

even refuted by) the historical account of the evolution of international trade institutions which Cass gives in Chapter 1, and the subject of development hardly arises throughout the book. This is not to deny, however, the attractiveness of Cass's vision. Whatever role development has historically played in the evolution of the trade regime, it is hard to deny that development represents one of the most suitable and important aims for the trade regime in contemporary conditions. At the very least, Cass's vision of 'trading democracy' serves as a reminder of the task facing trade lawyers, of exploring and elaborating precisely what this might mean.

University of Cambridge Andrew Lang

Email: ATFL2@cam.ac.uk

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Maison, Rafaëlle. ***La responsabilité individuelle pour crime d'Etat en droit international public***. Brussels: Bruylant, 2004. Pp 568. €95. ISBN 2802718207

The aim of this book by Rafaëlle Maison, professor at the Université de Picardie, is to demonstrate the existence under international customary law of a secondary norm which places individual criminal responsibility among the consequences of state-aggravated responsibility for international crimes. In other words, Maison argues that the punishment of individuals for crimes such as aggression, genocide, crimes against humanity and war crimes is nothing more nor less than a sanction against the author state. The underlying idea is that states are the only subjects capable of committing such serious breaches of international obligations towards the international community as a whole.

From a methodological point of view, the book has two principal merits. Firstly, it deals with a difficult subject – the foundations of individual criminal liability in the international legal order. This requires the author to examine issues such as state sovereignty, immunities from jurisdiction, the theory of international subjects, state responsibility for

international crimes, and many others. From this perspective, Maison's effort is remarkable and her book may provide insightful reading for international scholars dealing with such issues.

Secondly, in undertaking her analysis, Maison considers voluminous amounts of international documents, judgments and scholarly works. In particular, she examines in detail many important, but often neglected materials relating to the origin of 'individual' criminal responsibility under international law; for example, a number of international criminal theories developed in the 1920s, the various documents relating to the Nuremberg and Tokyo trials, and the so-called 'subsequent trials'. However, while this reliance on less recent practice and doctrine is to be commended, it is unfortunate that greater attention was not paid to more recent scholarship, which has increasingly addressed such problems. Moreover, the most recent jurisprudence, particularly the many judgments of the International Criminal Court for the former Yugoslavia, could have been more adequately examined, particularly since they may prove to be more instructive than some of the vague Rule 61 decisions that are cited throughout the book.

Maison starts with a detailed analysis of international crimes. Aggression, crimes against humanity and war crimes are conceived of exclusively as collective criminal phenomena, that is, as 'system' crimes. Indeed, she holds that international norms for their prohibition are only directed towards states. Thus, according to Maison, aggression is a typical state crime, perpetration of crimes against humanity requires a discriminatory intent and state organization, and war crimes are always connected to a state activity: an international or internal armed conflict.

Such an assumption is of fundamental importance for Maison's subsequent analysis: accordingly, individual criminal responsibility must always be connected to a wider criminal context, i.e., to a serious breach by the author state. However, whether this premise is robust in all cases may well be questioned. The *ad hoc* tribunals have made clear that both crimes against humanity and war crimes may be perpetrated by private individuals without any 'state policy' element

being required. This leaves room for individual criminality not connected to the state.

In Part II of her book, Maison explains that individuals are punished only for their participation in this broader context of state criminality, either as political or military leaders or as executioners. In the former case, the state is identified with those individuals who planned, organized and ordered the crimes. In the latter, executioners are convicted for their participation in collective criminality, although superior orders can exculpate them.

In other words, convictions should substantially depend on the position of authority held by the perpetrator in the state hierarchy and should be precluded when a state criminal context does not exist. Again, international case law seems to go in the opposite direction. When assessing individual criminal responsibility, international tribunals mainly rely on the direct participation of the accused in the criminal act, and not so much on his or her official position in the state apparatus. International tribunals establish individual as opposed to state responsibility, and the difference between the two has been explicitly emphasized, e.g., in the *Furundzija* case with respect to torture.⁵

Finally, Maison concludes that punishment by international tribunals (the role of domestic courts is not taken into account) can only be considered as a sanction against the responsible state. More precisely, individual responsibility is a special consequence provided for by the regime of aggravated responsibility arising out of the commission of state crimes. Only the international community, through interna-

tional tribunals, can prosecute state organs for international crimes, disregarding their functional immunity and thus giving rise to a centralized sanction against the responsible state. To be sure, this is not a new position,⁶ but it is one which leaves unchallenged the traditional certainties of the 'law of nations', for instance, with respect to international subjects, the unity of the regime of international responsibility, or the strict separation between the international and the domestic legal order.

The price to be paid is a certain degree of selectivity. Maison plays down the role of a relevant part of international practice concerning individual criminal responsibility: important aspects such as *mens rea* – which could have shown a significant difference between state and individual responsibility – are not analysed *per se*, and it is probably not so easy to include individual criminal responsibility among the consequences of state-aggravated responsibility in light of the works of the International Law Commission.⁷

In the end, this reviewer's main regret with Maison's volume is that she simply fails to consider different approaches to the subject matter which have gained ground in recent years.⁸

⁵ 'Under current international humanitarian law, in addition to individual criminal liability, State responsibility may ensue as a result of State officials engaging in torture or failing to prevent torture or to punish torturers. If carried out as an extensive practice of State officials, torture amounts to a serious breach on a widespread scale of an international obligation of essential importance for safeguarding the human being, thus constituting a particularly grave wrongful act generating State responsibility', ICTY, Trial Chamber, *Prosecutor v. Furundzija*, 10 December 1998, para. 142.

⁶ This theory was first explicitly elaborated by G. Sperduti, *L'individuo nel diritto internazionale* (1950), at 175, and then further developed by various authors.

⁷ The International Law Commission has consistently kept individual and state responsibility separate. Suffice it to recall here the two 'without prejudice' clauses contained in Article 4 of the Draft Code of Crimes against the Peace and Security of Mankind adopted in 1996 and Article 58 of the Draft Articles on State Responsibility adopted in 2001, respectively.

⁸ See, for example, A. Cassese, *International Law* (2001), at 271; Dupuy, 'International Criminal Responsibility of the Individual and International Responsibility of the State', in A. Cassese, P. Gaeta and J. Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary*, vol. II (2002), at 1085; and Nollkaemper, 'Concurrence between Individual Responsibility and State Responsibility in International Law', 52 *ICLQ* (2003) 615.

Had she done so, certain assumptions once taken for granted would necessarily have been called into question, but new solutions could have been explored. And possibly, these may

have proven more faithful to recent developments in modern international practice.

University of Macerata *Beatrice I. Bonafé*
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