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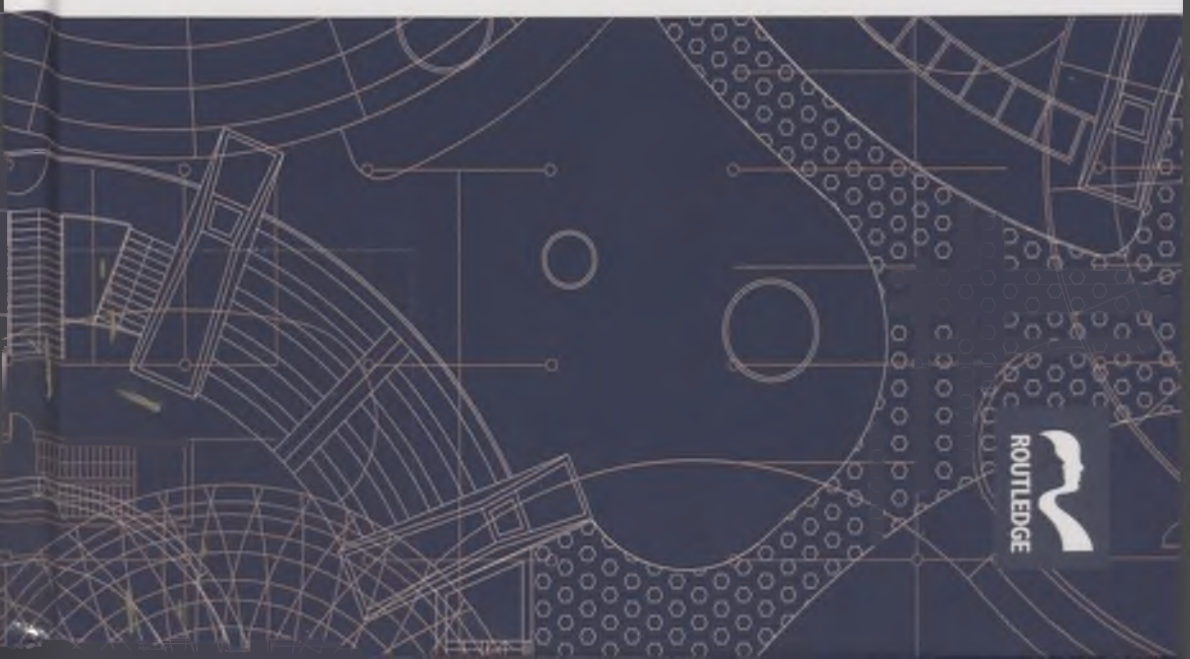
INTERNATIONAL 'CRIMINAL' RESPONSIBILITY

ANTINOMIES

Ottavio Quirico



International 'Criminal' Responsibility

In the course of the 20th and 21st centuries, major offences committed by individuals have been subject to progressive systematisation in the framework of international criminal law. Proposals developed within the context of the League of Nations coordinated individual liability and State responsibility. By contrast, international law as codified after World War II in the framework of the United Nations embodies a neat divide between individual criminal liability and State aggravated responsibility. However, conduct of State organs and agents generates dual liability. Through a critical analysis of key international rules, the book assesses whether the divisive approach to individual and State responsibility is normatively consistent. Contemporary situations, such as the humanitarian crises in Syria and Libya, 9/11 and the Iraq wars demonstrate that the matter still gives rise to controversy: a set of systemic problems emerge. The research focuses on the substantive elements of major offences, notably aggression, genocide, core war crimes, core crimes against humanity and terrorism, as well as relevant procedural implications.

The book is a useful resource for practitioners, policymakers, academics, students, researchers and anyone interested in international law and politics.

Ottavio Quirico is a Senior Lecturer in the School of Law at the University of New England in Australia, an Honorary Lecturer at the Centre for European Studies of the Australian National University and an Alumnus of the European University Institute.

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'A State is called the coldest of all cold monsters'
Friedrich Nietzsche, *Thus Spoke Zarathustra*

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Foreword

International 'criminal' responsibility: this book is an exceptionally rigorous scientific investigation of a modern field of law rife with technical complexity.

The issue of State 'criminal' responsibility has been discussed since the adoption of the Treaty of Versailles, around a hundred years ago. The Treaty simultaneously addressed the liability of Germany as a State and that of its Emperor, Wilhelm II of Hohenzollern, as an individual. In the 1920s, legal commentators invoked the establishment of a special jurisdiction with competence over individuals, and possibly States, for criminal offences. In the last quarter of the 20th century, the Statute of the International Criminal Court was approved after the international community experienced a troubled and complex period. At the same time, the UN International Law Commission (ILC) developed its work on the codification of 'international crimes' attributable to either natural persons or States.[1]

Within the context of the Draft Articles on State Responsibility, the ILC outlined a dualistic approach to State wrongful acts, distinguishing offences that affect one or more States in the context of bilateral and multilateral relations from breaches concerning the international community as a whole.[2] The expression 'international community as a whole' has become part of positive law. As is well known, the concept is based on Article 53 of the Vienna Convention on the Law of Treaties, which governs peremptory international norms having by their very nature a universal scope of application. In spite of the imperfection and incompleteness of the ILC's work on the issue, which I have considered in detail elsewhere,[3] it is possible to identify a certain 'progress' in international law as concerns

1 See, in particular, Roberto Ago, Fifth Report on State Responsibility: The Internationally Wrongful Act of the State, Source of International Responsibility, UN Doc A/CN.4/291 and Add.1 and 2 (1976) 2(1) *YBILC* 54, para 155; ILC, Report to the General Assembly on the Work of the Thirty-Fifth Session, UN Doc A/38/10 (1983) 2(2) *YBILC* 14, paras 50 and 54; Id, Report to the General Assembly on the Work of the Forty-Eight Session, UN Doc A/51/10 (1996) 2(2) *YBILC* 60.

2 ILC, Report to the General Assembly on the Work of the Fifty-Third Session, UN Doc A/56/10 (2001) 2(2) *YBILC* 112.

3 Pierre-Marie Dupuy, 'The Deficiencies of the Law of State Responsibility Relating to Breaches of "Obligations Owed to the International Community as a Whole": Suggestions for Avoiding

both the legal technique and the political 'consciousness of nations', which underpin the international community as a 'legal construct'.[4]

The matter has been enriched by the jurisprudence of the International Criminal Tribunal for the Former Yugoslavia (ICTY) and its Appeals Chamber. Particularly in the initial phase, the jurisprudence of the ICTY was dynamic as concerns the overlap between the responsibility of a State and that of an individual acting on its behalf. Evidence has in fact proved that the relationship between the two forms of responsibility is quite strict and has arisen to a greater or lesser extent in different cases.[5] The International Court of Justice has shown extreme prudence in approaching the question, notably in its 2007 judgment delivered in the case concerning the *Application of the Genocide Convention*:[6] only to a limited extent can it be said that the decision has contributed to shedding light on the overlap between individual and State responsibility.

Nonetheless, political developments, which the law should in principle frame and, more properly, normatively regulate, have led to what can be called the 'renewed frequency of barbarism'. The second Balkan war ended a century that began with the tragic events of the first. Despite UN membership, there has been an increase in the number of States where major offences against international humanitarian law and human rights have been committed, either internally or vis-à-vis other countries. The phenomenon has evolved together with the development of international terrorism, which has recently culminated in the humanitarian crises in Iraq and Syria.

This framework essentially raises the question of the effectiveness of fundamental principles and rules of international law, which have long been established and are still subject to progressive evolution, as shown by the aforementioned developments in the case law of international jurisdictions. Respect for the international rule of law is at stake. This is all the more troublesome in light of the fact that particularly serious offences are increasingly often supported by rough and seditious political declarations, involving countries that contributed to establishing the international legal order at the end of World War II.

In light of these developments, it is critical that lawyers undertake studies on the precise content of aggravated breaches of positive international law and their procedural implications, in order to elucidate the regime, or regimes, of State responsibility and consistency with individual regimes. This is a demanding and urgent task, as much as an indispensable one. Ottavio Quirico has developed such a study with great competence. He has completed this work with an intellectual

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Obsolescence of Aggravated Responsibility', in Antonio Cassese, *Realizing Utopia: The Future of International Law* (OUP, 2012) 214-219.

4 Pierre-Marie Dupuy, 'L'unité de l'ordre juridique international' (2002) 297 *RCADI* 9.

5 See, for instance, *Tadić*, IT-94-1, Trial Chamber, Judgment of 7 May 1997, 217, para 606.

6 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Yugoslavia)* [2007] ICJ Rep 43.

rigour that is equalled only by the practical and theoretical openness and importance of his methodical investigation.

Any reader will be grateful to the author.

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