



STUDIES IN INTERNATIONAL & COMPARATIVE CRIMINAL LAW

the criminal responsibility of
senior political and military
leaders as principals to
international crimes

HÉCTOR OLÁSOLO

with a foreword by JUDGE SIR ADRIAN FULFORD,
an introduction by JUDGE EKATERINA TRENDAFILOVA
& an epilogue by PROF DR KAI AMBOS

THE CRIMINAL RESPONSIBILITY OF SENIOR POLITICAL AND MILITARY LEADERS AS PRINCIPALS TO INTERNATIONAL CRIMES

As shown by the recent trials of Slobodan Milosevic, Charles Taylor and Saddam Hussein, the large-scale and systematic commission of international crimes is usually planned and set in motion by senior political and military leaders. Nevertheless, the application of traditional forms of criminal liability leads to the conclusion that they are mere accessories to such crimes. This does not reflect their central role and often results in a punishment which is inappropriately low in view of the impact of their actions and omissions. For these reasons, international criminal law has placed special emphasis on the development of the concepts of joint criminal enterprise (also known as the common purpose doctrine) and control of the crime, which aim to better reflect the central role played by senior political and military leaders in campaigns of large scale and systematic commission of international crimes. The Rome Statute of the International Criminal Court and the case law of the ICTY and the ICTR have, in recent years, played a unique role in achieving this goal.

Studies in International and Comparative Criminal Law: Volume 4

Studies in International and Comparative Criminal Law

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Criminal law had long been regarded as the preserve of national legal systems, and comparative research in criminal law for a long time had something of an academic ivory tower quality. However, in the past 15 years it has been transformed into an increasingly, and moreover practically, relevant subject of study for international and comparative lawyers. This can be attributed to numerous factors, such as the establishment of ad hoc international criminal tribunals and the International Criminal Court, as well as to developments within the EU, the UN and other international organisations. There is a myriad of initiatives related to tackling terrorism, money laundering, organised crime, people trafficking and the drugs trade, and the international 'war' on terror. Criminal law is being used to address global or regional problems, often across the borders of fundamentally different legal systems, only one of which is the traditional divide between common and civil law approaches. It is therefore no longer solely a matter for domestic lawyers. The need exists for a global approach which encompasses comparative and international law.

Responding to this development this new series will include books on a wide range of topics, including studies of international law, EU law, the work of specific international tribunals, and comparative studies of national systems of criminal law. Given that the different systems to a large extent operate based on the idiosyncracies of the peoples and states that have created them, the series will also welcome pertinent historical, criminological and socio-legal research into these issues.

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Héctor Olasolo, with a Foreword by Judge Sir Adrian Fulford and an Introduction by Judge E. K. H. L. T. F. H. L. and an Epilogue by Professor Dr. Kai Ambos

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an Introduction by
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and an Epilogue by
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FOREWORD

This book provides a hugely important contribution to a complex and vital area of international criminal law. For the courts and tribunals which are charged with the responsibility of trying the most serious cases in the criminal calendar, there can be few subjects of greater concern than the approach that should be taken when dealing with the alleged responsibility of those who are seemingly 'in control' when the worst international crimes are committed. The author, who brings to bear his distinguished academic and practical experience in this area, has subjected the issue to painstaking research and, in the event, he has provided with his personal views a penetrating analysis of the extensive materials which relate to this subject, as found in the academic writing and the leading jurisprudence.

The issue of practical and serial concern is, very often, not whether crimes of real magnitude have been committed by someone, but rather whether blame can properly be attached to those who, although at some distance from the event, were seemingly responsible for strategy and controlling the immediate perpetrators. The evidence-trail leading to the General at his headquarters and the politician in his office is often imperfect: identifying what a figure in authority did or did not know, or did or did not order, is frequently hard to establish for the prosecution and the defence.

Given the current trend of concentrating the limited time and resources that are available for these often lengthy and expensive trials on those believed to be the most culpable perpetrators, this becomes a subject of heightened importance. For a court to arrive at a valid judgment on the true position in these circumstances, evidence of the crimes themselves can, almost perversely, become of lesser importance. Instead, different kinds of evidence—often at some remove from the core events—take on a high degree of significance, such as meetings, telephone calls, letters and the movement of funds. This emphasis can have a critical effect on the content of trials and their focus, and to the public and the victims it may lead to a sense that the court has lost sight of the true nature of what happened.

To meet at least the legal aspect of these dilemmas and difficulties, international criminal law has adopted some necessary principles so as to address the role of these particular co-perpetrators, for instance those of 'joint criminal enterprise' (or the 'common purpose doctrine') and 'control of crime'. However, for prosecutors much of the debate has revolved around the need to find safe mechanisms that, within a juridical setting, will reflect the true role of senior political and military leaders, who often are not in the 'lower' position (as they are often understood) of accessories or aiders and abettors. The goal, therefore, has been to enable the court to address the 'leader's' true position—that of an indirect participant who is also a principal.

Foreword

This book provides the practitioner with fascinating and highly useful historical, national and international insights into how these problems have been addressed and how the law has emerged in this area. The developments are traced with skill, and although there is for the most understandable of reasons a strong focus on the jurisprudence of the ad hoc tribunals, academic writing and the important contributions by national systems are nevertheless generously included. In the event, a text has been produced that should be in the Chambers of every judge and in the office of every lawyer and academic who practices or writes in this field.

In short, I suspect this will rapidly become the *locus classicus* on this subject.

Judge Sir Adrian Fulford
Den Haag
24 April 2008

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‘all men make mistakes, but a good man yields when he knows his course is wrong, and repairs the evil. The only crime is pride.’

Sophocles

To Judge Sylvia Steiner, who stood up for me in the most difficult moments; Ana Isabel Perez Cepeda and Aleksandra Bojovic for their invaluable help in so many aspects, including the references in German; my former colleagues at the legal advisory and appeals sections of the ICTY Office of the Prosecutor, in particular Barbara Goy, Norman Farrel, Helen Brady and William Fenrick, from whom I learnt so much; my truly dedicated colleagues Josyanne Pierrat and Leila Bourguiba without whose support this book would not have been possible; and Enrique Carnero Rojo whom I wish a thorough recovery after the countless hours spent at the ICC.

The views expressed herein are those of the author alone and do not necessarily reflect the views of the ICC, the ICTY, the United Nations or the Spanish Government.

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ABiH	Army of the Republic of Bosnia and Herzegovina (also referred to as Bosnian-Muslim Armed Forces)
AFRC/RUF	Armed Forces Revolutionary Council / Revolutionary United Front
ARK	Serb Autonomous Region of Krajina
AP I	First Additional Protocol to the Geneva Conventions
AP II	Second Additional Protocol to the Geneva Conventions
art/arts	Article/s
BGH	Bundesgerichtshof (German Federal Supreme Court)
BGHSt	Entscheidungen des Bundesgerichtshofs in Strafsachen (Decisions of the German Federal Supreme Court in criminal matters)
BiH	Bosnia and Herzegovina
CAR	Central African Republic
DRC	Democratic Republic of Congo
EC	Elements of the Crimes
ed/eds	Editor/s
et al	And others
et seq	And the following
FAR	Rwandan Armed Forces
FNI	Front National Intégrationniste
FPLC	<i>Les Forces Populaires pour la Libération du Congo</i>
FRG	Federal Republic of Germany
FRPI	Forces de Résistance Patriotique d'Ituri
FRY	Federal Republic of Yugoslavia
GC I	First Geneva Convention
GC II	Second Geneva Convention
GC III	Third Geneva Convention
GC IV	Fourth Geneva Convention
GDR	German Democratic Republic
Gestapo	<i>Die Geheime Staatspolizei</i>
HVO	Croatian Defence Council (also referred to as Bosnian Croat Armed Forces)
HDZ-BiH	Croatian Democratic Union of Bosnia and Herzegovina
IACHR	Inter-American Commission on Human Rights
ICC	International Criminal Court
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
ICTR	International Criminal Tribunal for Rwanda

Table of Abbreviations

ICTRS	Statute of the International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
ICTY OTP	Office of the Prosecutor of the International Criminal Tribunal for the former Yugoslavia
ICTYS	Statute of the International Criminal Tribunal for the former Yugoslavia
IMT	International Military Tribunal (also referred to as Nuremberg Tribunal)
IMTFE	International Military Tribunal for the Far East (also referred to as Tokyo Tribunal)
KLA	Kosovo Liberation Army
JCE	Joint Criminal Enterprise
JNA	Former SFRY Armed Forces (also referred to as Yugoslav People's Army)
LRA	Lord's Resistance Army
MLC	Mouvement pour la Liberation du Congo
mm	Millimetres
Mtbr	Motorized Brigade
MUP	Special Police Forces of Serb Ministry of Interior
n	Footnote
NATO	North Atlantic Treaty Organization
No	Number
OSP	Organised Structure of Power
p/pp	Page/s
ICC PTC	Pre-Trial Chamber of the International Criminal Court
ICC TC	Trial Chamber of the International Criminal Court
PUSIC	<i>Le Parti pour l'Unite et la Sauvegarde de l'Integrite du Congo</i>
RPE	Rules of Procedure and Evidence
RPF	Rwandan Patriotic Front
RPP	Relevant Physical Perpetrators
RS	Rome Statute
SD	<i>Sicherheitsdients des Reichsfuehrer SS</i>
SDS	Serbian Democratic Party
SFRY	Socialist Federal Republic of Yugoslavia
SpCC	Spanish Criminal Code
SRT	Serb Radio Television
SRK	Sarajevo Romanija Korps (part of the VRS)
SS	<i>Die Schutzstaffeln Der Nationalsocialistischen Deutschen Arbeiterpartei</i>
TO	Territorial Defence Unit
UN	United Nations
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNTAET	United Nations Transitional Administration for East Timor
UNMO	United Nations Military Observer

Table of Abbreviations

UNPROFOR	United Nations Protection Force
UPC/RP	<i>L'Union Populaire Congolaise/Rassemblement pour la Democratie</i>
UPDF	Ugandan People Defence Forces
US	United States of America
VJ	Armed Forces of the Federal Republic of Yugoslavia
VRS	Bosnian-Serb Armed Forces
WW II	Second World War

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*North Sea Continental Shelf Cases (Federal Republic of Germany v Denmark;
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