INTERNATIONAL CRIMINAL LAW PRACTITIONER LIBRARY · VOLUME II

ELEMENTS OF CRIMES UNDER INTERNATIONAL LAW

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

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International Criminal Law Practitioner Library Series

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CAMBRIDGE
UNIVERSITY PRESS

CAMBRIDGE UNIVERSITY PRESS
Cambridge, New York, Melbourne, Madrid, Cape Town, Singapore, São Paulo, Delhi

Cambridge University Press
The Edinburgh Building, Cambridge CB2 8RU, UK

Published in the United States of America by Cambridge University Press, New York

www.cambridge.org
Information on this title: www.cambridge.org/9780521878302

First published 2008

Printed in the United Kingdom at the University Press, Cambridge

A catalogue record for this publication is available from the British Library

Library of Congress Cataloguing in Publication data
Boas, Gideon.
Elements of crimes under international law / Gideon Boas, James L. Bischoff, Natalie L. Reid.
p. cm. – (International criminal law practitioner library series; v. 2)
ISBN 978-0-521-87830-2 (hardback)
1. International offenses. 2. Crimes against humanity. 3. Genocide. 4. War crimes.
I. Bischoff, James L., J. D. II. Reid, Natalie L. III. Title.
K5301.B627 2008
345'.0235–dc22
2008028118

ISBN 978-0-521-87830-2 hardback

Foreword

International criminal law has developed substantially in the past two decades largely due to the creation of the *ad hoc* Tribunals for the former Yugoslavia and Rwanda and the International Criminal Court. Although much attention has been devoted to the International Criminal Court (ICC) since 1998, on the ground that it is a truly international tribunal, international criminal law has developed mainly through the jurisprudence of the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR). Unlike the ICC, which at the time of writing has delivered few judgments, the *ad hoc* Tribunals have been operating actively as criminal law tribunals for more than a decade. Lengthy, carefully researched, and thoroughly reasoned judgments have been handed down by judges from different countries with different judicial experience. These judgments have created a new international or transnational criminal law that draws on the experience of the Nuremberg and Tokyo Tribunals and national courts, and successfully integrates national and international criminal law, humanitarian law and human rights law.

The ICTY and ICTR have succeeded in developing both procedural law and substantive international criminal law. A host of orders have been given on questions of procedure designed to ensure that due process of law is respected; and many judgments have been rendered on questions of substantive law that advance international criminal justice. The first two volumes of the *International Criminal Law Practitioner Library*, 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 this tribunal, deal largely with issues of substantive law. Volume I examined the law of individual criminal responsibility and focused on joint criminal enterprise, superior orders, aiding and abetting, and the planning and instigation of international crime. Volume II – *Elements of Crimes Under International Law* – examines the jurisprudence of the core crimes of international criminal law: genocide, crimes against humanity, and war crimes, and the subject of cumulative

convictions and sentencing. Although the ICTY and ICTR provide much of the jurisprudence described in the present volume, the jurisprudence of other tribunals is not ignored. The law of Nuremberg and Tokyo features prominently, and the law and structure of other international and internationalised tribunals – the Special Court for Sierra 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.

Most of Volume II is devoted to a study of the core crimes of crimes against humanity, genocide, and war crimes, as applied and interpreted by the ICTY and ICTR. The evolution of each crime and its elements are addressed in the context of the jurisprudence of the *ad hoc* Tribunals, and then considered in the light of decisions of other international tribunals. Contemporary history in the form of the major criminal trials of the past two decades involving events in the Balkans, Rwanda, and Iraq are brought alive in the language of the law.

Volume II also contains a very useful Annex of the elements of core international crimes and sample combinations with forms of responsibility. This Annex will prove of great assistance to the practitioner. It will also assist the student as its detailed portrayal of the elements of each crime serves to underscore the complexities of these crimes in a jigsaw-like puzzle from which a coherent picture of each crime emerges.

The final part of Volume II deals with the vexed question of cumulative convictions and sentencing. Like national criminal courts, the ICTY, and to a lesser extent the ICTR, have grappled with the problem of cumulative and alternative charging and cumulative convictions. Whether the tribunals have reached satisfactory solutions on these subjects is carefully examined – and doubted – by the authors. The coherency – or incoherency! – of sentencing practice and policy is also described and analysed.

The authors provide an accurate portrayal and description of the law. But their study achieves much more. The approaches of different tribunals, and the approaches of different judges within the same tribunal, are contrasted and compared; and decisions are carefully analysed and criticised. This makes the study a critical portrayal of the jurisprudence of the *ad hoc* Tribunals. One need not agree with all the criticisms of the authors (indeed this writer does not!), but one must welcome their reasoned criticisms. For too long, scholars have sought to protect international tribunals (both criminal and non-criminal) from criticism on the ground that the novel and fragile nature of these institutions requires them to be sheltered from criticism to enable them to survive in the harsh world of international politics. There is no substance in such a view. International judicial institutions, like national courts, must not be beyond criticism if they are to grow and prosper. Careful

and reasoned criticism, of the kind found in this volume, contributes to the development of international criminal law and is to be welcomed.

Gideon Boas, James Bischoff and Natalie Reid are to be congratulated on a study that informs us about the content and complexities of the core crimes, and the problems of cumulative convictions and sentencing, but which at the same time makes us aware that international criminal law, like other branches of the law, is the product of the judicial search for reason and coherence in the context of legal sources and legal principle.

John Dugard
The Hague, July 2008

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