

Vincent-Joël Proulx. ***Institutionalizing State Responsibility: Global Security and UN Organs***. Oxford: Oxford University Press, 2016. Pp. 361. £85.00. ISBN: 9780199680399.

Some books deserve to be read and then re-read. Vincent-Joël Proulx's monograph is a comprehensive exploration of the relationship between the law of state responsibility and the institutional framework of the Charter of the United Nations (UN Charter) as it relates to collective security. Although it was published in 2016, this work could equally have been published yesterday as it remains highly relevant to the challenges we face today. Through its well-researched, thought-provoking and balanced arguments, Proulx makes a lasting contribution to the scholarship that engages with, and tests, the outer limits of the law of state responsibility and its implementation in the admittedly far-from-perfect institutional framework of international law.

The book is structured in six chapters that are set out in three parts. Part 1 is descriptive and contains the author's presentation of the main concepts underlying his argument and their interaction under the law of state responsibility and the framework for collective security. In Part 2, the author examines the role of the United Nations General Assembly, the International Court of Justice and the United Nations Security Council and argues that there is extensive institutional and state practice that points to a clear and complementary relationship between the law of state responsibility and the Security Council's functions in the field of collective security. Part 3 examines whether and how the institutional approach to the implementation of state responsibility could remedy the predominantly unilateral character of countermeasures taken by injured states and even justify the adoption of forcible measures in response to breaches of counterterrorism obligations.

In terms of its placement within the existing body of literature, Proulx's book seeks to build bridges between two foundational aspects of international law, which have largely been dealt with separately to date – first, the law of state responsibility and how it can be implemented, including with respect to counterterrorism, and, second, the collective security framework set out under the UN Charter.¹ Few scholars have attempted to comprehensively and analytically cover how they interact, as Proulx does.² His monograph stands out for its up-to-date account of the practice of the Security Council in the context of countering terrorism and its specific claim

¹ See, e.g., L.-A. Sicilianos, *Les réactions décentralisées à l'illicite* (1990); L. Boisson de Chazournes, *Les contre-mesures dans les relations internationales économiques* (1993); D. Alland, *Justice privée et ordre juridique international* (1994); M. Dawidowicz, *Third-Party Countermeasures in International Law* (2017); S. Rosselet, *Les contre-mesures à travers le prisme du principe de proportionnalité* (2020). For the specific treatment of the law of state responsibility and the extent to which it can provide answers to transnational terrorism, see, e.g., K. Trapp, *State Responsibility for International Terrorism* (2011); T. Becker, *Terrorism and the State: Rethinking the Rules of State Responsibility* (2006). For various volumes on collective security, see, e.g., A. Orakhelashvili, *Collective Security* (2011); G. Wilson, *The United Nations and Collective Security* (2014).

² For earlier inquiries into the normative relationships between the collective security framework and the law of state responsibility, see, e.g., M. Forteau, *Droit de la sécurité collective et droit de la responsabilité internationale de l'Etat* (2006); Gowlland-Debbas, 'The Security Council and Issues of Responsibility under International Law', 353 *Recueil des cours (RdC)* (2011) 185.

that the Security Council could strengthen the implementation of state responsibility through the existing institutional framework. In so doing, Proulx's volume brings back to life important debates on institutional mechanisms to enforce responsibility that took place at the UN International Law Commission (ILC) during the codification of the Articles on State Responsibility (ARSIWA), which in the end left unanswered the question of the role that these institutions could play in this regard.³

Proulx's underlying normative assumption is that there is a need to provide for more effective enforcement of obligations to prevent and suppress transnational terrorism (at 2–6). These obligations are, of course, not unique to transnational terrorism and apply to many other old and new threats to international peace and security, such as climate change, cybercrime and pandemics. However, Proulx's study is focused on terrorism as the 'black sheep' of modern international affairs or what he calls the 'best global security candidate' in the world where 'terrorist networks can wield State-like power and influence' and their 'preparatory acts span over several territories' (at 3–11).

In Proulx's view, the law of state responsibility, if it were to be effectively employed by the UN organs and specifically by the Security Council, could provide a solution to tackling the security threat posed by transnational terrorism through enforcement of the legal consequences that flow from a breach of counterterrorism obligations. The argument appears to follow as a natural prolongation of an earlier study by Proulx.⁴ However normatively appealing this message may be, it is difficult to apply it to the reality of the international legal order as it stands today, which is characterized by largely decentralized enforcement mechanisms for holding states responsible for any such breaches.

Two immediate objections could be addressed to the validity of Proulx's normative assumption. First, is state responsibility the right means for enforcing obligations in the field of transnational terrorism? Arguably, other means could prove more effective, including individual criminal liability at the domestic level, financial regulation, transnational cooperation and ad hoc mechanisms established through regional organizations. Second, to approach the implementation of state responsibility through an institutional framework may appear somewhat counter-intuitive as the responsibility of states is otherwise typically implemented outside institutional structures on a predominantly unilateral basis. In order to implement state responsibility, an injured state can espouse a claim by diplomatic means, bring a case before international courts or tribunals, take lawful measures available to it (such as retorsions) or

³ International Law Commission, Articles on Responsibility of States for Internationally Wrongful Acts (ARSIWA), UN Doc A/56/83, 3 August 2001. See, e.g., Ago, 'Eighth Report on State Responsibility', UN Doc. A/CN.4/318 and Add. 1–4, 2(1) *ILC Yearbook* (1979) 39, paras 78–99; Arangio-Ruiz, 'Seventh Report on State Responsibility', UN Doc. A/CN.4/469 and Add. 1–2, 2(1) *ILC Yearbook* (1995) 1726, paras 70–120; Arangio-Ruiz, 'Eighth Report on State Responsibility', UN Doc. A/CN.4/476 and Add. 1, 2(1) *ILC Yearbook* (1996) 5, paras 25–41. For further references, see also J. Crawford, *State Responsibility: The General Part* (2013), at 703–711.

⁴ V.-J. Proulx, *Transnational Terrorism and State Accountability: A New Theory of Prevention* (2012).

ultimately resort to countermeasures that are subject to strictly defined substantive and procedural limitations as set out in the ARSIWA. What happens when none of these options is available? This is where Proulx sees a role for the institutionalization of state responsibility through the UN organs, and, specifically, the Security Council, ‘as a sort of system of coordination to monitor and ultimately sanction violations of international law’.⁵

The principal argument of Proulx’s book is that the Security Council plays a role ‘sometimes determinant, in implementing [state responsibility] for global security breaches, particularly in the field of counterterrorism’ (at 4). This argument is supported by a comprehensive and well-structured inquiry into whether and to what extent greater institutionalization of state responsibility through the Security Council may counterbalance the natural tendencies of ‘unchecked unilateralism’ in the measures that states undertake to respond to violations of international law (at 4). In this regard, Proulx delves into specific areas of the law of state responsibility, such as attribution, cessation, guarantees of non-repetition, forms of reparation and the protection of collective interests (at 192–217).

In essence, Proulx argues that there are three ways in which the Security Council has contributed to institutionalizing the implementation of state responsibility in this context (at 4). First, the Security Council has imposed new primary obligations concerning counterterrorism, which have affected the scope of responsibility itself. Second, the Security Council has often identified specific internationally wrongful acts committed by a given state. Third, in performing its role in the maintenance of international peace and security, the Security Council has often imposed on states legal consequences that substantively overlap with those envisaged under the law of state responsibility – namely, cessation, assurances and guarantees of non-repetition and specific forms of reparation (at 190ff). Many of the examples from the practice of the Security Council are derived from contexts other than transnational terrorism – namely, with respect to breaches of various *erga omnes* obligations. Proulx’s analysis of the Security Council’s practice addresses resolutions relating to Southern Rhodesia, the *Lockerbie* incident, Iraq’s unlawful invasion and occupation of Kuwait, the 9/11 attacks and the activities of the Islamic State of Iraq and the Levant or al-Shabaab, among many others. Proulx sees in this practice the realization of the Security Council’s potential to implement state responsibility in the context of transnational terrorism.

In my view, the most important contributions that Proulx’s study makes are the following. First, Proulx has presented a detailed analysis of the practice of the Security Council in relation to counterterrorism and makes a convincing argument, albeit one that is not immune from criticism, that the Security Council has and should play an important role in implementing the law of state responsibility for failures to prevent and suppress transnational terrorism. This adds a significant dimension to the existing literature, which has focused disproportionately on the law-making function of the Security Council, but not so much on its role in the implementation of state

⁵ Proulx, ‘Institutionalizing State Responsibility: Global Security and UN Organs’, 110 *American Society of International Law Proceedings* (2016) 212, at 213.

responsibility.⁶ Proulx's analysis likewise highlights the relatively limited role that the General Assembly and the International Court of Justice have played thus far in this context (at 151). At the same time, he rightly notes the functional complementarity between the three organs. On a related point of principle, I agree with the author that the purported tension between the Security Council's function, as prescribed to it by the UN Charter, and the model of the law of state responsibility is more artificial than real. However, although the mechanisms available to states individually, and to the Security Council institutionally, to react to breaches of international law have a similar aim – that is, compliance with the obligation that has been breached (at 181–183) – their legal basis and justification differ. While Security Council measures are intended to ensure international peace and security, such measures frequently extend beyond simply addressing the consequences of the internationally wrongful act. Countermeasures, on the other hand, are temporary, reversible and highly regulated in terms of both their substance and procedure, precisely because they can only be directed to bringing the wrongdoer back to compliance. Importantly, the author not only pre-empts this criticism in his work but also examines it in a doctrinally persuasive fashion.

Proulx's second and related contribution is in the form of a rather controversial argument, as he himself acknowledges. In his view, injured states, as well as 'other than injured' states that may be acting in the protection of a collective interest, could use countermeasures or even forcible measures on the basis of the Security Council's determination of the existence of a breach of a given international obligation by a specific state (at 279–301). Proulx thus attempts to dispel the idea that the law on the use of force and the law on state responsibility are like two ships passing in the night – according to him, the Security Council's determination has a legitimating function within the law of state responsibility. While noting the generalized resistance of scholars to the idea of forcible measures, he posits that 'to declare that forcible reactions are excised altogether from the [law of state responsibility] is neither fair nor accurate' (at 301). According to Proulx, the use of force 'plays an important, albeit controversial, role in counteracting transnational terrorism, particularly when contemplated through self-defence' (at 301).

Accordingly, in the last chapter of his monograph, provocatively entitled 'Please Kill Responsibly', Proulx argues that the use of force as a matter of last resort, whether framed as self-defence or as collective countermeasures, may be an effective means for states to react to the failures of other states to prevent terrorism or other global security threats (at 304). Proulx appears to accept the possibility of invoking self-defence as a countermeasure to such failures (at 333). He also considers this to be an alternative solution to that of expanding the existing grounds for attributing conduct carried out by non-state actors to the state, as a necessary precondition for concluding that there has been an armed attack within the meaning of Article 51 of the UN Charter (at 343–344). Proulx suggests that the Security Council, as part of its role in the

⁶ See, e.g., Talmon, 'The Security Council as World Legislature', 99 *American Journal of International Law* (AJIL) (2005) 175; Szasz, 'The Security Council Starts Legislating', 86 *AJIL* (2002) 901.

implementation of state responsibility in this context, would ensure that any such forcible measure remains necessary and proportionate to the wrongdoing state's failure to prevent and suppress terrorism in question (at 333–338). This is a rather hopeful account of the Security Council's decision-making and oversight powers, which does not account for its long-standing limitations.

As Proulx himself acknowledges, parts of his book are 'an exercise in creative scholarship' (at 6–7) to the extent that he attempts to reshape the implementation of state responsibility as an institutional or collective mechanism. This does not sit well with the prevailing view of how state responsibility is to be implemented, nor does it sit well with state practice. Thus, the author's principal argument clearly departs from any 'rigid dichotomies between relevant normative schemes, such as the law of collective security and [State responsibility], or between the respective roles and competences devolved to UN organs by the UN Charter' (at 7). At the same time, the author rightly recognizes the difficulty of enhancing implementation of state responsibility through the UN organs, which are largely controlled by political factors and structural limitations (at 347).

Regardless of whether one agrees with all of Proulx's propositions, his monograph contains an important theoretical analysis of the practice of the Security Council as it pertains to the various aspects of the law of state responsibility. It follows in the footsteps of Vera Gowlland-Debbas, who in her 2011 Hague Academy course noted that, while the system of collective security and the law of state responsibility 'have different functions and emanate from different sources, there are important overlaps'.⁷ Proulx not only succeeds in shedding light on how the two overlap in this way but also makes us think about the adaptability of our existing collective security framework to different threats to international peace and security as well as how the greater institutionalization of the law of state responsibility could enhance our ability to address those threats. Thinking about how existing structures could be retooled and mutually enhanced is not only desirable but also pressing, particularly in the face of a decline of multilateralism and constraints on the ability of global institutions to perform their intended functions. Not least, 'institutionalizing the implementation of [state responsibility] could generate fruitful results, primarily by striving to eliminate unilateralism, self-judging, and auto-qualification' (at 350). At the same time, one should not lose sight of the fact that, even if such institutionalization could be achieved, it should be done through 'a forum within which the claims of the entire community of States may be raised and addressed'.⁸

It is common in scholarship today to discuss the deficiencies of the Security Council concerning the performance of its mandate in the field of collective security and its ability to react promptly to threats to international peace and security. Proulx's account of the notion that the institutional framework and practice of the Security Council may actually serve to enhance the implementation of state responsibility in

⁷ Gowlland-Debbas, 'The Security Council and Issues of Responsibility under International Law', 353 *RdC* (2011) 185, at 433.

⁸ *Ibid.*, at 438.

the context of counterterrorism is refreshing. It may only be time that will tell whether, and to what extent, this is a realistic prospect not only for counterterrorism but also for other pressing and de-territorialized threats facing the international community.

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