

Ciara Damgaard

Individual Criminal Responsibility for Core International Crimes

Selected Pertinent Issues

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Table of Contents

Acknowledgements..... xiii

Part I - General

1 Introduction..... 3

1.1 Opening Remarks and Objectives..... 3

1.2 Overview and Target Audience..... 8

2 Germane Considerations.....11

2.1 Introductory Remarks..... 11

2.2 Meaning of ‘Individually Criminally Responsible’..... 12

2.3 Objectives of Individual Criminal Responsibility for Core International Crimes..... 15

2.4 Sources of, and Judicial Precedent in, International Criminal Law..... 27

2.4.1 Introductory Remarks..... 27

2.4.2 General Sources of International Criminal Law 29

2.4.2.1 Treaties..... 31

2.4.2.2 Custom 32

2.4.2.3 General Principles of Law Recognised by Civilised Nations..... 34

2.4.2.4 Judicial Decisions..... 35

2.4.2.5 Teachings of the Most Highly Qualified Publicists..... 42

2.4.3 Sources of International Criminal Law Relevant to Adjudication Before the ICC and the Ad Hoc International Criminal Tribunals..... 43

2.4.3.1 ICC..... 44

2.4.3.2 Ad Hoc International Criminal Tribunals..... 47

2.4.3.3 Significance of the ICC, ICTY and ICTR Statutes other than as a Binding Source of Law..... 47

2.4.4 Evaluation of other Potential Sources of International Criminal Law..... 48

2.4.4.1 Nuremberg Principles..... 48

2.4.4.2 Draft Code of Crimes Against the Peace and Security of Mankind..... 48

2.4.4.3	CCL 10.....	49
2.4.4.4	Resolutions of the UN General Assembly and UN Security Council.....	50
2.4.4.5	Reports of the International Law Commission.....	50
2.4.5	Judicial Precedent and the Ad Hoc International Criminal Tribunals, the ICC and the SCSL.....	50
2.4.5.1	Judicial Precedent and the Ad Hoc International Criminal Tribunals and the SCSL.....	51
2.4.5.2	Judicial Precedent and the ICC.....	55
2.4.5.3	Conclusion.....	56
2.4.6	Concluding Remarks.....	56
2.5	Definition of Core International Crimes.....	56
2.5.1	Introductory Remarks.....	56
2.5.2	Definition of ‘Core International Crimes’.....	57
2.5.3	Core International Crimes for which a Person can be Individually Criminally Responsible.....	61
2.5.3.1	Genocide.....	62
2.5.3.2	War Crimes.....	64
2.5.3.3	Crimes Against Humanity.....	72
2.6	Evolution of Individual Criminal Responsibility for Core International Crimes.....	85
2.6.1	Introductory Remarks.....	85
2.6.2	Evolution of the Concept of Individual Criminal Responsibility for Core International Crimes in International Law.....	86
2.6.2.1	Pre-Nuremberg and Tokyo.....	87
2.6.2.2	Nuremberg and Tokyo up to the 1990s.....	98
2.6.2.3	Post Nuremberg and Tokyo.....	105
2.6.2.4	ICTY and Beyond.....	113
2.6.2.5	Conclusion.....	123

Part II - Selected Pertinent Issues

3	The Joint Criminal Enterprise Doctrine: A “monster theory of liability” or a legitimate and satisfactory tool in the prosecution of the perpetrators of core international crimes?.....	127
3.1	Introduction and Overview.....	127
3.2	Terminology.....	130
3.3	History.....	132
3.4	The JCED Before the Ad Hoc Tribunals and as Contained in Other Instruments.....	136
3.4.1	ICTY.....	136
3.4.1.1	Tadić Appeals Judgment.....	137
3.4.1.2	Application of the Principles Identified in the Tadić Appeals Judgment.....	148
3.4.2	ICTR.....	163

3.4.3	ICC	167
3.4.3.1	Observations to Article 25(3)(d), ICC Statute.....	168
3.4.3.2	Future Employment of the JCED Before the ICC	177
3.4.4	Draft Code of Crimes Against the Peace and Security of Mankind	178
3.4.5	Special Court for Sierra Leone.....	178
3.4.6	Supreme Iraqi Criminal Tribunal	180
3.4.7	US Military Commission	180
3.5	Distinguishing the JCE Concept from Other Modes of Liability/Crimes.....	182
3.5.1	Relevance of Making the Distinction.....	182
3.5.2	Aiding and Abetting	183
3.5.3	Conspiracy	184
3.5.4	Membership of a Criminal Organisation	188
3.6	Issues Arising in Relation to the JCED from a Review of the JCED Jurisprudence.....	193
3.6.1	Is The JCE Mode of Liability a Form of Principal or Accomplice Liability?	193
3.6.1.1	Significance of Classification.....	194
3.6.1.2	Jurisprudence Supporting the Position that JCE Liability is a Form of Principal Liability.....	198
3.6.1.3	Jurisprudence Supporting the Position that JCE Liability is a Form of Accomplice Liability.....	202
3.6.1.4	Jurisprudence Supporting the Position that JCE Liability is Both a Form of Principal and Accomplice Liability.....	203
3.6.1.5	Employment of Terminology.....	211
3.6.2	Genocide and JCE Category 3	212
3.6.2.1	Case Law.....	213
3.6.2.2	Criticism of the Brdanin Appeals Decision.....	216
3.6.3	The Pleading of the JCE Mode of Liability in Indictments.....	218
3.6.3.1	Relevant Provisions of the ICTY Statute, ICTY Rules and Rules Arising From the Case Law of the ICTY, in Relation to the Form of Indictments.....	219
3.6.3.2	Blanket Pleading of All Modes of Responsibility Under Article 7(1) ICTY Statute	221
3.6.3.3	Revealing the Nature of the Alleged Individual Criminal Responsibility of the Accused in the Prosecution's Pre-Trial Brief.....	227
3.6.3.4	JCE Specifically Charged, but not Specified which JCE Category is Being Charged.....	229
3.6.3.5	Permissibility of Charging Under Alternative Categories of JCE Liability.....	233
3.6.3.6	Concluding Remarks.....	234

3.7	Critique of the JCED.....	234
3.7.1	Pertinent Issues.....	235
3.7.1.1	Rationale of the JCED.....	235
3.7.1.2	Undermining the Principle of Individual Criminal Responsibility in Favour of Collective Responsibility.....	236
3.7.1.3	Infringement of the Nullum Crimen Sine Lege Principle.....	238
3.7.1.4	JCE Scenarios Already Covered by Aiding and Abetting?.....	242
3.7.1.5	Principal/Accomplice Debate.....	245
3.7.1.6	Genocide and JCE Category 3.....	247
3.7.1.7	Pleading of the JCED in Indictments.....	248
3.7.1.8	Significant Level of Participation of the Accused in the JCE.....	250
3.7.1.9	The Application of the JCED to the 'Little Fish'.....	253
3.7.1.10	The ICC and the JCE Mode of Liability.....	255
3.7.2	Conclusion.....	258
4	The Defining Criteria of International Criminal Courts for the Purposes of Lifting State Official Immunity.....	263
4.1	Introduction.....	263
4.2	Scope, Aim and Overview.....	267
4.3	Terminology.....	270
4.4	<i>Yerodia</i> Case.....	271
4.5	Defining Criteria of an International Criminal Judicial Body.....	273
4.5.1	Introduction.....	273
4.5.2	Defining Criteria of an International Judicial Body	273
4.5.3	Jurisprudence and Literature on the Defining Criteria of an International <i>Criminal</i> Judicial Body.....	277
4.5.3.1	Amicus Curiae Brief of Professor Philippe Sands.....	278
4.5.3.2	Amicus Curiae Brief of Professor Diane F. Orentlicher.....	281
4.5.3.3	SCSL Appeals Chamber's Taylor Decision.....	283
4.5.4	Defining Criteria of an International Criminal Judicial Body....	284
4.5.4.1	Introduction.....	284
4.5.4.2	Legal Basis of an International Criminal Judicial Body.....	285
4.5.4.3	An International Criminal Judicial Body may not be Part of the Judiciary of One Single State.....	317
4.5.4.4	An International Criminal Judicial Body Shall Apply International Criminal Law.....	317
4.5.4.5	The Jurisdiction Ratione Materiae and Ratione Personae of the International Criminal Judicial Body Must be International.....	318

4.5.4.6	The Decisions of the International Criminal Judicial Body are Binding.....	320
4.5.4.7	The Judiciary of an International Criminal Judicial Body is Impartial, Independent and International.....	320
4.5.4.8	The Judiciary must not have been Appointed Ad Hoc by the Parties.....	321
4.5.4.9	Adjudication According to a Pre-Determined Set of Rules of Procedure and Evidence, which cannot be Modified by the Parties.....	321
4.5.4.10	Relationship with the Domestic Courts of a State: Concurrent/Primacy or Complementarity Jurisdiction.....	322
4.5.4.11	Independent Financing of the International Criminal Judicial Body.....	323
4.5.4.12	Fulfilment of the Criteria Associated with Classical International Organisations.....	324
4.5.4.13	Existence of Chapter VII Powers.....	324
4.5.4.14	Intention of the Parties to Establish an International Criminal Judicial Body.....	326
4.5.4.15	Designation of a Judicial Body as International.....	327
4.5.4.16	Express Lifting of Immunity from Prosecution for Core International Crimes.....	327
4.5.4.17	Does an International Criminal Judicial Body have to be Permanent?.....	328
4.5.4.18	Jurisdiction Between States and the Equality of the Parties.....	328
4.5.4.19	The International Criminal Judicial Body shall have Jurisdiction only in Cases in which the Parties, Either in General, or by Special Agreement have Accepted the Jurisdiction of the Tribunal.....	330
4.5.4.20	Other Potential Criteria/Indicia of an International Criminal Judicial Body.....	330
4.5.5	Summary of the Fundamental and Indicative Criteria of an International Criminal Judicial Body.....	332
4.6	Analysis of Hybrid Criminal Judicial Bodies.....	334
4.6.1	Introduction	334
4.6.2	Analysis.....	334
4.6.2.1	Special Court for Sierra Leone.....	334
4.6.2.2	Extraordinary Chambers of the Courts of Cambodia...	339
4.6.2.3	Special Panels for Serious Crimes of the District Court of Dili (East Timor).....	341
4.6.2.4	'Regulation 64' Panels of Kosovo.....	343
4.6.2.5	War Crimes Chamber of the State Court of Bosnia and Herzegovina.....	345

4.6.2.6	Supreme Iraqi Criminal Tribunal.....	347
4.6.2.7	Special Tribunal for Lebanon.....	350
4.6.3	Conclusion.....	354
4.7	Final Note.....	354
4.8	Conclusion.....	357

5 Individual Criminal Responsibility for Terrorism as a Crime Against Humanity: An Appropriate Expansive Adaptation of the Subject

	Matter of Core International Crimes?	359
5.1	Introduction and Overview.....	359
5.2	Clarification.....	361
5.3	Individual Criminal Responsibility for Terrorism: Defining the Categories of Criminalisation.....	363
5.4	Individual Criminal Responsibility for Terrorism, as a <i>Distinct Crime</i>	363
5.5	Individual Criminal Responsibility for Certain <i>Manifestations</i> of Terrorism.....	375
5.6	Individual Criminal Responsibility for Terrorism, as a <i>War Crime</i>	375
5.7	Individual Criminal Responsibility for Terrorism, as <i>Genocide</i>	376
5.8	Individual Criminal Responsibility for Terrorism, as a <i>Crime Against Humanity</i>	376
5.8.1	History of the Crime of Terrorism and the ICC Statute.....	379
5.8.1.1	1994 Draft Definition of the International Law Commission.....	379
5.8.1.2	1996 Preparatory Committee Session.....	381
5.8.1.3	1997 Definition of the Preparatory Committee's Working Group.....	382
5.8.1.4	1998 Rome Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court.....	383
5.8.1.5	End Result.....	384
5.8.2	Terrorism, as a Crime Against Humanity in Accordance with the ICC Statute and/or under General International Law?.....	385
5.8.2.1	Literal Interpretation of Article 7 of the ICC Statute...	385
5.8.2.2	Indicia that Militate Against the Inclusion of Terrorism Perpetrated by Individuals Within the Scope of Article 7 of the ICC Statute.....	389
5.8.2.3	Indicia that Acts of Terrorism Fall Outside the Scope of Crimes Against Humanity in General International Law.....	391
5.8.3	Conclusion.....	392
5.9	Other Issues Relating to the Prosecution of Terrorism Before the ICC.....	396
5.9.1	Additional Obstacles to the Prosecution of Terrorism Before the ICC	397
5.9.1.1	Jurisdictional Obstacles.....	397

5.9.1.2	Obstacle of Complementarity.....	398
5.9.1.3	Other Obstacles.....	399
5.9.2	Should Terrorism Fall Within the Jurisdiction of the ICC?.....	400
5.9.3	Conclusion.....	401
5.10	Appropriate Expansive Adaptation of Core International Crimes?.....	402
6	Summary.....	405
6.1	Introduction.....	405
6.2	Summary.....	405
6.3	Significance of Conclusions.....	411
	Bibliography.....	413
	Jurisprudence	439
	Index	453

Part I- General

1 Introduction¹

1.1 Opening Remarks and Objectives

Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.²

This is, perhaps, the most renowned citation from the judgment of the International Military Tribunal at Nuremberg (“IMT”). In the six decades which have passed since the IMT judgment was handed down, the recognition of the concept of individual criminal responsibility for core international crimes has been significantly reinforced and developed, particularly since the establishment of the International Criminal Tribunal for the Former Yugoslavia (“ICTY”) and the International Criminal Tribunal for Rwanda (“ICTR”) in the 1990’s and most recently the International Criminal Court (“ICC”). The media has, of course, played a crucial role in increasing awareness of this concept, especially amongst the general populace. Indeed, the concept has, arguably, a much higher profile today, than ever before in its history.

However, the concept of individual criminal responsibility for core international crimes is neither as straightforward nor as single-faceted, as might appear on first glance. While the general principle behind the concept does not generate too many difficulties, it is in its practical application that the more challenging aspects of the concept are brought to the fore. Each of these ‘challenging aspects’ can also be described as a ‘pertinent issue’ of the concept of individual criminal responsibility for core international crimes.

This thesis analyses a number of the pertinent issues concerning individual criminal responsibility for core international crimes in international criminal law. It has, however, proved difficult to select the specific pertinent issues on which this thesis should focus. Many suitable candidates come to mind: for example, (i) the increased recognition and prosecution of gender-based crimes;³

¹ This thesis encompasses material available as of 1 August 2007, unless otherwise indicated.

² Judgement of the International Military Tribunal, Trial of Major War Criminals before the IMT, Nuremberg, (14 Nov. 1945 – Oct. 1946), p. 41. The IMT judgment is also available at <http://www.yale.edu/lawweb/avalon/imt/proc/judlawch.htm> (last visited 6 March 2007).

³ In this regard, see for example, Kelly D. Askin, “Stefan A. Risenfeld Symposium 2002: Prosecuting Wartime Rape and Other Gender-Related Crimes under International Law:

(ii) the role to be played by, and the merits of, hybrid international-domestic bodies;⁴ (iii) the increased employment of universal jurisdiction by national courts;⁵ (iv) whether international criminal prosecutions of individuals are effective in achieving the goals of international criminal justice, or whether alternative mechanisms of accountability should be seriously considered;⁶ and (v) the selective application of international criminal law.⁷ In the end, the decision was made to focus on three pertinent issues:

1. The joint criminal enterprise doctrine: A “monster theory of liability” or a legitimate and satisfactory tool in the prosecution of the perpetrators of core international crimes?
2. The defining criteria of international criminal courts for the purposes of lifting state official liability.

Extraordinary Advances, Enduring Obstacles”, 21 Berkeley J. Int’l L. 288 (2003); James R. McHenry III, “The Prosecution of Rape under International Law: Justice that is Long Overdue”, 35 Vand. J. Transnat’l L. 1269 (2002); Jocelyn Campanaro, “Women, War and International Law: The Historical Treatment of Gender-Based War Crimes”, 89 Geo. L. J. 2557 (2001); and Ciara Damgaard, “The Special Court for Sierra Leone: Challenging the Tradition of Impunity for Gender-based Crimes?”, 73 Nordic Journal of International Law 485 (2004).

- 4 For example, the Special Court for Sierra Leone, the Extraordinary Chambers of the Courts of Cambodia, the Special Panels for Serious Crimes of the District Court of Dili (East Timor), the ‘Regulation 64’ Panels of Kosovo and the soon to be established Special Tribunal for Lebanon. For a consideration of the legal basis of such hybrid bodies, see *infra* Chapter 4.
- 5 For example, in Belgium (see International Justice Tribune, No. 16, 6 December 2004, p. 2 and No. 66, 16 April 2007, p. 1), Canada (see International Justice Tribune, No. 65, 2 April 2007, p. 1), France (see The Tocqueville Connection, 1 July 2005, available at <http://www.ttc.org/200507011951.j61jpui09085.htm> (last visited 4 July 2005)) and Spain (see International Justice Tribune, No. 24, 25 April 2005, p. 4). The English courts have also relied on universal jurisdiction in relation to the prosecution of the crime of torture. See International Justice Tribune, No. 30, 25 July 2005, p. 2.
- 6 This subject is briefly considered in *infra* Chapter 2, section 2.3. See generally, Steven R. Ratner and James L. Bischoff (eds.), *International War Crimes Trials: Making a Difference? Proceedings of an International Conference held at the University of Texas School of Law, November 6–7, 2003*.
- 7 For example, some argue that President Bush should be tried for the alleged illegal use of force by the USA in Afghanistan and Iraq. The ICC Office of the Prosecutor has received over 240 communications concerning the situation in Iraq, including allegations concerning the legality of the conflict in Iraq. However, as the crime of aggression is still not within the jurisdiction of the ICC (due the absence of a definition of such crime), the ICC Prosecutor has determined that he does not have the mandate to address such allegations. See Letter of Luis Moreno-Ocampo, Chief Prosecutor of the ICC, 9 February 2006, p. 4, available at http://www.icc-cpi.int/library/organs/otp/OTP_letter_to_senders_re_Iraq_9_February_2006.pdf (last visited 24 June 2007).

3. Individual criminal responsibility for terrorism as a crime against humanity: An appropriate expansive adaptation of the subject matter of core international crimes?

The rationale behind the choice of each of the selected pertinent issues is different.

A consideration of the first pertinent issue, the joint criminal enterprise doctrine, is undertaken, as this mode of liability, the application of which can result in the imposition of individual criminal responsibility for *inter alia* core international crimes, raises, in the author's view, a number of concerns. This is the case, notwithstanding its current extensive use before the *ad hoc* international criminal courts. The doctrine, arguably, is imprecise, dilutes standards of proof, undermines the principle of individual criminal responsibility in favour of collective responsibility, infringes the *nullum crimen sine lege* principle and infringes the right of the accused to a fair trial. Moreover, the research undertaken indicates a lack of agreement as to whether the joint criminal enterprise mode of liability is a form of principal or accomplice liability. Such disagreement is significant *inter alia* in terms of the truth-telling function of the international criminal law system, and is especially significant in the light of the ICC's Rules of Procedure and Evidence, which could result in the accused being handed down a much harsher sentence before the ICC, on the basis of the joint criminal enterprise mode of liability, than if he had appeared before the ICTY or ICTR. In addition, it does seem *prima facie* desirable that the *actus reus* of the doctrine be altered to require the *significant* participation of the accused, rather than merely *any* level of participation. Notwithstanding the numerous criticisms which can, arguably, be directed at the joint criminal enterprise mode of liability, the literature on this subject, has, until recently, been sparse. By addressing this issue, it is the objective of this thesis to contribute to the plugging of this 'gap' in the literature and to stimulate a discussion of this topic by underscoring its numerous shortcomings. It is not the author's contention that the joint criminal enterprise mode of liability should be retired completely; however, the shortcomings of the doctrine need to be addressed in order to ensure that they neither undermine the legitimacy and satisfactoriness of the doctrine as a prosecutorial tool, nor the international criminal justice system itself.

The second pertinent issue to be addressed is the defining criteria of an international criminal court/tribunal, for the purposes of the rules in international law on the lifting of immunity from prosecution of state officials for core international crimes. The lifting of such immunity is central to whether or not individual criminal responsibility can be imposed on persons in official capacity, such as a Head of State or Government, a member of Government or parliament, an elected representative or a government official, who has perpetrated a core international crime. In *Democratic Republic of the Congo v Belgium* ("Yerodia case"),⁸ a majority of the bench of the International Court of Justice ("ICJ") held

⁸ Case concerning Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v Belgium), 2002 ICJ.

that whereas an incumbent or former Minister for Foreign Affairs enjoys absolute immunity from criminal prosecutions before *national* courts for war crimes and crimes against humanity, an incumbent or former Minister for Foreign Affairs may be subject to criminal prosecution for the same crimes before certain *international* criminal tribunals, where such tribunals have jurisdiction over the crime in question. Accordingly, the international or domestic status of a tribunal or court is, apparently, of vital importance in the context of the discussion on immunity from prosecution for core international crimes. Although, the ICTY, ICTR and ICC are generally considered to be international criminal tribunals/courts, there exists no general agreed legal definition of an international criminal court/tribunal, nor a list of the defining criteria which must be satisfied in order for a judicial body to be categorised as an international criminal court/tribunal. The plethora of hybrid international-domestic bodies has only clouded this issue further. For example, even though the Special Court for Sierra Leone (“SCSL”) is generally considered to be a hybrid international-domestic body, the Appeals Chamber of the SCSL determined that it was an *international* criminal court in its “Decision on Immunity from Jurisdiction” in the *Prosecutor v Charles Ghankay Taylor* case.⁹ Can other hybrid international-domestic bodies also be classified as international criminal tribunals/courts for the purposes of the rules in international law on the lifting of immunity from prosecution for core international crimes?

Given the significance of this issue, this thesis will attempt to identify the defining criteria of an international criminal court/tribunal, and in this regard will consider the hybrid international-domestic bodies currently in existence, as well as the soon to be established Special Tribunal for Lebanon, to determine to what extent each can be categorised as an international criminal court/tribunal. This pertinent issue has been chosen due to the absence of agreement on the defining criteria of an international criminal court/tribunal and the ever increasing importance of this issue in the context of immunity from prosecution for core international crimes. By addressing this issue, it is the objective of this thesis to contribute to a serious consideration of the defining criteria of an international criminal court/tribunal and to highlight how the establishment of the ICTY/ICTR, both established by way of United Nations (“UN”) Security Council Chapter VII resolutions, and the SCSL, established by way of an agreement between the UN and the Government of Sierra Leone, have each challenged the traditional position that an international criminal court/tribunal can only be established by way of an international treaty.

The third and final pertinent issue to be considered is that of individual criminal responsibility for terrorism, as a crime against humanity. Acts of terrorism continually beleaguer our world, and accordingly generate much discourse, including a discussion on the legal remedies which can be found in international criminal law to impose individual criminal responsibility for such acts. Subsequent to the attacks of September 11th, 2001, various stakeholders attempted, for

⁹ *Prosecutor v Charles Ghankay Taylor*, Case No.: SCSL-2003-01-I, “Decision on Immunity from Jurisdiction”, App. Ch., 31 May 2004.