

Review - The International Law of State Responsibility: An Introduction

Written by Richard W. Coughlin

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RICHARD W. COUGHLIN, AUG 18 2017

The International Law of State Responsibility: An Introduction by Robert Kolb Cheltenham/Northampton: Edward Elgar, 2017

Robert Kolb's *The International Law of State Responsibility* offers an authoritative account of the legalization of interstate relations. Kolb's work focuses on the decades-long labour of the International Law Commission (ILC) to codify the international law of state responsibility. This process has centered around the formulation of the *Articles on the Responsibility of States for Internationally Wrongful Acts* or ASR (International Law Commission, 2005), a text that was approved by the International Law Commission and then submitted to the United Nations General Assembly in 2001.

Kolb's work traces the development of the ASR from the beginnings of the UN to the present. He pays particular attention to Roberto Ago's distinction between the primary and secondary rules of International Law (pp.6-8). Primary rules stem from treaty agreements. Secondary rules specify the consequences of a breach in the primary rules. Where primary rules are voluminous, reflecting the multitude of bilateral and multilateral treaties between states, secondary rules are parsimonious. With respect to the law of state responsibility, they are succinctly encoded within the 59 articles of the ASR. From 1996 to 2001, these articles were significantly revised in light of state comments. Since 2001 the ASR have been widely cited by the International Court of Law and other international tribunals, such as the appellate body of the World Trade Organization and numerous investment dispute panels. Kolb's analysis of the ASR provides an incisive account of the formulation of its key articles as well as the commentary and debate that have taken shape around them.

This volume is primarily a work of international law rather than international relations. In reviewing this text, I am interested in discussing it from an IR perspective. As Kolb depicts it, the ASR represents what IR theorist Martin Wight termed a "via media" between realism and revolutionism (1991). It entails not transformation of the state system into some form of hierarchical order, but rather the development of a society of states centered on the recognition of a common set of rules. States are folded into an order of international responsibility, which, in Kolb's terms, refers to "...the general principle that all legal persons of a legal order are also responsible for the breaches of law they commit" (p.15).

The claim that follows from this is that the international order is a legal order – to the extent that states want it to be. There is a domain of international responsibility, but it is delimited in certain respects and vague in others, all of which serves to connect state interests – which are defined in terms of power – with international legal norms, which are allowed to operate within a particular bandwidth of acceptability. One of the chief virtues of Kolb's book is his capacity to characterize the space in which state responsibility operates by delineating its edges and describing its internal economy. I will comment briefly on each of these aspects of his analysis.

On one side, state responsibility is marked by soft law, which consists of agreements between states, often couched in terms of policy declarations or guiding principles, for which states incur no legal responsibility (Kolb, 2017: 36). On

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the other side of the state responsibility are serious breaches of international law, with respect to international peace and security, self-determination of peoples, prohibition of genocide, slavery or apartheid and protection of the environment. Article 19 of the 1996 draft version of the ASR categorized these breaches of international law as international crimes (p.55). This formulation elicited support from some quarters but criticism from others. Several are worth noting here. Assigning criminal liability to states misreads the civil rather than criminal nature of the law of state responsibility. The point of civil responsibility is the restoration of a *status quo ante*, presumed to be a lawful state of affairs. Any breaches of primary obligations, spelled out in innumerable treaty obligations between states, must be wiped clean through some form of reparation. "If you unlawfully disturbed the position that I was in," writes Kolb, "you should reinstall me in that position" (p.153). He adds: "we are in a context of civil responsibility: no one wins, no one loses and everything is brought back, to the extent feasible, to the original position" (p.153).

In light of the norms of civic responsibility, article 19's reference to international crimes was reformulated as an internationally wrongful act (or IWA). The 2001 draft of the ASR substituted "serious breaches of international law", in articles 40 and 41, for "international crimes", which impose a duty on all states to bring such breaches to an end and to withhold legal recognition of any new state of affairs arising from them. These are, remarks Kolb, quite weak secondary obligations with which states have generally refused to comply (p.58). Consider, in this regard, the U.S.'s unlawful invasion of Iraq in 2003. No state acted to stop the breach or to withhold legal recognition from the new Iraqi state that emerged from the invasion. It is simply a fact, concludes Kolb, "that international solidarity has not grown to the point where states consider these rule of law questions as matters of fundamental concern" (p.59).

In the space between soft law and serious breaches of international law, particularly when they are perpetrated by great powers, lies the effective domain of state responsibility. As Kolb characterizes it, this is not a frozen space, but one that is capable of being developed in certain ways. This is due to the way in which particular cases heard by the International Court of Justice or other international tribunals interpret the articles of the ASR.

Consider several examples of this. First, reparation for IWAs is increasingly tied, through case law, to an emerging duty on the part of injured states to mitigate the extent of the injury. Second, when states are injured by an IWA and not offered reparation for the injury, they are entitled to take counter measures (CM) toward the offending state – as long as the CM is lawful in the sense of being consistent with the UN Charter, directed exclusively toward the target state, intent on securing compliance with existing obligations, and proportionate to the IWA that gave rise to them (p.180). Case law, emerging from the International Criminal Court and other tribunals, is now concerned with defining proportionality in terms of what is necessary in order to restore the status quo (p.181).

Lastly, an important area of state practice, diplomatic protection (DP), which is the doctrine that a state is entitled to present a claim to another state for one of its nationals which is contrary to the latter's international legal rights (p.185). Certain states have tried to extend DP to stateless persons, but this clashes with the rule that the recipients of DP must have exhausted all their other legal remedies before a state may exercise this power on their behalf. This is a difficult requirement for a stateless person to meet and, in response, "numerous exceptions to this rule have been accepted in the ever growing case law" (p.193).

To summarize, the international law of state responsibility that Kolb discusses is an example of international society based upon shared norms and interests. E.H. Carr (1964) might regard these arrangements as a politically effective union between the reality of anarchy and power seeking states and the utopia of justice that transcends national borders. As Kolb shows, this union is capable of progressive development. In the contemporary world, which is increasingly marked by powerful, centrifugal political, economic and environmental forces, the preservation of international society is a vital human and global concern. In this regard, Kolb has presented us with an excellent overview of the international law of state responsibility. This is a text that should be of interest to students of international law and international relations alike.

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