Book Notes


The general principle of responsibility is a core feature of any given legal order, as it provides for the test of compliance and, eventually, effectiveness of the applicable legal rules, and state responsibility as the application of this general principle in international law is no exception to that, and Professor Brownlie therefore ascribes to state responsibility even a ‘quasi-constitutional role’ (p. 12). The subsequent contributions deal with more substantive issues of state responsibility before other international courts and tribunals. The question of ‘State Responsibility for the Decisions of National Courts’ is the subject of Professor Greenwoods contribution (pp. 55-73). While it is generally accepted that, despite the principle of separation of powers, national courts may engender the responsibility of the state, the particulars of this rule are far less clear. The question Greenwood addresses is whether the decision of a lower court can constitute a denial of justice irrespective of the possibility of appeal or whether only a failure of the judicial system as a whole is required. His main object of inquiry is the Loewen award of a NAFTA tribunal, which essentially confirmed the principle that a denial of justice only arises when all adequate and effective means of challenge have been exhausted.

Professor Goodwin-Gill examines the relationship between ‘State Responsibility and the “Good Faith” Obligation in International Law’ (pp. 75-104). He also resorts to a case study to exemplify his ideas, and this study concerns a litigation in UK courts where applicants for asylum challenged the legality of a so-called pre-entry clearance, that is, of controls exercised over them prior to departure from their country of origin. Goodwin-Gill’s main point of argument is that good faith operates as a yardstick for measuring the consistency or compatibility of a state’s action with its international obligations at large and, as such, for eventually establishing the occurrence of an internationally wrongful act that entails the responsibility of the state.

In a very stimulating article, Dr Craven reappraises the issue of invocation of state responsibility (‘For the “Common Good”: Rights and Interests in the Law of State Responsibility’, pp. 105-127). He focuses on the distinction between article 42 and article 48 in the context of human rights, and while a lot of literature has already been written on that relationship even subsequent to the adoption of the ILC Articles on State Responsibility, Craven’s contribution is refreshingly different in that it also reveals the politics – or as he calls it – ‘narratives’ underlying the regime of invocation established by the ILC Articles.

The more substantive aspects of human rights protection are covered briefly by Benedetto Conforti, who undertakes to ‘Exploring the Strasbourg Case-Law: Reflections on State Responsibility for the Breach of Positive Obligations’ (pp. 129-137), whereas Professor
Evans, also dealing with the European system of human rights protection, addresses the issue of ‘State Responsibility and the European Convention on Human Rights: Role and Realm’ (pp. 139-160). Evans’ main argument is that, while the ILC Articles do in a formal sense apply to human rights obligations, they do not provide for an ‘appropriate lens through which to analyse the practice of human rights bodies’ (p. 144) because, in essence, the ‘true province of international human rights law does not lie within the realms of State responsibility at all’ (p. 148). With particular reference to the ECHR he states that in practice, ‘the Convention should not really be seen as being about holding States to account as a matter of international law’ (p. 155, emphasis in the original). In the end, state responsibility ‘in the hands of the ECHR is a malleable instrument’ (p. 160) that is taken to use several paradoxical purposes.

The situation on the universal level is then examined in depth by Professor McGoldrick (‘State Responsibility and the International Covenant on Civil and Political Rights’, pp. 161-199). He analyses first the theoretical and conceptual underpinnings of the Covenant in relation to state responsibility and then, in a very comprehensive manner, the relevant aspects of internationally wrongful acts as applied in the practice of the Human Rights Committee along the elements of the ILC Articles. Thus, he starts with the internationally wrongful act (including issues such as subjective/objective responsibility, jurisdiction and responsibility, attribution, duty to prevent by regulating private relations, existence of a breach, continuing violations, circumstances precluding wrongfulness) and then addresses issues of both the content of responsibility (cessation and non-repetition, reparation and serious breaches of peremptory norms) and implementation (invocation and individual and collective countermeasures).

There is another substantive area of international law that is singled out for analysis and that is the law of the environment. Professor Loibl deals with ‘Environmental Law and Non-Compliance Procedures: Issues of State Responsibility’ (pp. 201-217). After recalling the few cases involving state responsibility in the field of environmental law, Loibl notes that the practical difficulties in invoking responsibility for environmental damage as well as the reluctance of state to do so has led to the creation of alternative mechanisms in environmental law. These compliance procedures clearly act as specific machineries, and the underlying legal rules may be seen as operating as leges speciales, a conclusion which however is not totally shared by the author. Finally, Dr Elias treats the topic of ‘The UN Compensation Commission and Liability for the Cost of Monitoring and Assessment of Environmental Damage’, pp. 219-236). He gives a general overview of the Compensation Commission and the claims submitted for environmental damage as well as claims for the monitoring and assessment of environmental damage. Elias puts this practice into perspective by comparing it to other international instances of the recovery of such costs as established by specific treaty regimes in the field of environmental law. He concludes by presenting the rationale for classification of such claims, particularly against the background that the Compensation Commission is a political organ performing essentially a fact-finding function.

All in all, this collection of essays provides a highly interesting tour d’horizon on the current state of the law of state responsibility before international judicial institutions. It shows that the relevant legal rules, particularly those elaborated by the ILC, have a firm