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***Duality of Responsibility in International Law: The Individual, the State, and International Crimes.* By Thomas Weatherall. Leiden: Brill/Nijhoff, 2022. 367 + xxxiv pages.**

DRAFT

Sotirios-Ioannis Lekkas*

On 20 May 2024, the Prosecutor of the International Criminal Court ('ICC'), Karim Khan KC, announced that his Office filed applications for arrest warrants against the leadership of Hamas and the Prime Minister and Secretary of Defence of the State of Israel for suspected war crimes and crimes against humanity committed in Gaza after 7 October 2023.¹ Just a couple of miles away, the International Court of Justice ('ICJ') was deliberating on its fourth order on provisional measures in the case instituted by South Africa against the State of Israel claiming violations of the Genocide Convention against the people of Gaza in the same period.² For the Hague international courts, and those involved in their operations, this was perhaps another day on the job. Parallel international proceedings against states and individuals are currently pending before the ICJ and the ICC with respect to allegations of crimes under international law committed against the Rohingya people in the Rakhine State, Myanmar,³ as well as against civilians in the course of the war in Ukraine.⁴ In the past, different international courts and tribunals have dealt with applications against states and criminal charges against individuals, most notably, with respect to the Yugoslav War.⁵ It is firmly established within the current

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¹ ICC, 'Statement of ICC Prosecutor Karim A.A. Khan KC: Applications for arrest warrants in the situation in the State of Palestine' (Statement) OTP (20 May 2024). The content of the applications remains confidential.

² *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v Israel)* Order 2024 <<https://www.icj-cij.org/sites/default/files/case-related/192/192-20240524-ord-01-00-en.pdf>>.

³ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v Myanmar: 7 States intervening)* Application instituting proceedings [2019] ICJ Pleadings 2; *Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar* (Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the People's Republic of Bangladesh/Republic of the Union of Myanmar) PTC-III, ICC-01/19-27 (14 November 2019).

⁴ *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v Russian Federation)* Merits 2024 <<https://www.icj-cij.org/sites/default/files/case-related/166/166-20240131-jud-01-00-en.pdf>>; *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v Russian Federation)* Application instituting proceedings [2022] ICJ Pleadings 2; ICC, 'Situation in Ukraine: ICC judges issue arrest warrants against Vladimir Vladimirovich Putin and Maria Alekseyevna Lvova-Belova' (Press Release) Registry (17 March 2023); ICC, 'Situation in Ukraine: ICC judges issue arrest warrants against Sergei Ivanovich Kobylash and Viktor Nikolayevich Sokolov' (Press Release) Registry (5 March 2024); ICC, 'Situation in Ukraine: ICC judges issue arrest warrants against Sergei Kuzhugetovich Shoigu and Valery Vasilyevich Gerasimov' (Press Release) Registry (25 June 2024). The content of the arrest warrants remains confidential.

⁵ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* Merits [2007] ICJ Rep 3 ('*Bosnia Genocide*'); *Application of the Convention for the Prevention and Suppression of the Crime of Genocide (Croatia v Serbia)* Merits [2015] ICJ Rep 3 ('*Croatia Genocide*'); eg *Milošević (Slobodan)* (Amended Indictment) IT-02-54-T (22 November 2002); *Perišić* (Judgment) IT-04-81-A (28 February 2013).

framework of international law that the commission of certain acts—most notably, genocide—triggers the international (and domestic) responsibility of states and individuals simultaneously.⁶ According to the International Court of Justice, this ‘duality of responsibility continues to be a constant feature of international law’.⁷ What is less established or constant is what this duality entails for the operation and evolution of the respective international responsibility regimes and, concomitantly, for the bureaucracies tasked with their implementation.

Weatherall’s *Duality of Responsibility* draws upon this broader theme. It interrogates the relationship of the international responsibility of states and individuals as it has been portrayed in broad strokes by the International Court of Justice:

State responsibility and individual criminal responsibility are governed by different legal régimes and pursue different aims. The former concerns the consequences of the breach by a State of the obligations imposed upon in by international law, whereas the latter is concerned with the responsibility of an individual as established under the rules of international and domestic criminal law, and the resultant sanctions to be imposed upon that person.⁸

The main premise of the book is that certain primary rules of international law apply to both states and individuals giving rise to duality of responsibility.⁹ As a corollary, ‘secondary rules governing individual and state responsibility come into contact as they operationalize duality of responsibility, which in many instances may be observed to impact their application in ways that are unique to the primary rules that give rise to such duality.’¹⁰ Against this backdrop, the main objective of the book is to offer a detailed description of the respective secondary rules of responsibility and map out their key points of contact with a view to make a contribution to ‘convergence in the international law of dual responsibility’.¹¹

Weatherall covers a lot of ground in his mapping expedition. Part 1 lays down the theoretical premises of the work comprising the capacity of both states and individuals to incur international responsibility (Chapter 1) and the distinction between primary and secondary rules of international law as they apply to states and individuals (Chapter 2). Part 2 examines under the rubric of ‘Breach’ the elements of crimes under international criminal law (Chapter 3), the elements of the international wrongful act under the law of state responsibility (Chapter 4), and their ensuing interaction including at the level of sources of international law and applicable standards of proof (Chapter 5). Part 3, titled ‘Attribution’, discusses the different

⁶ eg ILC, ‘Articles on the Responsibility of States for Internationally Wrongful Acts with Commentaries’ (2001) II(2) YbILC 31 (‘ARSIWA’), art 58 and Commentary [3].

⁷ *Bosnia Genocide* (n5) [173].

⁸ *Croatia Genocide* (n5) [129].

⁹ Thomas Weatherall, *Duality of Responsibility: The Individual, the State, and International Crimes* (Brill/Nijhoff 2022) 31; also eg André Nollkaemper, ‘Concurrence between Individual Responsibility and State Responsibility in International Law’ (2003) 52 ICLQ 615, 618-619; Beatrice Bonafè, *The Relationship Between State and Individual Responsibility for International Crimes* (Brill/Nijhoff 2009) 239-243.

¹⁰ Weatherall (n9) 3.

¹¹ *ibid* 6.

modes of liability under international criminal law (Chapter 6) and rules of attribution of conduct under the law of state responsibility (Chapter 7), as well as investigates the implications of double attribution of conduct to states and individuals for the operation of the international law on immunity of state officials (Chapter 8). Part 4, titled ‘Responsibility’, discusses the content of responsibility under the respective regimes (Chapter 9), the available defences (Chapter 10), as well as issues of jurisdiction (Chapter 11), immunity, and inviolability (Chapter 12). Part 5 highlights the key findings of the inquiry along the three axes of breach, attribution, and responsibility (Chapters 13 & 14).

The resulting map depicts a vast ‘shared legal space’ between state responsibility and individual criminal responsibility under international law.¹² What marks the boundaries of his inquiry is the distinction between primary and secondary rules.¹³ Weatherall uses a broad notion of secondary rules that includes not only the international law of state and individual responsibility, but also ‘associated’ secondary rules including the rules on jurisdiction and state immunity.¹⁴ Whilst this expansion appears deliberate, its practical value is open to question. For instance, the chapter on jurisdiction primarily outlines the available fora for prosecuting individuals and presents the basic rules for adjudicating disputes between states, ultimately designating this area as one of ‘divergence’.¹⁵ Similarly, the chapter on immunities mostly records the practice of international criminal courts rejecting claims of immunity and that of domestic courts affirming the immunity of states and personal immunities and inviolabilities of its most senior officials for allegations of violations of the primary norms envisaged in the study.¹⁶ The chapter also expands upon the still contested issue of functional immunity of state officials from foreign criminal jurisdiction for crimes under international law, though much of this discussion largely mirrors analysis provided earlier in the chapter on attribution.¹⁷ One may also wonder if this expansion sacrifices a degree of detail. For example, the chapters on jurisdiction and immunities treat all alleged violations of primary rules entailing dual responsibility in a largely uniform manner, without considering the possibility that differences may exist in how certain violations may be treated. The crime of aggression is a case in point.¹⁸

To its credit, the book refrains from imposing any comprehensive normative agenda on its reader. Weatherall, more committed to his quasi-cartographic methods than to his stated goal of contributing to convergence between the two regimes,¹⁹ does not shy away from designating large areas in the law of state and individual responsibility as points of divergence.²⁰ At the same time, a roadmap is as good as its landmarks. The inclusion of both the material and mental elements of crimes under international law and of the internationally

¹² ibid xviii.

¹³ ibid 36.

¹⁴ ibid 58-62.

¹⁵ ibid 286-289.

¹⁶ ibid 207-228, 290-295, and 307-310.

¹⁷ ibid 303.

¹⁸ eg ICC-ASP, ‘Understandings regarding the amendments to the Rome Statute of the International Criminal Court on the crime of aggression’ (11 June 2010) RC/Res.6, Annex III [4]-[5]; ILC, ‘Report of the International Law Commission on its sixty-ninth session’ (2017) II(2) YbILC 2, 122 and 127-128.

¹⁹ Weatherall (n9) 6 quoted in full above; text accompanying n11.

²⁰ ibid 335-344.

wrongful act under the same rubric of ‘Breach’ seems somewhat misplaced, notwithstanding antecedents in literature.²¹ The two concepts operate at different levels of abstraction. Breach is only an element of an internationally wrongful act of a state.²² Moreover, analytically speaking, the material and mental elements of crime are not sufficient conditions to establish individual criminal responsibility; it is also necessary to determine that a specific mode of liability applies to the specific accused.²³ Similarly, the grouping of modes of liability under international criminal law and the rules of attribution of conduct under the law of state responsibility within the same heading of ‘attribution’ masks profound differences about the scope and purposes of the underlying juridical operations, even within the rules under discussion. What exactly is being attributed under the rules of individual criminal responsibility and what under those of state responsibility?

This issue goes beyond mere terminology. First, one of the book’s recurring claims is that state responsibility is ‘subsidiary’ to individual criminal responsibility, or that it operates ‘effectively successively’ to individual criminal responsibility.²⁴ Weatherall states that ‘international criminal conduct is sufficient to satisfy the element of breach of an international obligation for the state’, whilst ‘[i]t is practically unlikely for the breach of an obligation by the State to serve as the basis for a subsequent determination of an individual criminal responsibility’.²⁵ Whilst the claim offers a straightforward narrative, it remains largely unsubstantiated. In fact, it appears to contradict the premise of the book that the same primary rules apply to both states and individuals.²⁶ Similarly, the analysis on applicable standards of proof in interstate and international criminal proceedings does not appear to fully support this claim.²⁷ Furthermore, Weatherall acknowledges that the crime of aggression might upset this configuration, because the establishment of a state act of aggression is an element of the crime.²⁸ Less obviously, the claim about the subsidiarity of state responsibility also overlooks the fact that establishing individual responsibility in international criminal law is a two-step process. For example, modes of liability in international criminal law include ‘leadership modalities’ which encompass the commission of all crimes under international law through organisations, including conceivably the state apparatus or some parts of it.²⁹ In this context, the characterisation of a course of conduct as a breach of an international obligation by a state—ie the prohibition of genocide, crimes against humanity, or war crimes—is just as likely to inform the establishment of individual criminal responsibility as a practical matter. However,

²¹ eg Ottavio Quirico, *International ‘Criminal’ Responsibility* (Routledge 2019) ch 2.

²² ARSIWA (n6), art 2.

²³ Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3, art 25(3).

²⁴ Weatherall (n9) 4 and 29.

²⁵ *ibid* 84-85.

²⁶ *ibid* 31.

²⁷ *ibid* 129 (‘this limited practice does not indicate deviation in applicable standards of proof’).

²⁸ *ibid* 85.

²⁹ eg Elies van Sliedregt, *Individual Criminal Responsibility in International Law* (OUP 2012) 157-171; on the connection between ‘leadership modalities’ and the crime of aggression see: Kai Ambos, *Treatise on International Criminal Law* vol II (OUP 2014) 205.

the relevant chapter (Chapter 6) does not delve into these nuances or reflect on the relevant practice of international criminal courts and tribunals.

Second, the conflation of two distinct juridical operations—attribution of conduct and attribution of responsibility—leads to the conclusion that the two regimes diverge due to the centrality of the principle of culpability in international criminal law and the ‘objective’ character of state responsibility.³⁰ However, by addressing the issue of mental elements exclusively from the perspective of secondary rules, Weatherall neglects the connection between secondary rules and primary rules binding on states.³¹ The establishment of breach of an international obligation is a necessary condition for attributing *responsibility* to a state and obligations addressed to both states and individuals include mental elements.³² Less conspicuously, when the general rules of state responsibility attribute *responsibility* to a state, as they do with respect to internationally wrongful acts of other states or international organizations, they tend to include mental elements.³³ Whilst Weatherall appears to recognize the potential of interaction between these concepts,³⁴ he concludes that ‘it is unclear how... [it] may or may not impact the attribution to the State of conduct engaging individual criminal responsibility for aiding and abetting an international crime’.³⁵ Arguably, this complexity deserves a more detailed account and thoughtful evaluation.³⁶

Besides, a crucial choice when making a map is what detail to include in the map and what to leave out.³⁷ To illustrate this point, in one notable instance, the book concludes that the two regimes of responsibility pursue different purposes, ultimately echoing the *dictum* of the ICJ, despite initially aiming to challenge it.³⁸ Weatherall asserts that the purpose of individual responsibility in international law is retribution and deterrence and thus only encompasses punitive consequences.³⁹ What is most notable is that the book overlooks the possibility that individual responsibility under international law has also a ‘restorative’ purpose.⁴⁰ One obvious instantiation of this aspect is the obligation of individuals to make reparation for the harm caused by their crimes under international law,⁴¹ a topic which Weatherall has explored extensively in his previous work.⁴² Unfortunately, there is no explanation provided for the omission in this current work.

³⁰ Weatherall (n9) 202-207 and 339.

³¹ Riccardo Pisillo-Mazzeschi, ‘The Due Diligence Rule and the Nature of the International Responsibility of States’ (1992) 35 GYIL 9, 21.

³² Weatherall (n9) 83-84 and 110; see also ARSIWA (n6), Commentary to Art 2 [3] and [10].

³³ ARSIWA (n6), arts 16(a), 17(a), and 18(b).

³⁴ Weatherall (n9) 171-173.

³⁵ *ibid* 173.

³⁶ eg Miles Jackson, *Complicity in International Law* (OUP 2015); Vladyslav Lanovoy, *Complicity and its Limits in the Law of International Responsibility* (Hart 2016).

³⁷ Anne Orford, ‘In Praise of Description’ (2012) 25 LJIL 609, 625.

³⁸ Weatherall (n9) 341.

³⁹ *ibid* 231-237.

⁴⁰ eg Bemba Gombo (Final decision on the reparation proceedings) ICC-01/05-01/08-3653, TCIII (3 August 2018) [3].

⁴¹ Rome Statute (n23), art 75; ARSIWA (n6), Commentary to art 58 [2].

⁴² Thomas Weatherall, *Jus Cogens: International Law and Social Contract* (CUP 2015) 276-285.

It is important to acknowledge that presenting a comprehensive academic work through a book review risks overshadowing the author's narrative and achievements with the reviewer's expectations and biases. Weatherall's work intervenes in a densely populated legal space that often appears dangerously compartmentalized and suspiciously static. His normative vision of an international law of dual responsibility is undoubtedly compelling. However, to this reviewer, it remains questionable whether the book fully achieves this ambitious agenda or reinforces, perhaps inadvertently, existing doctrinal and institutional silos.