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## **CHINKS IN THE CLIMATE LAW ARMOR: STATE RESPONSIBILITY FOR CLIMATE CHANGE HARMS**

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### **ABSTRACT**

Attribution has long been a necessary limb of State responsibility under Article 2 of ARSIWA and the customary law. Climate litigants struggle to prove attribution to fix State responsibility in international adjudication, given diffuse, multi-state causation. Further, the climate law regime gives individuals no litigation route of their own. The trend is for the claimants to invoke general human rights instruments, which impose a duty of care rather than requiring attribution. Drawing on landmark climate cases, this article traces the trajectory and argues that the practice carries a cost beyond doctrine: it excludes large-scale, geographically dispersed climate victims from any effective remedy, and it rests on international bodies speaking with judicial authority they do not hold, over matters a State's own courts have settled, raising real questions of sovereignty. Several major States have not unreasonably limited their exposure to these mechanisms, a pattern this article argues risks weakening the human rights treaty regime itself if left unaddressed. The article argues that the remedy for such diffuse harm should be international in character rather than borne by one State's citizens, and that the durable solution lies in equipping climate law with enforcement mechanisms of its own.

## 1. Introduction

State responsibility is the liability of a State for any internationally wrongful act it has committed.<sup>1</sup> It is responsible for reparation for any harm caused to another State by committing an internationally wrongful act. This is reflected in the case of *Chorzow factory* where the PCIJ laid down the foundational rule for State responsibility based on the principle of restitution in integrum. While the consequence of breach of State responsibility is fairly settled in international law, the concept of internationally wrongful act appears to be a moving piece<sup>2</sup>.

For quite a long time the concept of internationally wrongful act has been guided by customary international law. The codification of international wrongful act was done by ILC in its Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA).<sup>3</sup> Though not binding by itself, the general agreement appears to be that Article 2 largely represents the customary law around IWA.

Art. 2 of ARSIWA is objective in nature. The twin test comprises whether the State has committed the alleged wrongful act and whether such act is a breach of international law. This has been applied by international judicial bodies in several cases. Attribution and breach are the two limbs to fix State's liability. Both are to be satisfied.<sup>4</sup>

However, climate change related cases appear to be changing this test<sup>5</sup>- the first limb of attribution. This becomes critical when the issue to be adjudicated is one where attribution is diffuse and parties to the dispute are a State and its citizens. This article doctrinally examines this shift and attempts to predict its consequences for States.

## 2. Traditional View on Internationally Wrongful Acts

Traditionally, attribution is necessary to fix State responsibility. For example, in 1949, when British warships were damaged by mines in Albanian waters the International Court of Justice

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<sup>1</sup> Sompong Sucharitkul, State Responsibility and International Liability under International Law, 18 Loy. L.A. Int'l & Comp. L. Rev. 821, 823 (1996).

<sup>2</sup> Edith Brown Weiss, Invoking State Responsibility in the Twenty-First Century, 96 Am. J. Int'l L. 798, 816 (2002)

<sup>3</sup> Rep. of the Int'l Law Comm'n, 53d Sess., U.N. Doc. A/56/10, at 43 (2001), [https://legal.un.org/ilc/texts/instruments/english/commentaries/9\\_6\\_2001.pdf](https://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf).

<sup>4</sup> Sucharitkul, *supra* note 1, at 834.

<sup>5</sup> Christina Voigt, State Responsibility for Climate Change Damages, 77 Nordic J. Int'l L. 1, 2 (2008).

(ICJ) held it responsible despite the fact that Albania had not laid the mines (*Corfu Channel (UK v. Albania)*)<sup>6</sup>.<sup>7</sup> But, it knew of their presence and failed to warn other States. This case shows that liability can rest on a State's knowledge and inaction, not just its direct conduct. In *Tehran Hostages* (1980)<sup>8</sup>, militants who were not initially acting for Iran seized the US embassy. Iran was not responsible at first. But once Iranian authorities publicly endorsed the militants' actions, the ICJ held that this endorsement made their conduct attributable to the State. Attribution, here, arose after the fact, through adoption. In *Nicaragua v. United States* (1986)<sup>9</sup>, the US funded and trained the Nicaraguan contras but did not directly command them. The ICJ ruled that funding and training alone were not enough to attribute the contras' conduct to the US. Attribution required "effective control" over the specific operations in question. In *Bosnia v. Serbia* (2007)<sup>10</sup>, Bosnia tried to attribute the Bosnian Serb forces' genocide to Serbia using a looser "overall control" standard drawn from the ICTY's *Tadić* case.<sup>11</sup> The ICJ rejected this and reaffirmed *Nicaragua's* "effective control" test instead. Even when a looser standard existed, the Court chose to keep attribution narrow.

The four cases do not show one single scale running from lenient to strict. *Corfu Channel* is different in kind. Albania's liability rested on its own conduct, the failure to warn, not on attributing someone else's conduct to it. Attribution was never in question there. The real trajectory is visible across the other three. *Tehran Hostages* allowed attribution through a State's later adoption of private conduct. Iran made the militants' acts its own by endorsing them. *Nicaragua* then set a much higher bar for attributing an organised group's conduct to its sponsor: funding and training were not enough, effective control over specific operations was required. In *Bosnia v. Serbia*, a looser standard was available. The ICTY's "overall control" test would have made Serbia's responsibility easier to establish. The ICJ declined to use it.<sup>12</sup> The pattern, then, is not one of standards getting stricter over time. It is one of a strict standard being set in *Nicaragua* and held firm afterward, even when a looser alternative was available. Whatever else has varied across these cases, attribution has remained a necessary hygiene

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<sup>6</sup> *Corfu Channel (U.K. v. Alb.)*, Merits, 1949 I.C.J. 4 (Apr. 9).

<sup>7</sup> Voigt, *supra* note 5, at 12, 16

<sup>8</sup> *United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran)*, 1980 I.C.J. 3 (May 24).

<sup>9</sup> *Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.)*, Merits, 1986 I.C.J. 14 (June 27).

<sup>10</sup> *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro)*, 2007 I.C.J. 43 (Feb. 26).

<sup>11</sup> *Prosecutor v. Tadić*, Case No. IT-94-1-A, Appeals Chamber Judgment, paras 116–145 (Int'l Crim. Trib. for the Former Yugoslavia, 15 July 1999).

<sup>12</sup> Antonio Cassese, *The Nicaragua and Tadić Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia*, 18 *Eur. J. Int'l L.* 649, 650–51 (2007).

factor for establishing State responsibility.

### 3. Attribution in Climate Change Harm Cases

In *Urgenda v. Netherlands* (2015, upheld 2019)<sup>13</sup>, Dutch citizens sued their own government for insufficient emissions cuts. The Netherlands argued its own emissions were too small a share of the global total to matter<sup>14</sup>. Further, it argued that the causal contribution was diffuse, and hence, it was not responsible. The Dutch Supreme Court rejected this, holding that a State cannot escape responsibility for its contribution simply because the problem is global and the contribution comparatively small. This is a case where attribution was ignored to establish liability of the State for climate change related harms in a municipal court.<sup>15</sup> While this is a municipal case, the court notably cited European Convention on Human Rights (ECHR) obligations of Netherlands, particularly Arts. 2 and 8.<sup>16</sup> This is a dispute between the government and some citizens before a municipal court.

Contrarily, Australian courts took a view exactly opposite to this and ruled that State organs do not owe a duty of care for environment-related failures to its citizens in cases such as *Graham Barclay Oysters* (2002), *Sharma* (2022), and *Pabai* (2025).<sup>17</sup> These rulings effectively carved out an exception for State organs from liabilities arising from environment-related harms. This reflects Australian municipal courts asserting their views on an internal dispute. However, these rulings allowed Daniel Billy and his friends to directly complain to the Human Rights Committee (HRC) without “exhausting local remedies” citing ineffective domestic remedies.<sup>18</sup>

In *Daniel Billy v. Australia* (2022), Torres Strait Islanders complained to the HRC that Australia's inadequate adaptation measures, such as building sea walls or resettlement

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<sup>13</sup> Hoge Raad [Supreme Court], 20 Dec. 2019, ECLI:NL:HR:2019:2007 (Neth.).

<sup>14</sup> Chris Backes & Gerrit van der Veen, *Urgenda: The Final Judgment of the Dutch Supreme Court*, 17 J. Eur. Env't & Plan. L. 307, 309 (2020).

<sup>15</sup> Id. at 310–11.

<sup>16</sup> Convention for the Protection of Human Rights and Fundamental Freedoms arts. 2, 8, Nov. 4, 1950, 213 U.N.T.S. 221.

<sup>17</sup> *Graham Barclay Oysters Pty Ltd v. Ryan* (2002) 211 CLR 540; [2002] HCA 54 (Austl.); *Minister for the Environment v. Sharma* [2022] FCAFC 65 (Austl.); *Pabai v. Commonwealth of Australia* (No 2) [2025] FCA 796 (Austl.).

<sup>18</sup> Human Rights Committee, Views adopted by the Committee under Article 5(4) of the Optional Protocol, concerning Communication No. 3624/2019, U.N. Doc. CCPR/C/135/D/3624/2019, paras 2.9, 7.3 (22 Sept. 2022) (*Daniel Billy et al. v. Australia*).

planning, exposed them to climate harm. The Committee found Australia in breach of its obligations under the International Covenant on Civil and Political Rights (ICCPR) articles which are not specific to environment/climate-related liabilities. It did not ask whether Australia's own emissions caused the harm, sidestepping the attribution question by using a general human rights instrument. It asked only whether Australia had done enough to protect its citizens from a harm it did not need to have caused. The Committee also ignored the Australian municipal courts' consistent position that State doesn't owe a duty of care to its citizens in environmental harm.<sup>19</sup> Instead, it looked at the more general principle of a duty to protect citizens, and found a violation of ICCPR articles.

While Daniel Billy obtained relief under human rights law, *Sacchi (Sacchi v. Argentina)*<sup>20</sup> did not. *Sacchi* was fundamentally a multi-State climate causation claim, filed under the same kind of human rights instrument. But that instrument is built on one treaty, one State, one claimant, not several States at once. In *Sacchi*, sixteen children, several with no nationality link to the States they sued, brought claims against Argentina, Brazil, France, Germany, and Turkey together. The Committee went further than *Billy* on attribution itself, finding a State can be responsible for the effect of its own emissions on children outside its territory, given a sufficient causal link and the capacity to act. But the case was dismissed for failure to exhaust domestic remedies, and never reached the merits.

In *Verein KlimaSeniorinnen Schweiz v. Switzerland* (2024),<sup>21</sup> the European Court of Human Rights (ECtHR) Grand Chamber held Switzerland in breach of Article 8 ECHR for failing to put in place an adequate domestic framework to cut emissions. As in *Billy*, the Court did not require proof that Swiss emissions specifically caused the applicants' harm. It asked whether Switzerland had discharged a positive obligation to regulate. The case also expanded standing, allowing an association to bring the claim on behalf of its members without each member showing individual, particularised harm. This is a further loosening, this time procedural rather

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<sup>19</sup> Fiona McGaughey, Amy Maguire & Sasha Purcell, Torres Strait Islanders Leading the Charge on the Human Rights Implications of Climate Change: Daniel Billy et al v Australia, 51 U. W. Austl. L. Rev. 88, 92 (2023).

<sup>20</sup> Committee on the Rights of the Child, *Sacchi v. Argentina*, Communication No. 104/2019, U.N. Doc. CRC/C/88/D/104/2019 (8 Oct. 2021). See also Committee on the Rights of the Child, *Sacchi v. Brazil*, Communication No. 105/2019, U.N. Doc. CRC/C/88/D/105/2019 (8 Oct. 2021); *Sacchi v. France*, Communication No. 106/2019, U.N. Doc. CRC/C/88/D/106/2019 (8 Oct. 2021); *Sacchi v. Germany*, Communication No. 107/2019, U.N. Doc. CRC/C/88/D/107/2019 (8 Oct. 2021); *Sacchi v. Turkey*, Communication No. 108/2019, U.N. Doc. CRC/C/88/D/108/2019 (8 Oct. 2021).

<sup>21</sup> *Verein KlimaSeniorinnen Schweiz v. Switzerland*, App. No. 53600/20, Eur. Ct. H.R. (Grand Chamber, 9 Apr. 2024).

than substantive.

*Duarte Agostinho v. Portugal and 32 Others (2024)*<sup>22</sup> was decided by the same ECtHR Grand Chamber, the same day as *KlimaSeniorinnen*. Portuguese youth tried to sue 32 other States directly, none of them their own. The Court refused. It held that a State's obligations under the Convention run to those within its own jurisdiction, and declined to extend that jurisdiction extraterritorially for climate harm. Individuals suing their own State have a route, however imperfect. Individuals trying to reach the States most responsible for the harm they suffer do not.

Read together, these cases show that a citizen facing diffuse climate harm has only two real choices. Sue their own State, first in municipal courts, and if that fails, before an international body under human rights law. This is the route *Billy* and *KlimaSeniorinnen* took. Or, sue the other States responsible, through their own State as complainant, in a State-to-State claim. This is the route no one has successfully taken. *Sacchi* and *Duarte Agostinho* show why: human rights treaty adjudication is bilateral by design, one State, one treaty, one claimant, and does not extend to multiple respondent States at once.

This answers a fair question this article has not yet addressed directly. If the outcome is good, does it matter how it was reached? It matters because the route only works for a narrow class of claimant: someone whose own State happens to be both a treaty signatory and part of the harm. It does nothing for a geographically spread population harmed by acts of multiple States. The individual route is foreclosed, as *Sacchi* and *Duarte Agostinho* show. The State-to-State route remains open in theory, but it depends entirely on their own government's willingness to bring it, a willingness that cannot be assumed, and that no citizen can compel. The workaround does not distribute justice according to who is harmed. It distributes justice according to who can sue whom, and under what treaty.

Attribution- the requirement rooted in ARSIWA and customary law- is a challenge in climate cases. A workaround using general human rights instruments has a serious flaw. It cannot address internationally wrongful acts involving multiple States with diffuse causation, or

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<sup>22</sup> *Duarte Agostinho and Others v. Portugal and 32 Others*, App. No. 39371/20, Eur. Ct. H.R. (Grand Chamber, 9 Apr. 2024).

provide reparation to individual citizens who are themselves spread across States. This is not a marginal case. It is the classical shape of large-scale climate harm- sea-level rise, extreme weather, ecosystem collapse- caused by many States together, and suffered by populations across many States at once. The very harm this article set out to examine is the harm the current framework is least equipped to redress. Further, this approach also raises questions around State sovereignty.

#### **4. The Question of Sovereignty: Invitation to Interfere?**

*Daniel Billy* is a strange case. The HRC's decision<sup>23</sup> speaks over Australia's own apex court, which had answered the same question the opposite way for decades. The Committee itself admits the posture this creates: though not a judicial body, it says its Views “exhibit some important characteristics of a judicial decision.”<sup>24</sup> Does this affect the standing of the municipal judiciary in the eyes of its own citizens? Does the international body become, in effect, a court of appeal for an aggrieved group of citizens?

State sovereignty is a customary law principle, arguably emanating from the Peace of Westphalia (1648), and held sacrosanct for over three and a half centuries. This sovereignty includes the State's, and its citizens', right to decide how to manage their own affairs, including the justice system. An apex court, in most States, is the highest authority declaring the law of the land. Given this, an international body ruling against a municipal court's established position, in a domestic dispute, can be perceived as undermining both the municipal justice system and State sovereignty itself.

The United Nations (UN) Charter codifies this: non-interference in the internal matters of a sovereign State<sup>25</sup>. The question is whether a State can waive its right under this customary principle. Can a State legitimately invite international scrutiny on its domestic affairs? Apparently, it can and it does. ICCPR is an example. Australia's ratification opened exactly this avenue, the one that let the HRC speak over its own apex court in *Billy*.

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<sup>23</sup> *Daniel Billy et al. v. Australia*, supra note 18, para. 11.

<sup>24</sup> Human Rights Committee, General Comment No. 33: Obligations of States Parties under the Optional Protocol to the International Covenant on Civil and Political Rights, paragraph 11, U.N. Doc. CCPR/C/GC/33 (25 June 2009).

<sup>25</sup> U.N. Charter art. 2, para. 7.

United Nations Framework Convention on Climate Change (UNFCCC) is another example that rides on human rights instruments for enforcement. There is no complaints mechanism. Article 2, read with Article 4.2, arguably commits member countries to obligations on which environmental claims could be based. Paired with a human rights instrument, these become the measure of whether a State has done enough. A violation becomes an internationally wrongful act by virtue of breaching a treaty. This gives international bodies jurisdiction to pass opinions on what were once purely internal disputes, as seen in the cases discussed above.

International Organisations (IO) directing sovereign States to grant relief to their own citizens creates a strange outcome. Australia, in *Daniel Billy*, was asked to pay compensation to its own citizens. This compensation is to be paid out of the country's own resources, pooled by all its citizens. Essentially, the IO is asking the rest of Australian citizens to pay the authors for not doing enough to assist them. Whether climate mitigation is a policy priority, or whether common resources should go elsewhere, is an internal decision of the people. In the Netherlands, perhaps it holds a higher priority; Australia, evidently, has accorded it a lower one. Short of a *jus cogens* violation- genocide, slavery, torture, and the like- this is a sovereign call, for a State's own citizens to make. The IO here is effectively telling the rest of the citizens, minus Daniel Billy and his co-authors, where to deploy their resources and what to prioritise. And this surrender happened through a more general human rights framework, signed by the State for entirely different reasons.

This raises a genuine question, not one this article resolves. Non-interference is not a UN Charter invention. It is a facet of sovereignty that predates the UN itself.<sup>26</sup> Can such a foundational principle be waived through a treaty? Should it be? If non-interference is sovereignty's fundamental right, held on behalf of a State's population across generations, then perhaps no single government can waive it through a treaty either. Yet treaty-making is itself one of the core exercises of sovereignty. To say a State cannot waive non-interference is close to saying a State cannot fully exercise its own sovereignty, which defeats the very freedom the argument sets out to protect. Either way, one ends up challenging the very freedom one is trying to preserve.

Not every State has made this choice. India ratified the ICCPR but never accepted its Optional

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<sup>26</sup> Military and Paramilitary Activities in and against Nicaragua, *supra* note 9, para. 202.

Protocol; a case like *Billy* could not reach it<sup>27</sup>. The United States goes further. It accepted only inter-State complaints under Article 41, the classical mechanism this article traced at the outset, and declared the Covenant's substantive articles "not self-executing," meaning they create no right enforceable in a US court regardless of what the Covenant requires internationally.<sup>28</sup> Both States, in different ways, have ringfenced themselves from exactly the domestic impact this article has traced through *Billy* and *KlimaSeniorinnen*.

The abovesaid positions of sovereign States flag a more serious operational risk. When an international body finds a State liable not by identifying a wrongful act against another State, but by effectively second-guessing a domestic apex court's own settled position on an internal matter, it is opining on the correctness of a municipal decision, not on an international wrong. That scrutiny was permitted only because the State signed a treaty allowing it. If this practice continues and expands beyond what States understood they were agreeing to, States have every reason to respond by withdrawing, declining to ratify, or attaching reservations that strip these mechanisms of their reach. A treaty regime that keeps expanding past its signatories' expectations risks having no signatories left to expand upon.

The real difficulty in climate harm is diffuse causality. A State cannot be made responsible for harm caused collectively, by a community of States. Yet someone has caused the harm, and compensation is owed. This difficulty must not be allowed to compromise the essential attribution limb of State responsibility. The solution does not lie in an international body directing a State's own priorities. It lies in making the remedy international instead. A global environmental fund specifically for individual claims could help. International bodies could direct compensation there, rather than asking the "rest of the citizens" of one State to pay for a harm not attributed to them specifically. The current geo-political scenario might make such a fund an ambitious proposal. Nevertheless, the remedy needs to be international, not domestic. Whether that takes the form of a dedicated facility, or some extension of existing mechanisms, is a design question beyond this article's scope. What matters is the principle: compensation for diffuse, multi-State harm should not fall on the citizens of one State alone.

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<sup>27</sup> United Nations Treaty Collection, ch. IV.4, International Covenant on Civil and Political Rights, N.Y., Dec. 16, 1966, [https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtmsg\\_no=IV-4&chapter=4&clang=\\_en#EndDec](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtmsg_no=IV-4&chapter=4&clang=_en#EndDec) (last visited Aug. 4, 2026) (India's declarations upon ratification).

<sup>28</sup> United Nations Treaty Collection, *supra* note 27 (United States' reservations, understandings, and declarations upon ratification).

## 5. Conclusion

Attribution remains, in theory, the governing rule. It sits at the heart of the twin test under Article 2 of ARSIWA,<sup>29</sup> and the ICJ's 2025 Advisory Opinion reaffirmed it directly.<sup>30</sup> What has changed is not the rule, but its application. Several adjudicating bodies have simply stopped applying it, reaching liability through a duty of care instead. This is a workaround, not a repeal.

Climate harms are difficult to attribute to a State's own conduct in a way that fixes State responsibility under the classical test. Unlike human rights law, climate law provides no individual complaints mechanism. It offers only a State-to-State dispute settlement channel under UNFCCC Article 14, itself rarely invoked, and built on the same attribution-based model this article has traced throughout. This gap has pushed such disputes into general human rights law instead, an avenue that does not require attribution, only a duty of care owed to the members of that specific treaty.

This is not doctrinally wrong. Climate harm can and does amount to a human rights violation. The approach can deliver real relief, at least where the responsible State is itself a party to a human rights treaty. But it does nothing for large-scale climate harm caused by States that are not parties to such a treaty, or that have entered reservations limiting its binding force. The gap is not incidental; it tracks treaty membership, not the scale or source of the harm.

Sovereignty is arguably what is actually at stake here. Consent through treaty-making does not settle the question. This article has already argued that a government cannot simply sign away, on behalf of a citizenry across generations, a principle this foundational. This gets reflected in the Views themselves, which carry the color of a judicial pronouncement, at times overruling the municipal judicature. The approach itself, therefore, not merely how it is delivered, becomes infringement.

Several major States have already hedged against this risk, through reservations to human rights treaties or by declining their optional mechanisms altogether. Continuing to use these treaties for diffuse climate harm risks alienating States further, not only from the human rights treaties being stretched, but from any future willingness to accept a comparable mechanism

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<sup>29</sup> Sucharitkul, *supra* note 1.

<sup>30</sup> Obligations of States in respect of Climate Change, Advisory Opinion, I.C.J. Reports 2025 (23 July).

built specifically for climate law. The better fix lies upstream: give individuals their own litigation forum under climate law itself, and develop international solutions for harms that are, by nature, diffuse. International bodies, for their part, should be more conservative in admitting internal disputes, and more careful in how they express their views, so as not to sound adjudicatory without the authority to be.

A rule that exists on paper but no longer decides outcomes is not really doing the work of a rule. That is close to the old Austinian charge against international law,<sup>31</sup> that it lacks the binding force to be called law at all, and is closer to a moral or political expectation. The irony is that this charge, if it lands here, would not be because international law has too little authority over States, but because its own expansion, through attribution's quiet retreat and sovereignty's quiet infringement, has hollowed out the very tests that once made responsibility, and legitimacy, a matter of law rather than judgment.

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<sup>31</sup> John Austin, *The Province of Jurisprudence Determined* (1832). See also H.L.A. Hart, *The Concept of Law* 213–37 (2d ed. 1994).