

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