



unimc
UNIVERSITÀ DI MACERATA

l'umanesimo che innova

A LEGAL/POLITICAL HISTORY OF THE PRIMARY/SECONDARY RULES DISTINCTION IN THE LAW OF STATE RESPONSIBILITY

Università di Macerata, Dipartimento di Giurisprudenza, Corso di Dottorato in
Scienze Giuridiche

2017

George R. B. Galindo
Visiting Professor

Syllabus

Introduction

In the 1960s, the International Law Commission, guided by Professor Roberto Ago, took the decision to confine its work on state responsibility to the domain of the so-called secondary rules. Differently from primary rules - that lay down substantive rules - secondary rules establish the conditions in which a breach of a primary rule may be held to have occurred and the legal consequences arising from the same breach. Such decision was kept in the final draft articles prepared by the ILC, approved in 2001.

The decision to distinguish primary and secondary rules, far from being one only restricted to the realm of a highly technical issue, influenced tremendously the politics of the responsibility of states and is behind heated debates in the discipline, such as that on the existence of self-contained regimes and the fragmentation of international law. Besides that, the practice of states and international courts have been absorbing the distinction with concrete consequences for the way we understand today one of the main (and more controversial) topics of international law: the responsibility of states

The series of lectures aims to investigate the emergence of the distinction between primary and secondary rules in the law of state responsibility, its semantic change in times and its legal and political consequences to the way we think the fundamentals of international law in present days.

Class One: March 22nd (11:00 to 13:00)

□ Setting the Scene

- Introduction to the lectures (presentation, relevance of the subject-matter, aims)
- Some Historical-Methodological points
- The Historiography of the Law of State Responsibility
- The ILC and the beginnings of its work on the Law of State Responsibility

Recommended readings:

- KOSKENNIEMI, Martti. Doctrines of State Responsibility. In: CRAWFORD, James et al (ed.). *The Law of International Responsibility*. New York: Oxford University Press, 2010, p. 45-51.
- GARCIA-AMADOR, F. V. The Role of State Responsibility in the Private Financing of Economic and Social Development. *Syracuse Law Review*. Vol. 16. N° 4, 1965, p. 738-744.

Class Two: March 23rd (11:00 to 13:00)

□ The Work of the International Law Commission

- The “Ago Revolution” and its political consequences
- How to locate the origins of the primary/secondary rules distinction?
- The treatment of the distinction by the following rapporteurs (Riphagen, Arangio-Ruiz, Crawford) and other topics studied by the ILC

Recommended readings:

- AGO, Roberto. Le délit international. *Recueil des Cours de l’Académie de Droit International de la Haye*. Tome 68, 1939, p. 415-554.
- DAVID, Eric. Primary and Secondary Rules. In: CRAWFORD, James et al (ed.). *The Law of International Responsibility*. New York: Oxford University Press, 2010, p. 27-33.

Class Three: March 28th (9:00 to 11:00)

□ Self-contained regimes

- The debate on diversity of secondary rules
- Are there self-contained regimes?
- The unity of international law and the distinction’s semantic change

Recommended readings:

- SIMMA, Bruno. Self-contained Regimes. *Netherlands Yearbook of International Law*. Vol. XVI, 1985, p. 111-136.
- MARSCHIK, Axel. Too Much Order? The Impact of Special Secondary Norms on the Unity and Efficacy of the International System. *European Journal of International Law*. Vol. 9. N° 1, 1998, p. 212-239.

Class Four: March 29th (11:00 to 13:00)

□ Fragmentation of international law

- Far from the ILC: from diversity of secondary rules to fragmentation
- Back to the ILC: from secondary rules to *lege specialis*
- Is the “invisible college of international lawyers” fragmented?

Recommended readings:

INTERNATIONAL LAW COMMISSION. Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law (Report of the Study Group of the International Law Commission. Finalized by Martti Koskenniemi). A/CN.4/L.682.

VON BERNSTORFF, Jochen. International Legal Scholarship as a Cooling Medium in International Law and Politics. *European Journal of International Law*. Vol. 25. N° 4, 2014, p. 977-990.

Class Five: March 30th (11:00 to 13:00)

□ International Practice

- Secondary rules in Investment dispute settlement mechanisms
- Secondary rules in the ICJ
- Final assessment

Recommended readings:

INTERNATIONAL COURT OF JUSTICE. Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), Judgment, I.C.J. Reports 2012, p. 99-156.

ALLOTT, Philip. State Responsibility and the Unmaking of International Law. *Harvard International Law Journal*. Vol. 29. N° 1, 1988, p. 1-26.