INTERNATIONAL CRIMINAL LAW PRACTITIONER LIBRARY · VOLUME I

FORMS OF RESPONSIBILITY IN INTERNATIONAL CRIMINAL LAW

GIDEON BOAS, JAMES L. BISCHOFF AND NATALIE L. REID

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International Criminal Law Practitioner Library Series

Volume I

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The views expressed in this book are those of the authors alone and do not necessarily reflect the views of the International Criminal Tribunal for the former Yugoslavia or the United Nations in general.

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Foreword

International criminal law is a new branch of law, with one foot in international law and the other in criminal law. Until the Nuremberg trial, international criminal law was largely 'horizontal' in its operation – that is, it consisted mainly of co-operation between states in the suppression of national crime. Extradition was therefore the central feature of international criminal law. Of course there were international crimes, crimes that threatened the international order, such as piracy and slave trading, but with no international court to prosecute such crimes, they inevitably played an insignificant part in international criminal law. In 1937 came the first attempt to create an international criminal court, for terrorism, but the treaty adopted for this purpose never came into force. The Nuremberg and Tokyo trials mark the commencement of modern international criminal law – that is, the prosecution of individuals for crimes against the international order before international courts. The Nuremberg and Tokyo tribunals have been criticised for providing victors' justice, but they did succeed in developing a jurisprudence for the prosecution of international crimes that courts still invoke today. The Cold War brought this development to an end. Attempts to create a permanent international criminal court failed and it was left to academics to debate and dream about the creation of such a court for the next forty years.

All this changed with the end of the Cold War and the creation of *ad hoc* tribunals for the former Yugoslavia and Rwanda. At last the international community had two genuine international tribunals to dispense justice. 'Vertical' international criminal law – that is, the prosecution of individuals for international crimes before international courts – became a reality. However, no sooner had the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) started to function than attention was diverted to the creation of a

permanent international criminal court to try crimes throughout the world and not just in Yugoslavia and Rwanda. International lawyers applauded the proposal for such a court put forward by the International Law Commission and scrambled to participate in the Rome Conference of 1998 for the creation of an international criminal court. Attention remained focused on the International Criminal Court as the number of states ratifying the Rome Statute grew and the International Criminal Court finally became a reality in 2002. At this time there was a burst of writing and many books and journal articles appeared on the structure, jurisdiction, procedure and substantive law of the International Criminal Court.

In recent times, in part as a result of disillusionment following the slow start of the International Criminal Court, the pendulum of international criminal law has been swung back once more to where it should probably have been all the time – the *ad hoc* tribunals. Throughout the period of excitement and expectation over the creation of the International Criminal Court, the ICTY and ICTR quietly proceeded with the prosecution of international criminals for the most serious crimes known to mankind – genocide, crimes against humanity and war crimes. The trial of Slobodan Milošević received much media attention but little attention was paid to the daily work of the ICTY and ICTR. Lengthy, carefully researched and thoroughly reasoned judgments have been handed down by judges from different backgrounds and with different judicial experience. These judgments have created a new, truly international or transnational international criminal law that draws on the experience of Nuremberg and Tokyo and national criminal courts, and successfully integrates national and international criminal law, humanitarian law and human rights law. At the same time the ICTY and ICTR have created vibrant institutions that attract judges and lawyers from many countries, united in their commitment to international justice. Over 1,000 lawyers and para-legals are today employed in some capacity before international tribunals – and most are with the ICTY or ICTR.

Publications have not kept pace with developments before the ICTY and ICTR. Writings on these courts, particularly in comparison with writings on the International Criminal Court, are few. Moreover, much of the writing on the ICTY and ICTR focuses on the structure of the tribunals and their procedures, rather than on the substantive law applied. *International Criminal Law Practitioner Library Series*, with one volume devoted to forms of responsibility and the other to elements of crime, therefore makes a timely appearance. Written by three young international criminal lawyers who have all worked in the ICTY and been directly involved in the evolution of the law before the tribunal, the study examines the substantive law of the tribunals

primarily from the perspective of the international criminal law practitioner, with the needs of the practitioner in mind. However, as one would expect from authors with such distinguished academic credentials, the study has an equal appeal to the legal academic and student.

Inevitably, as the ICTY and ICTR provide the richest source of substantive criminal law, the study focuses on the jurisprudence of these tribunals. The jurisprudence of other tribunals is not, however, ignored. The law of Nuremberg and Tokyo features prominently, and the law and structures of the other international or internationalised tribunals – the Special Court for Sierre Leone (SCSL), the Special Panels for Serious Crimes in East Timor (SPSC), the Supreme Iraqi Criminal Tribunal (SICT), the Extraordinary Chambers of the Courts of Cambodia (ECCC) and, of course, the International Criminal Court – are also examined. The law of the International Criminal Court, contained in its primary instruments dealing with crimes and elements of crimes, receives particular attention.

Volume I deals with the law of individual criminal responsibility in international criminal law. This law seeks to capture all the methods and means by which an individual may contribute to the commission of a crime and be held responsible under the law. It aims to ensure that not only the perpetrator but also the high- or mid-level person – both civil and military – frequently removed from the actual perpetration of the crime, may be held responsible. Consequently this volume focuses on the various forms of participation in international crimes – joint criminal enterprise, superior responsibility, aiding and abetting and planning and instigating international crimes.

Volume II will cover the elements of the core international crimes of genocide, crimes against humanity and war crimes, as seen from the perspective of law of both the *ad hoc* international tribunals and other tribunals.

The authors are not content with a mere portrayal or description of the law. The approaches of different tribunals, and the approaches of different judges within the same tribunal, are compared and contrasted; and decisions are carefully analysed and criticised. Moreover, the views of scholars are considered and integrated into the text.

International Criminal Law Practitioner Library Series will primarily, and in the first instance, assist the international criminal law practitioner, whatever his or her court. But it will also be of assistance to the growing body of national lawyers engaged in the practice of international criminal law before domestic courts. As the Rome Statute of the International Criminal Court gives jurisdiction over international crimes in the first instance to domestic courts, in accordance with the principle of complementarity, it can be expected that this body of lawyers will grow.

Gideon Boas, James Bischoff and Natalie Reid are to be congratulated on a work that concentrates on the jurisprudence of the main source of contemporary international criminal law – the law of the *ad hoc* tribunals – but which at the same time takes account of all the other sources of this rapidly expanding branch of law. Practitioners, academics and students will learn much from this excellent study.

John Dugard
The Hague

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