
Book Review

Maurizio Ragazzi (ed.), *International Responsibility Today: Essays in Memory of Oscar Schachter*. Leiden and Boston: Martinus Nijhoff Publishers, 2005. Pp. lxxi + 472.

Santiago Villalpando. *L'émergence de la communauté internationale dans la responsabilité des Etats*. Paris: Presses Universitaires de France, 2005. Pp. xx + 527.

The law of state responsibility has generated considerable academic writing over the past decades, and earlier scholarly accounts also attempted to elucidate the thorny relationship between non-state actors and international responsibility. However, contemporary realities have propelled certain aspects of international responsibility – ranging from the relationship between state responsibility and *erga omnes* obligations to the responsibility of international organizations – to the forefront of academic debate. As certain areas of international law shift away from a state-centric conception towards an increasingly transnational paradigm, it seems that the idea of international responsibility must be re-examined in this new light of recent events and trends. The two books under review touch upon this main theme in a general sense, albeit in very different ways, while also at times converging into philosophically adjacent fields of inquiry. They both contribute and, in some instances, add immensely to an ongoing debate over a complex and elusive branch of international law.

On the one hand, *International Responsibility Today*, a collection of essays edited by Maurizio Ragazzi, Senior Counsel specializing in international law at the World Bank, corrals an impressive series of contributions from high-profile international law scholars, while paying homage to the life and work of

Oscar Schachter. The book's contents revolve around the central theme of international responsibility, and individual contributions are grouped into four topics: general issues of state responsibility, particular concerns in the law of state responsibility (such as the protection of foreign investment under international law or the issue of humanitarian intervention, for example), state responsibility and the courts, and responsibility of international organizations and other non-state entities. A very different but nonetheless complementary book is Santiago Villalpando's doctoral thesis undertaken at l'Institut universitaire de hautes études internationales, titled *L'émergence de la communauté internationale dans la responsabilité des Etats*, which offers a sociological exploration of the concept of 'international community'.¹ This is a term that has generated its share

¹ For Villalpando, the modern concept of 'international community' marks a clear departure from ancient communities, which were predominantly spontaneous, limited and static. The current 'international community' is a rational one and hinges on its members' conscience and cooperation in attaining and in safeguarding collective interests (at 40–41). He later concludes that, because of its lack of institutional structure, this community cannot be individualized or claim a specific interest. All states simultaneously bear responsibility for safeguarding community interests (at 98–99). Collective interests are therefore vindicated via alternate means and through different manifestations of community solidarity (at 296–298). This discussion is particularly welcome in light of certain scholarly accounts highlighting the vagueness of the term 'international community', including in Ragazzi's book. See, e.g., Roucouнас, 'Non-state Actors: Areas of International Responsibility in Need of Further Exploration', in M. Ragazzi (ed.), *International Responsibility Today: Essays in Memory of Oscar Schachter* (2005) 391, at 399 [hereinafter

of controversy in legal scholarship,² and the book ultimately identifies key manifestations of the concept in public international law, while also steering its readers away from the notion that ‘international community’ derives solely from *de lege ferenda* theoretical constructs (at 75). In other words, Villalpando’s monograph does not so much deliver an exhaustive review of international responsibility issues, but rather elects the realm of state responsibility as a primary intellectual and practical prism through which the idea of ‘international community’ can be better analysed and understood.

At the outset, the varying sets of research and scholarly objectives underpinning both studies make a *rapprochement* challenging, but nonetheless immensely useful on points of detail. Among the salient themes running through both books, the idea of coercion, as inspired by Kelsen’s writings on the subject, pervades the discussion. Particular tensions arise between the notions of international obligation, sanction and reparation for internationally wrongful acts. Can the concepts of

reparation and sanction be dissociated from the international obligations they purport to redress or uphold? This debate prompts some authors to call into question whether coercion constitutes an end in itself under the law of state responsibility, or whether it solely remains a means to enforce international obligations. For example, in Ragazzi’s collection there is some question whether the spirit of Kelsen’s view that international law exists as a coercive order – whether by failing to dissociate reparation from the primary norm,³ to use state responsibility parlance, or that states may commit a ‘delict’ or a crime⁴ – has been upheld in contemporary international responsibility folklore.⁵ Others seek to redefine some tenets of Kelsen’s theory by expounding that coercion is not an end in itself on the international plane, but rather facilitates enforcement of a primary obligation, thereby disabling the dominant inter-state model of enforcement and compliance: ‘If one follows the theory that sanctions are necessarily a determinant element of law, it should not matter that such sanctions or, more precisely, the coercion behind it, does not come from another state but from a non-governmental source, as long as it forces the object state to fulfill a hitherto unfulfilled international obligation.’⁶

International Responsibility Today]; and Rao, ‘International Crimes and state Responsibility’, in *International Responsibility Today*, 63, at 79–80 n. 58. But cf. Peirano, ‘International Responsibility and Cooperation for Development’, in *International Responsibility Today*, 183, at 184–185 (noting the revival of a universal international community focused on human rights and the emergence of a universal community grounded in the advancement of international law through the challenging of state voluntarism and the affirmation of collective values).

² See, e.g., C. De Visscher, *Theory and Reality in International Law* (1968), at 94; Toope, ‘Emerging Patterns of Governance and International Law’, in M. Byers (ed.), *The Role of Law in International Politics: Essays in International Relations and International Law* (2000) 91, at 103. See also P. Allott, *Eunomia: New Order for a New World* (1990), at 3–4, 189–190, 219, 234–235, 239–240, 325–326, 374–375; and *Idem*, ‘The True Function of Law in the International Community’, 5 *Indiana Journal of Global Legal Studies* (1998) 391, at 411 (discussing and critiquing the concepts of ‘international society’ and ‘international community’).

³ See, e.g., Barboza, ‘Legal Injury: The Tip of the Iceberg in the Law of State Responsibility’, in *International Responsibility Today*, 7, at 10.

⁴ See, e.g., Trindade, ‘Complementarity Between State Responsibility and Individual Responsibility for Grave Violations of Human Rights: The Crime of State Revisited’, in *International Responsibility Today*, 253, at 258.

⁵ See, e.g., O’Connell, ‘Controlling Countermeasures’, in *International Responsibility Today*, 49, at 51–52.

⁶ Zemanek, ‘Does the Prospect of Incurring Responsibility Improve the Observance of International Law?’, in *International Responsibility Today*, 125, at 134. See also, *ibid.*, at 132 (inferring that the application of the current scheme of state responsibility to the traditional state-to-state model remains ill-suited in ensuring compliance with international obligations). This dimension of international enforcement warrants a closer examination of the relationship between self-help measures and

As a corollary, the idea of reciprocity plays a large role in the field of state responsibility, especially when addressing the idea of coercion. Not only does it have a sort of neutralizing effect on international relations, but the expectation of reciprocity can also generate incentives for governments to comply with their international obligations. That reciprocity, translated in Ragazzi's book as a 'shared interest in the maintenance of predictable patterns of conduct', stabilizes asymmetrical power dynamics engendered by the scheme of responsibility and countermeasures.⁷ Therefore, the commission of an internationally wrongful act by one state against another may unsettle relations between both states. Similarly, once the mechanisms of state responsibility are engaged and one state adopts unilateral sanctions against the other towards the fulfilment of the violated obligation, reciprocal state relationships and expectations may also be undermined. It follows that the originally aggrieved state may actually incur more damage than the wrongdoing state, should the former take it upon itself to impose countermeasures on the latter, and thereby disrupt a previously established pattern of predictable reciprocal international relations.

Although Villalpando echoes some of these ideas in his treatment of '*la théorie de la contrainte*' (at 134–136), he also highlights what could be termed a community model of international responsibility through the lens of Kelsen's theory. In this light, sanctions aimed at redressing an internationally wrongful act are perceived as emanating from the international community. Therefore, when a state applies a sanction in a decentralized setting, it does so as an extension of said community,

fairness, as disparate and asymmetric power dynamics often pervade international relations in this field. On this issue, Mary Ellen O'Connell's remarks are quite instructive. See O'Connell, *supra* note 5, at 53 (discussing and contrasting Quincy Wright's conception of self-help with Kelsen's suggestion of implementing an objective third-party decision-maker in order to dissipate discrepancies inherent to self-help countermeasures).

⁷ Zemanek, *supra* note 6, at 128–129.

while this very community arguably retains a monopoly over power in the legal order (at 135). However, Villalpando goes on to state that the existing scheme of state responsibility also rests upon a bilateral logic in its treatment of state reactions to internationally wrongful acts, while acknowledging that the concepts of legal obligation and subjective right are inextricably intertwined. Put another way, reprisals are ordinarily prohibited under international law but can be exceptionally allowed when used to counteract an internationally wrongful act by a state, which, in many ways, remains the sole warrantor of its subjective rights and may seek compliance through sanctions or war against the wrongdoing state (at 136). This conception is also partially grounded in the classical theory of responsibility, '*la théorie de la réparation*' (at 129–134), which resists the notion of coercion and state-imposed sanctions, and remains predicated on the idea that the mechanism of reparation itself fulfils the objectives of international responsibility (at 133). It should be mentioned that the precepts of the classical theory of responsibility rest upon three pillars: i) an internationally wrongful act amounts to a violation of a subjective right of a state and engenders a bilateral relationship of responsibility; ii) international responsibility necessarily connotes a new and mandatory relationship between the wrongdoing and wronged states, based on the idea of reparation; and iii) the regime of international responsibility is unique.

This is not to say, however, that the concept of sanction is absent from the classical theory. As opposed to being literally embedded in the conception of responsibility, i.e. by constituting a direct consequence of the internationally wrongful act, it is rather incorporated independently into the classical theoretical framework. Therefore, reprisals and war remain available to the aggrieved state as a means of compelling performance of the obligation to repair the initial wrongful act, as opposed to flowing directly from the breach itself. In other words, the classical theory attempts to satisfy the ideals of accountability through a preliminary screen, namely reparation of the wrongful act, but offers a second tier of recourses to

ensure that reparation is achieved and the purposes of responsibility upheld.

In my view, these parallels only reinforce the notion that dominant theoretical readings of international responsibility ultimately serve the same function, albeit through different means or similar means invoked at different stages of the inquiry. The true challenge, therefore, lies in elucidating the relationship between bilateral and multilateral tensions stemming from the mechanics of international responsibility, as they are shaped and transformed by difficult, and sometimes fact-specific, phenomena such as the proliferation of non-state actors⁸ and *erga omnes* obligations.⁹

The substance of these considerations is further compounded by two underlying tenets of modern state responsibility: the changing of partners and the distinction between primary and secondary obligations. This important distinction relies on the assumption that the violation of a primary obligation, such as a treaty obligation, automatically triggers the application of a secondary set of obligations, such as the obligations of cessation and non-

repetition of the wrongful act, to the perpetrator. As a corollary, both this distinction and the changing of partners are interdependent. In fact, as soon as a primary obligation is breached, a series of secondary obligations found in state responsibility repertoire is set in motion and a new legal relationship is formed. This transition might also engender a substitution of major actors and/or partners at the primary level, whom, while involved or directly affected by the events leading to a breach, might be shuffled around or discarded through the screen of secondary norms – i.e. when applying the rules of state responsibility to a specific breach. The confusion surrounding the changing of partners, perhaps exacerbated by the pressing need to better situate the individual within the international system, operates on the logic of the International Law Commission's Draft Articles and poses increasingly intractable challenges to the idea of responsibility for private acts, as acknowledged in Ragazzi's book. For example, Emmanuel Roucouas invokes the '*gradual transformation that occurs in the relationship between the ship, the flag state and the port-state control*', and notes that if 'a ship does not meet the internationally agreed standards, *irrespective of her place of registration, her flag state or the citizenship of the owner*, she is retained by the authorities of the port-state and is liable for the violation of these standards.'¹⁰ This clearly reiterates the need to further delineate the role of non-state actors under state responsibility, while this specific example remains 'one more efficient expression of the *genuine link*, which is henceforth required, not only between the ship and her flag state, but also *between the ship and international law*.'¹¹

In my view, Villalpando's treatment of the topic ultimately fails in adapting to this reality. Although he recognizes the newly formed legal relationship resulting from a breach as a pervasive component of state responsibility (at 132), his construction of the actual contents and contours of this relationship is

⁸ In addressing the problem of non-state actors within the state responsibility framework, Roucouas, *supra* note 1, rightly highlights, at 392, that '[p]ast efforts to distinguish between direct and indirect responsibility were explained by the need to locate the individual within the system.' His discussion ultimately gravitates towards, and further reinforces, the idea that, since the ILC's codification of responsibility is contingent on state control or endorsement of private conduct, certain tenets of state responsibility law must be revisited in light of the recent involvement of private actors at the transnational level. *Ibid.* at 392–403. The bases for attribution under the ILC's Draft Articles and the deterritorialized nature of certain private activities, such as terrorist operations and the outsourcing of state and non-state violence, immediately come to mind.

⁹ For instance, Villalpando underlines that the violation of an *erga omnes* obligation typically engenders different effects for certain states, and applies this reasoning to an armed attack (at 319).

¹⁰ See, e.g., Roucouas, *supra* note 1, at 404.

¹¹ *Ibid.*

challenged by a widespread view within the ILC, namely that secondary rules empower/determine which states may protect collective interests *vis-à-vis* a breach. He ultimately resists and discards this theory, opting for a more homogeneous application of state responsibility, and infers that whatever legal situation is prevalent at the level of the primary norm carries over to the relationship generated by the secondary level of the breach (at 313–314). Implying a potential overlap of partners at all stages, Villalpando posits that the major actors involved in the newly formed, secondary, legal relationship must correspond to those who may claim an interest in having the primary obligation upheld (at 247).

This construction inexorably reverts back to the involvement of the international community as a whole at both the primary and secondary levels of international breaches, and remains predicated on Villalpando's assertion that the cohesion characterizing the international community rests upon the solidarity of its members in safeguarding certain collective or common interests (at 25–29). It should be noted that his approach conceptualizes state responsibility in terms of a binary continuum (at 224) involving individual interests and collective interests at opposite poles, while also identifying a common regime of responsibility and a community regime of responsibility (at 246).¹² The latter is also subdivided into a common regime (covering all violations of *erga omnes* obligations) and an aggravated regime (applicable to the most serious violations) (at 246–259).

¹² Villalpando's classification of types of responsibility is embodied in a bipartite model and hinges solely on the nature, collective versus individual, of the legally protected interests at stake (at 251). He further cautions that the seriousness of the unlawful act in question bears no incidence in determining which regime of responsibility warrants application, as both regimes remain separate, respond to different rules, and serve different purposes and objectives (at 252). According to his schema at 254, it follows that both regimes are endowed with their own inherent varying scales of gravity, which, in turn, inform the mechanics of responsibility and ultimately impact available responses to redress breaches.

Needless to say, the distinction between primary and secondary rules, which has been persuasively defended recently,¹³ permeates the discussion above and remains a widely debated issue, including in Ragazzi's¹⁴ and Villalpando's¹⁵ books. It becomes clear that the interplay between primary and secondary norms hinges, to a large extent, on the level of governmental involvement in an international breach, which

¹³ See, e.g., Milanovic, 'State Responsibility for Genocide', 17 *EJIL* (2006) 553. Villalpando's treatment of the primary/secondary distinction also remains very persuasive, as he advances a series of arguments for upholding the current state responsibility structure (at 139–141, 333–334).

¹⁴ See, e.g., Treves, 'The International Law Commission's Articles on State Responsibility and the Settlement of Disputes', in *International Responsibility Today*, 223, at 227 (arguing that 'the primary and the secondary rules are in most cases inseparable'); Thirlway, 'Injured and Non-Injured States before the International Court of Justice', in *International Responsibility Today*, 311 at 323 (observing that the primary/secondary distinction is now firmly implanted in the field of state responsibility and that legal commentators no longer discard it as 'artificial and unnecessary'); Roucouas, *supra* note 1, at 398–399 (discussing the primary/secondary distinction and exploring its relationship with the changing of partners, and calling for further elucidation of the legal consequences flowing from the new legal relationship engendered by secondary norms).

¹⁵ See, e.g., at 196 (acknowledging the distinction in the context of the criminalization of state responsibility); at 243 (judging that current rules of state responsibility are ill-suited to protect collective interests in the long run and that secondary rules intervene solely after the fact to contain the damages flowing from the breach, thereby highlighting the need to incorporate preventive mechanisms into the law); at 245 (observing that the enforcement of state responsibility remains unnecessarily grounded in self-help and that the secondary rules must evolve with the new developments in international law); at 266, 269 (discussing the content of both primary and secondary obligations, along with their interdependency); at 384 (discussing the practical application of the distinction in the context of the binary model of state responsibility).

also propels the distinction between direct and indirect responsibility to the centre of the discussion. For instance, the assertion that indirect responsibility for acts carried out by private persons is contingent on a primary obligation of the state to intervene¹⁶ brings the relationship between direct and indirect responsibility into sharp relief. Yet, the discussion in both studies insufficiently elucidates the consequences and implications of these distinctions in the hard cases, namely where governmental input is virtually indecipherable or where private actors subvert and challenge traditional rules of state responsibility. International terrorism is a case in point and contributions in Ragazzi's edited collection¹⁷ supplement post-9/11 scholarship exploring the link between state responsibility and terrorism.¹⁸

However, aside from specific illuminating passages,¹⁹ too little emphasis is placed on the

actual content of primary obligations across all canvassed fields, thereby signalling a need to better define the extant scheme of state responsibility for private actors. In the spirit of Villalpando's remarks (at 140–141), there is clearly a need to establish general parameters/principles applicable to all international breaches and, more importantly, *vis-à-vis* unconventional actors. Against the criticism purporting to disable the primary/secondary distinction, I would suggest that further defining secondary norms of responsibility would actually shed new light and, perhaps, better circumscribe primary obligations. This argument becomes particularly compelling when faced with terrorism and the corresponding lack of consensus on both its definition and on what states are actually expected to do to repel it, i.e. the primary obligation. These impediments, which are partially caused by unclear legal language and largely driven by politics, could be addressed by revisiting certain aspects of the current law, thereby making the case for a responsibility-expanding regime more attractive. Equally interesting is the idea of debating whether attribution is adequately suited to address these volatile situations and whether the notion of control, which remains inextricably connected to the concept of attribution in the ILC's Draft Articles, should be excised altogether in certain cases involving non-state actors. Although met with some academic resistance,²⁰ this exercise remains a

¹⁶ See, e.g., Wolfrum, 'State Responsibility for Private Actors: An Old Problem of Renewed Relevance', in *International Responsibility Today*, 423, at 425, 430–431 and 434.

¹⁷ See, e.g., Battaglini, 'War Against Terrorism *Extra Moenia*, Self-Defence and Responsibility: A Pure Juridical Approach', in *International Responsibility Today*, 137, at 137–149; and Zemanek, *supra* note 6, at 130–132 and 134.

¹⁸ See, e.g., T. Becker, *Terrorism and the State: Rethinking the Rules of State Responsibility* (2006); Dupuy, 'State Sponsors of Terrorism: Issues of International Responsibility', in A. Bianchi (ed.), *Enforcing International Law Norms against Terrorism* (2004) 3; Malzahn, 'State Sponsorship and Support of International Terrorism: Customary Norms of State Responsibility', 26 *Hastings International and Comparative Law Review* (2002) 83; Proulx, 'Babysitting Terrorists: Should States Be Strictly Liable for Failing to Prevent Transborder Attacks?', 23 *Berkeley Journal of International Law* (2005) 615.

¹⁹ See, e.g., Scovazzi, 'Some Remarks on International Responsibility in the Field of Environmental Protection', in *International Responsibility Today*, 209, at 210–212 (discussing the character of obligations pertaining to the prevention of transboundary environmental damage and drawing a distinction between prohibited conduct and prohibited result); Roucouas, *supra* note 1, at 401–402 (discussing the idea of strict liability in environmental law and underlining that there are

'unresolved questions on primary rules expressing concepts such as the precautionary principle, sustainable development, common but differentiated responsibilities'). See also Villalpando, at 61 (linking the emergence of an international law of cooperation with the imposition on the international community of positive obligations of conduct, along with the corresponding institutional implementation mechanisms purporting to divide up the work and promote concerted actions among that community).

²⁰ See, e.g., Jinks, 'State Responsibility for the Acts of Private Armed Groups', 4 *Chicago Journal of International Law* (2003) 83, at 84 (arguing that '[T]he revision of trans-substantive secondary rules is a clumsy, and typically ineffective, device for vindicating specific policy objectives.')

valid one and select excerpts found in Ragazzi's book²¹ serve as building blocks towards further exploration of the topic.

Similarly, the relationship between Security Council practice and the creation, interpretation and application of rules of state responsibility remains largely underexplored, especially in the field of counter-terrorism.²² Building on

existing scholarship,²³ Villalpando delivers a thoughtful discussion of this relationship (at 434–450), judging that the Security Council interprets certain aspects of state responsibility practice in specific fields (at 438–439). He also aptly identifies relevant doctrinal currents in favour of and against the proposition that the Security Council frequently spearheads certain law-shaping incursions into the realm of state responsibility (at 443–447). Regardless of one's stance on the debate, it remains fair to contend, as Villalpando does, that Security Council decision-making informs the unilateral implementation of responsibility by states, along with the application of secondary rules of responsibility. Security Council resolutions can also be particularly instructive in determining the legal characterization of a given situation or act as a benchmark in ensuring the legality of requests or countermeasures adopted by states (at 450). More importantly, Villalpando infers that meaningful parallels and interrelationships may be drawn between the Security Council's traditional functions and the implementation of state responsibility (at 446–447).

In response to the sceptics and drawing from these bodies of work, I would argue that the Security Council plays, and should play, a central role in shaping and applying the law of state responsibility to counter-terrorism. In fact, international terrorism and the legal tools to suppress it epitomize a truly *sui generis* phenomenon, in that they offer a unique opportunity for the Security Council to adjudicate on and advance the law of state responsibility without overstepping its more fundamental and intrinsic boundaries. Although its findings can sometimes be predicated on a prior

²¹ See, e.g., Amerasinghe, 'The Essence of the Structure of International Responsibility', in *International Responsibility Today*, 3, at 5 (querying, from the standpoint of semantics, whether 'attribution' should be translated into a general principle); Caron, 'State Crimes: Looking at Municipal Experience with Organizational Crime', in *International Responsibility Today*, 23, at 30 (suggesting that attribution should be revisited so that it would vary depending upon whether ordinary or criminal state responsibility was engaged); Yamada, 'Revisiting the International Law Commission's Draft Articles on State Responsibility', in *International Responsibility Today*, 117, at 121–122 (arguing that attribution should be fragmented into two distinct branches, one dealing with conduct and the other with responsibility in the context of international organizations); Higgins, 'The International Court of Justice: Selected Issues of State Responsibility', in *International Responsibility Today*, 271, at 272–275 (discussing attribution through the lens of the burden of proof, and contrasting a crucial distinction between what I would term a 'whodunit' model of attribution, pursuant to the *Oil Platforms* case, and more substantial bases for attribution); Talmon, 'Responsibility of International Organizations: Does the European Community Require Special Treatment?', in *International Responsibility Today*, 405, at 410–414 (citing Annex IX to the United Nations Convention on the Law of the Sea as an example embodying attribution of responsibility rather than attribution of conduct, and exploring whether its provisions turn on allocation of responsibility, as opposed to attribution of responsibility).

²² See, e.g., De Sena, 'Book Review', 17 *EJIL* (2006), 863, at 864 (reviewing Pierre-Marie Dupuy's essay in Andrea Bianchi (ed.), *Enforcing International Law Norms against Terrorism* (2004) and calling for further research on the relationship between Security Council resolutions dealing with terrorism and international responsibility).

²³ See, e.g., De Brichambaut, 'The Role of the United Nations Security Council in the International Legal System', in M. Byers (ed.), *The Role of Law in International Politics: Essays in International Relations and International Law* (2000) 269, at 272–274; Gowlland-Debbas, 'The Functions of the United Nations Security Council in the International Legal System', in *ibid.*, 277, at 288–294; Nolte, 'The Limits of the Security Council's Powers and its Functions in the International Legal System: Some Reflections', in *ibid.*, 315, at 322–326.

declaration of responsibility, it is fair to argue that the Security Council does not directly rule on the question of state responsibility, *per se*, rather framing its reasoning within the furrow of Chapter VII powers.

However, it becomes clear that there exists a significant conceptual and practical straddling of Chapter VII objectives and the suppression of terrorist acts, which are invariably tantamount to threats against international peace and security. At the outset, the very nature of terrorism seems to engage Chapter VII considerations and, in dealing with threats to international peace and security, the Security Council has sometimes ventured upon an analytical terrain that melds its executive functions with state responsibility undertones. In recent years, the Council has increasingly tackled terrorism by invoking state responsibility-like language, thereby signalling that the seemingly indelible chasm between that body of law and the restoration of international peace and security can blur on occasion. This is not to suggest, however, that, by potentially straddling each other in the context of Council decision-making, both of these areas are necessarily mutually interpenetrating. But this phenomenon surely extends beyond the mere borrowing from one branch's vernacular by the other, and foreshadows the payoffs of undertaking more substantial and horizontal incursions into the commonalities of both regimes, so as to better address the threats of terrorism.

Similarly, other linkages, especially those that bridge the divide between international responsibility and international criminal justice, will play an integral part in circumscribing a regime of state responsibility for private acts. Following the lead of Villalpando (at 109–110, 241–242, 405) and certain contributors in Ragazzi's book,²⁴ future academic endeavours addressing these aspects of state respon-

sibility will have to start from the assumption that this field remains complementary to international criminal law (and the mechanisms of individual criminal responsibility), and that both areas can, at times, be mutually reinforcing. I would, however, register a preliminary caveat, in that they both serve very different objectives for the purposes of counter-terrorism. International criminal law aims primarily at eradicating impunity, imposing punishment for individual criminal acts, and promoting deterrence. However, its mechanisms are invariably deployed after the fact, namely only once an international criminal act has been committed. Surely, an argument can be made that fear of criminal conviction may dissuade private actors from perpetrating crimes, but its persuasiveness begins to wane when faced with the resolve and determination of terrorist organizations such as Al-Qaeda. Although state responsibility can also achieve similar goals, albeit through the screen of the state, its strength lies in its potential *preventive* character, if infused with the right mechanisms and underlying philosophy. Because we are dealing under that rubric with governments that have to withstand international scrutiny, as opposed to highly motivated individuals pursuing their own political goals, the mere threat of triggering state responsibility might compel states to combat terrorism more efficiently within their borders. In other words, the prospect of states incurring responsibility, coupled with the apprehension of destabilized reciprocal behaviour patterns, may actually shift incentives onto governments and induce them to comply with their obligations, provided the content of those obligations is sufficiently defined. Drawing on recent scholarship,²⁵ attempts at further defining state responsibility will also

²⁴ See, e.g., Rao, *supra* note 1, at 76 n. 47 and accompanying text; Espiell, 'International Responsibility of the State and Individual Criminal Responsibility in the International Protection of Human Rights', in *International Responsibility Today*, 151, at 160; Trindade, *supra* note 4, at 253–269; Wolfrum, *supra* note 16, at 429 n. 21.

²⁵ Recent accounts include H. Duffy, *The 'War on Terror' and the Framework of International Law* (2005), at 188–192. For a concise review of the nebulous relationship between terrorist attacks, use of force and countermeasures through the lens of the ILC's Draft Articles, see T. Franck, *Recourse to Force: State Action against Threats and Armed Attacks* (2002), at 53–55.

have to delve deeper into the benefits that can be derived from the interrelationship between state responsibility and use of force/self-defence, although Villalpando's discussion on the subject proves thought-provoking (at 374–376, 392–399).

In sum, both books contribute enormously to a fast-evolving and complex area of international law. For reasons of space, other salient themes cannot be thoroughly canvassed here. It would probably be much to the dismay of Hersch Lauterpacht²⁶ that Ragazzi's book is replete with discussions²⁷ on whether municipal law analogies can inform the law of state responsibility, an exercise that seems increas-

ingly attractive with the emergence of transnational actors. Villalpando also explores the possible transplantation of domestic criminal law to the international level (at 158). After noting the efforts of those who lament the failure of importing corresponding criminal law safeguards into international law (at 197–198),²⁸ he ultimately discards the rigid transplantation of criminal law in state responsibility (at 222–223, 467). This discussion clearly bolsters his assertion that the moralization of international law (at 65) has contributed to the emergence of a common set of values/interests for the international community. Inherent in this proposition is a value judgment that operates in tandem with international law and, in turn, instils added legal value and protection to certain types of obligations, such as *jus cogens* engagements (at 108).

According to some contributions in Ragazzi's book,²⁹ the resolution of the legal and conceptual discrepancies described above will also depend, to a large extent, on elucidating

²⁶ See, e.g., Provost, 'Introduction', in R. Provost (ed.), *State Responsibility in International Law* (2002) at xiii (noting the awkwardness of borrowing from municipal tort law or delictual responsibility in the field of state responsibility, and citing H. Lauterpacht, *Private Law Sources and Analogies of International Law (With Special Reference to International Arbitration)* (1927)).

²⁷ See, e.g., Caron, *supra* note 21, at 25–27 (extending domestic corporate criminal responsibility to international law); Yamada, *supra* note 21, at 118 (noting that the advancement of international law 'should take into account as much as possible the development of the domestic laws of civilized nations'; Vicuña, 'The Protection of Shareholders under International Law: Making State Responsibility More Accessible', in *International Responsibility Today*, 161, at 163–163 (observing that domestic corporate law is gradually permeating international law and manifests itself through such notions as the piercing of the corporate veil or the admission of derivative suits by shareholders/investors); Trindade, *supra* note 4, at 262, 264 (arguing that the much debated 'crime of state' has sometimes been mistakenly analogized with categories of domestic criminal law) and at 266 (inferring that international 'obligations of doing' draw from domestic responsibility regimes, blending both civil and penal influences); Yee, 'The Responsibility of States Members of an International Organization for its Conduct as a Result of Membership of their Normal Conduct Associated with Membership', in *International Responsibility Today*, 435, at 441 (rejecting the importation into international law of domestic legal principles governing liability of juridical persons).

²⁸ This line of argument has acquired credence in certain academic circles. See, e.g., Lobel, 'The Use of Force to Respond to Terrorist Attacks: The Bombing of Sudan and Afghanistan', 24 *Yale Journal of International Law* (1999) 537, at 550–551 (voicing his concern on circumventing procedural/evidentiary safeguards usually afforded in domestic law when analogizing the 'aiding and abetting' principle in international law).

²⁹ See, e.g., Barboza, *supra* note 3, at 20–22; Stern, 'A Plea for "Reconstruction" of International Responsibility Based on the Notion of Legal Injury', in *International Responsibility Today*, 93, at 96–101 (discussing the issue through the lens of 'legal injury'); Zemanek, *supra* note 6, at 126; Peirano, *supra* note 1, at 190–194; Forlati, 'Registration of Foreign Judgments under the European Convention of Human Rights and the Law of International Responsibility', in *International Responsibility Today*, 287, at 294–295; Rosenne, 'Decisions of the International Court of Justice and the New Law of State Responsibility', in *International Responsibility Today*, 297, at 303–308; Thirlway, *supra* note 14, at 311, 316–320 and 326 n. 51 (echoing some of Brigitte Stern's remarks).

the sophisticated question of invoking state responsibility and its relationship with Article 48 of the Draft Articles. This problem is further compounded by the recent emergence of transnational violence and human rights abuse, and brings about specific implications for *erga omnes* obligations. Villalpando's argument becomes particularly illuminating here: there might, in fact, be a disconnect on the invocation issue between primary rules, which allow standing to all states, and secondary rules, which would restrict recovery to certain states and thereby hinder the prospect of integral reparation *vis-à-vis* the violation of collective rights and interests (at 354–355, 371). This, again, encapsulates the problem of modern state responsibility: it responds

largely to a unitary typology and, as Villalpando points out, rests upon a predominantly bilateral conception of legal relationships (at 466–467).

In reconciling the disparate threads and arguments in both books, a common, overarching theme emerges: classical constructions of state responsibility are no longer suited to responding to the multiplicity of actors in international relations. Consequently, solutions to present day concerns may also better emerge amidst a multiplicity of ideas, perspectives and insights.

Doctoral Candidate, Vincent-Joël Proulx
McGill University Institute of
Comparative Law
Email: vinjo@nyu.edu

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