is easy to accept that the breach of a given norm (primary one) gives rise to a new relationship – and call the latter a secondary one. On the other hand it is more difficult to call all rules on state responsibility secondary ones.

Perhaps the deepened discussion on this dichotomy would be more problematic for a thesis on the presence of the entire system of responsibility.

It is worthwhile to recall that Arangio-Ruiz in his first report expressed some doubts as to the qualification of an obligation of cessation of a wrongful act. As he wrote, 'A different function is to be ascribed to cessation (or discontinuance) of a wrongful act having a continuing character. Often considered in more or less close connection (if not confusion) with restitution in kind or other forms of reparation, cessation seems more correctly to fall, as recognized (at least in principle) by the previous Special Rapporteur, outside the framework of reparation in a proper sense' (Preliminary report on State Responsibility, 1988: 11). In fact the question is whether the obligation to stop violation is not a simple part of the primary obligation.

This is just a small fraction of a much larger problem.

It is striking that J. Crawford was not a very tough defendant of the very distinction of primary and secondary rules. As he wrote in his first report:

> 14. The distinction between primary and secondary rules has had its critics. It has been said, for example, that the "secondary" rules are mere abstractions, of no practical use; that the assumption of generally applicable secondary rules overlooks the possibility that particular substantive rules, or substantive rules within a particular field of international law, may generate their own specific secondary rules, and that the draft articles themselves fail to apply the distinction consistently, thereby demonstrating its artificiality.
>
> 15. On the other hand, to abandon the distinction, at the current stage of the work on the topic, and to search for some different principle of organization for the draft articles, would be extremely difficult. (...) (First report on State responsibility, 1998: 6).

For U. Linderfalk 'By *secondary rules of international law*, on the other hand, international lawyers mean "rules establishing (i) on what conditions a breach of a 'primary rule' may be held to have occurred and (ii) the legal consequences of this breach" ' (Linderfalk, 2009: 55).

M. Balcerzak rightly perceives the differentiation between primary and secondary rules as an important argument for the systemic nature of international law (Balcerzak, 2015: 332). It is to be expected that critics of the latter should concentrate their attention on the former.

The size of the present text makes it impossible to undertake a thorough analysis of all elements of state responsibility from the perspective of being primary or secondary norms. I can just concentrate attention on a few aspects. What is especially striking is the qualification of norms dealing with circumstances precluding wrongfulness. Let us look at self-defence. On the one hand it is easy to prove that self-defence will take place only after an armed attack. Assuming that the latter is an internationally wrongful act, we can easily say that the right to self-defence is a secondary rule in this respect. It is difficult however not to see that it is a part of the primary rules on the use of force. In this sense we can wonder if the use of force on the basis of a decision of the Security Council is not a device of the rules on state responsibility while a classical right to self-defence is one. What's more – does a state acting in self-defence really need justification? Is a state so powerless or so cowardly to defend itself a good example of behaviour and a state acting in individual or possibly collective self-defence a somehow shameful actor? What if that state puts an end to a cruel, inhuman system which was able to destroy state after state and population after population? In my opinion a state fighting and subduing such an aggressor can think about anything but excusing itself.

Another problem is furnished by consent as a circumstance precluding wrongfulness. It is stressed that this consent should predate an act. How can we call this act intentionally wrongful if it is preceded by consent? Let us imagine that Luxembourg asks Belgium to send its troops to help keep order during an important football match in the first country. Is the crossing of a border really an act of illegal crossing of a border? In my opinion it is not.

U. Linderfalk rightly asks whether 'the substance of the ILC Articles can be described as *separate* from the ordinary (or primary) rules of international law' and 'whether or not the ILC Articles and the ordinary (or primary) rules of international law can be described as pertaining to different stages of the judicial decision-making process' (Linderfalk, 2009: 59). His answers are

to a high degree dependent on the division of the rules into what he calls regulative and constitutive rules. I have some doubts about the necessity of introducing this terminology into the present short text, all the same the problems are almost the same as indicated above.

That is why one can look at the rules precluding wrongfulness as a compromise between the logics, grammar and law. Their systemic appearance is to a large extent just an appearance rather than reality.

What is more some rules of the 2001 Articles must be said to be doubtful. In this respect one can wonder on the true basis in public international law of a rule according to which a state has to pay compensation even if it acted in circumstances precluding wrongfulness. For S. Sucharitkul it is a source of doubts as to differentiation between responsibility and liability (Sucharitkul, 1995–1996: 822). The true problem is a little bit different. One can agree that a state which confiscated food in order to secure the lives of its people should pay damages to the state – owner or the nation state of the owners of this food. Is it also the obligation of a state whose ship because of distress was not able to give aid to another sinking ship? In fact the sinking would have happened in any case and the lack of aid is not its reason.

Another important (and closely connected question) has to do with so-called self-contained regimes. It is by no means a coincidence that P.-M. Dupuy perceives them as a source of 'a fragmentation of the theory of international state responsibility, a fundamental institution of the international legal system' (Dupuy, 1989–1990: 108). On the other hand J. Crawford looks at them as an element of a wider system (Crawford, 2010: 24).

All the same, self-contained regimes are important as they just illustrate the main problem – namely the problem of delimitation. It is much wider. It is not only a question of delimitation of the scope of normal rules on responsibility and the ones of a given self-contained regime. It is also the question of delimitation of the rules of state responsibility and the ones of other regimes which deal with the adverse consequences of a violation of the law. The most notable example is the parallel application of the mechanisms of the law of treaties and the law of state responsibility. For J. Crawford also this element does not seem to be a problem from the perspective of a system (Crawford, 2010: 22).

One can agree with the latter way of thinking. It is a kind of paradox but even if the rules on state responsibility have some important problems with delimitation, it is perhaps a problem for a thesis on a system of responsibility but not necessarily the system of international law. The latter thesis seems to be strengthened even if the former one weakens.

All the same the above-cited elements are not a true danger for statements on the similarity to a system – both as regards the law of state responsibility as well as the whole of international law. The true danger can be situated elsewhere. In my opinion it has to do with the question of the sources of international law.

The true source of problems with the systemic nature of international law

It seems worthwhile to ask a more hypothetical question. What would have been the picture of the law on state responsibility had the ILC finished its work 20 years earlier? What would be the teaching on state responsibility had the ILC kept to the division between delicts and international crimes? What would be the teaching on state responsibility had the ILC kept to damage as a precondition of state responsibility? I have no doubt that the teaching would have been completely different. The only question is whether the state responsibility would be really so different. In my opinion it would not be so. It is evidently a serious problem. If we treat seriously the teaching on the sources of international law, the unpleasant truth is that the sources being unchanged the overall picture of law would have been completely different. It is rather a bad signal for those who look for a system of international law. It may mean that international law is not a system or maybe even is a system but very imperfect.

It must be stressed that the influence of the ILC on doctrine is not just one-sided. It is also the doctrinal critical assessment that influenced or at least could have influenced the ILC. In this context it is worthwhile to cite a severe criticism of K. Marek with respect to the very idea of the criminal responsibility of states (Marek, 1978–1979: 463). All the same it is difficult to oversee the fact of a non-binding document of an expert body influencing the teaching to a very considerable extent.

If we look at the 2001 Articles as a system we can easily point to other proposed or possible systems or at least sub-systems. One of them is to be found in the voluminous work of L. Oppenheim. He distinguished two different kinds of state responsibility – original and vicarious ones (Oppenheim, 1955: 337 ff). The former was to be the responsibility of a state for its acts. The vicarious responsibility was presented as 'responsibility of States for certain acts other than its own'. It was believed to be based on 'certain unauthorised injurious acts of their agents, of their subjects or even of such aliens as are for the time living within their territory' (Op-

penheim, 1955: 337). In the opinion of L. Oppenheim a state may avoid vicarious responsibility if it brings a given person to justice – both civil and criminal (Oppenheim, 1955: 338).

On the other hand, B. Graefrath proposed introducing a presumption of intention on the part of a state giving aid to a violator of international law. According to it 'Whenever it has been established that a State is committing an international crime any substantial aid or assistance rendered to such a State which may be used in the crime should suffice to be considered as complicity" (Graefrath, 1996: 376).

Of course, the earlier idea of differentiation between international crimes and delicts also deserves the notion of a system.

It is easy to see that even some utterances of authors who advocate relatively precise rules on state responsibility reveal (maybe unintentionally) doubts as to the real source of a given rule. So e.g. the above-mentioned statements of A. Ross on the responsibility of states for actions carried out by their organs outside the scope of their powers (Ross, 1947: 252) are accompanied by references to an analogy with domestic law, the responsibility of an employer for his servants. In another place the same author writes that 'the shaping of the claim must be left to the judgment of the injured party, within reasonable limits determined by general international law (the international standard)' (Ross, 1947: 268).

There can be no wonder that in cases of doubt the authors prefer to hide behind case-law as to state responsibility for *ultra vires* acts of state officials (Gould, 1957: 508). Only some of the authors go as far as to go into the details of the cases. In this context one can cite a very critical evaluation of a ruling made by de Martens in the Costa Rica Packet case. (Ross, 1947: 258). Now it is most easy and comfortable to hide behind the 2001 Articles.

The place of the rules of responsibility in the true sources of international law was already referred to as proof of the strength of that law. It would be difficult to oversee some problems as well, however. One can have the impression of some hopelessness on the part of the doctrine.

This could be reflected in the ways of confirming the presence of a given rule. Let us imagine that a given author wants to trace one by one the arbitral awards made in disputes among a few states and identify the rules applied. There could be a tendency to present them as norms of international law. Are they really such? One can have serious doubts. Case-law is not a source of international law. Judgments are binding for the parties only. Other sovereign players have virtually no influence upon the content of a given judgment.

It does not mean, however, that we are in a position to prove the presence of the rules which are opposite to the ones adopted by a given arbitrator.

In fact, the context of court proceedings and the presence of art. 38(1)(c) of the ICJ Statute support a good justification for the ICJ to apply a rule which does not necessarily have the character of a source of law. All the same we may have serious doubts if we want to prove a given rule as a part of international law in an abstract way, to which lawyers, and especially continental lawyers, are used. The basic question remains where to look for those rules. If we refer to settlement of claims agreements the parties could argue that what they have decided is the result of their free will and negotiating positions and not the objective rules on state responsibility. In fact we can be irritated by the tendency of some lawyers to hide behind some elements on which they have just written denying them the character of sources of international law. The basic question remains what can we offer in their place. Unfortunately, there is not much to be so offered. It must be treated as a warning that the theses on international law as a complete system are at least premature.

This is in particular the case with many norms of diplomatic protection. So in fact getting rid of them from works on international responsibility has somehow saved the topic also from the above-presented danger. One should neither underestimate nor overestimate it. The 2001 Articles to a great extent reflect a customary norm of responsibility for violations of law. They contain also several logical conclusions stemming from it. The probability of confirming them as a part of positive international law is high, but in no case certain. They contain also some proposals of norms for the future. Their legal nature is not certain at the present time. The last element has to do with the proposed terminology. Paradoxically the influence of the ILC is the biggest in this respect. The terminology, as important as it is, can be, however, treated as an element not being as such a part of law in the strict meaning of the term.

Conclusion

The rules on state responsibility look like a system. They may prima facie support the idea of international law as such a system. It is a kind of paradox that those rules are too ideal, too systemic. The main problem is not whether this system could not be more ideal, more clear. The main problem is how several of those rules find support in recognized sources of

international law. In my opinion, neither they nor their competitors find such support. That is why it would be difficult to support a thesis on international law as a complete system or maybe even as a system at all. On the other hand, we have to do with a tendency of presenting as law some non-binding documents prepared by expert groups. This is a part of a wider process of 'paper-law' or 'spoken law'; that is, of presenting as law some elements that do not deserve this notion. Inevitable as it may be, this process requires at least an honest diagnosis if not a cure.

REFERENCES

Balcerzak, M. (2015). Odpowiedzialność międzynarodowa państwa za działania zabronione a systemowy charakter prawa międzynarodowego, in: R. Kwiecień (ed.), *Państwo a prawo międzynarodowe jako system prawa*, Lublin: Wydawnictwo Uniwersytetu Marie Curie-Skłodowskiej, 319–354.

Berber, F. (1964). *Lehrbuch des Völkerrechts. Erster Band. Allgemeines Friedensrecht*, München und Berlin: Beck, Band III, 2.

Crawford J., Pellet, A., Olleson, S. (eds.). (2010). *The Law of International Responsibility*, Oxford: Oxford University Press.

Crawford, J. (2010). System of International Responsibility, in: Crawford, James, Pellet, Alain, Olleson, Simon. (eds.), *The Law of International Responsibility*, Oxford: Oxford University Press, 20.

d'Aspremont, J. (2009–2010). Responsibility for Coups d'Etat in International Law, *Tulane Journal of International and Comparative Law*, 18, 451–472.

Dupuy, P.-M. (1989–1990). The International Law Of State Responsibility: Revolution Or Evolution?, *Michigan Journal of International Law*, 108.

Fenwick, Ch. (1948). *International Law*, New York and London: Appleton-Century-Croft, 275ff.

First report on State responsibility (1998), by Mr. James Crawford, Special Rapporteur, Document A/CN.4/490 and Add. 1–7, *Yearbook of the International Law Commission*, Vol. II, Part. I, 6, 12, 14, 15.

Gould, W. L. (1957). *An Introduction to International Law*, New York: Harpers & Brothers, 507.

Graefrath, B. (1996). Complicity in the Law of International Responsibility, *Revue Belge de Droit International*, 2, 376.

Kwiecień, R. (ed.) 2015. *Państwo a prawo międzynarodowe jako system prawa*, Lublin: Wydawnictwo Uniwersytetu Marie Curie-Skłodowskiej.

Linderfalk U. (2009). State Responsibility and the Primary-Secondary Rules Terminology – The Role of Language for an Understanding of the International Legal System, *Nordic Journal of International Law*, 78, 55.

Marek, K. (1978–1979). Criminalizing State Responsibility, *Reveu Belge de Droit International*, 2, 460.

Nollkaemper, A., Jacobs D. (2012–2013). Shared Responsibility in International Law: *A Conceptual Framework, Michigan Journal of International Law*, 359–438.

Oppenheim L. (1955). *International Law. A Treatise*. Vol. I – Peace, Eighth edition, H. Lauterpacht (ed.) by, London, New York, Toronto: Longmans, Green, 337ff.

Preliminary report on State Responsibility (1998). Mr. Gaetano Arangio-Ruiz, Special Rapporteur, Document A/CN.4/416 & Corr. 1 & 2 and Add. 1 & Corr. 1, *Yearbook of the International Law Commission*, Vol. II, part. I, 11, para. 22.

Quoc Dinh, N., Daillier, P., Pellet, A. 1994. *Droit international public*, Paris: L.G.D.J, 730.

Ross, A. (1947). *A Textbook of International Law. General Part*, London, New York, Toronto: Longmans, Green and Co, 241.

Saganek, P. (2015), Uznanie jako akt jednostronny państwa a systemowy charakter prawa międzynarodowego, in: R. Kwiecień (ed.), *Państwo a prawo międzynarodowe jako system prawa*, Lublin: Wydawnictwo Uniwersytetu Marie Curie-Skłodowskiej, 109–166.

Second report on State responsibility (1970), by Roberto Ago, Special Rapporteur – the origin of international responsibility, Document A/CN.4/233, *Yearbook of the International Law Commission*, Vol. II, 179–180, para. 13.

Sucharitkul, S. (1995–1996). State Responsibility And International Liability Under International Law, *Loyola of Los Angeles International and Comparative Law Journal*, 822.

Third Report on State responsibility (1971), by Mr. Roberto Ago, Special Rapporteur, the internationally wrongful act of the State, source of international responsibility, Document A/CN.4/246 and Add. 1–3, *Yearbook of the International Law Commission*, Vol. II, part. I, 202, para. 15.

Verdross, A. Simma, B. (1984). *Universelles Völkerrecht. Theorie und Praxis*, Berlin: Dunckon & Humbolt, 852.

Yearbook of the International Law Commission (2001), Vol. II, Part. 2, 26–30.