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Individual Criminal Responsibility for Core International Crimes

Selected Pertinent Issues

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Part I- General

1 Introduction[1]

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-facetted, 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]

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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

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