INTERNATIONAL CRIMES AND THE AD HOC TRIBUNALS BY GUÉNAËL METTRAUX OXFORD: OXFORD[†]

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Mr. Mettraux brings a wealth of personal experience into the writing of this book, as he worked within the Chambers of the International Criminal Tribunal for the former Yugoslavia and subsequently practiced as defense counsel before the same Tribunal. Before these practical experiences, he pursued academic qualifications in international law, and this work demonstrates how international law and criminal law mesh; it represents international criminal law from a practitioner's perspective.

As both the United Nations' International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) have produced a formidable body of case law on a wide range of international crimes during the past decade, and numerous procedural and jurisdictional issues have come to light in the process, the author has undertaken to appraise the administration of criminal justice and the jurisprudence developed by these two Tribunals.

It will be recalled that the ICTY was given authority to prosecute and judge categories of crimes that include serious violations of international humanitarian law, grave breaches of the Geneva Conventions of 1949, serious violations of the laws or customs of war, genocide, and crimes against humanity in the territory of the former Yugoslavia. Similarly, the ICTR was given responsibility to prosecute categories of crimes that included genocide and serious violations of humanitarian law in Rwanda.

In the preface, the author forewarns the reader that the law of international crimes is not a fully fledged body of law that has been judicially fine-tuned. The body of rules and principles developed have been incremental so that orders, decisions, judgments, and appeals have to be closely observed as to their temporal pronouncement, that would account for certain prevalent inconsistencies. The composite of the abovementioned constitutes what the author designates as the "jurisprudence" of the ad hoc tribunals. This large patchwork of jurisprudence contains gaps in the body of law of international crimes, and the author points them out where they exist. The book is divided into eight parts.

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Part I, "Subject-Matter Jurisdiction of the Ad Hoc Tribunals and Applicable Law," shows that the statutes of the tribunals are slightly better than bare bones skeletons of the crimes within their jurisdictions. Hence, the application of the definitions and law of the international crimes in general, needed fine-tuning by the judges without the tribunals "legislating." To find the elements that made up the statutory crimes under international law necessitated identifying customary international law with the accompanying difficulty for the judges of locating *opinio juris* and state practice, and that the particular prohibition applies to individuals and not only to states. He credits the judges for "taking advantage of the plasticity and indeterminacy of customary law to flesh out international criminal law," whereas by contrast, the Statute of the International Criminal Court explicitly provides that a particular conduct be regarded as criminal. Analogies, when apposite, appear throughout the book.

Part II deals with "Serious Violations Of The Laws Or Customs Of War: 'War Crimes'," and according to both statutes, entails individual criminal responsibility. Each statute contains a list of war crimes over which each Tribunal can exercise jurisdiction. Whereas, Article 2 of the ICTY is concerned with "grave breaches" of the Geneva Conventions, and Article 3 covers all serious violations of international humanitarian law not explicitly listed in the statute and is illustrative not exhaustive. The war crimes in the ICTR Statute differ from its European counterpart with explanations for the differences. All of the elements or factors that must be established and their nexus to the conflict are described for a successful prosecution. The author sets out how grave breaches are characterized as different from other categories of war crimes and are prosecuted only with respect to armed conflicts of an international character. He also documents the range of prosecutions concerning grave breaches.

Interestingly, there are circumstances under which individuals could be prosecuted for war crimes not expressly stipulated in the Statutes but are impliedly within the coverage due to the conduct of the accused being recognized as crimes under international law at the relevant time. Mr. Mettraux questions whether the use of "terror" may be a criminal offense under international law as a violation of the laws or customs of war, as was discussed in the Trial Chamber of the ICTY in the *Galic* case. How each Tribunal dealt with the issue of whether war crimes could be committed in internal armed conflicts was an issue at one time. Serious violations of

¹ GUÉNAËL METTRAUX, INTERNATIONAL CRIMES AND THE AD HOC TRIBUNALS 14 (2005).

² *Id.* at 7.

common Article 3 of the Geneva Conventions and Additional Protocol II raised issues of jurisdictional requirements being met.

Part III, "Crimes Against Humanity," finds the author commending both tribunals for "turning a set of abstract concepts into a fully fledged and well-defined body of law." The general requirements of the offense that developed its specificity and dimension, and setting it apart from domestic crimes due to it being a widespread or a systematic attack on a civilian population are part of the crime's definition. The other part of the definition encompasses any one of the listed underling offenses in Article 5 of the ICTY Statute, such as murder or torture, and Article 3 of the ICTR Statute, such as extermination or enslavement. The mens rea requirement and the nexus between the acts of the accused and the attack, as considered by the tribunals, are followed through the case law.

On the topic of genocide, in Part IV, the author's approach is different from previous parts in the book. The author looks back at genocide during the operation of the International Military Tribunal in Nuremberg despite its omission in the text of that Tribunal's Charter, the absence of any conviction for genocide, and its absence in the text of the judgment. The contributions of the ad hoc tribunals as to the underlying offenses and necessary mens rea are thoroughly discussed, as well as the pivotal role that the International Criminal Court (ICC) can play although the ICC Statute does not provide a list of specific forms of criminal liability specific to genocide in Article 6. The various forms that the genocidal offense may take and the degree of involvement by the perpetrator are found in the numerous decisions recounted and evaluated.

"Participation In International Crimes And Individual Criminal Responsibility" is the title of Part V. Identical provisions in Article 7 of the ICTY Statute and Article 6 of the ICTR Statute regulate the forms of participation for which individual criminal responsibility may be found by the tribunals. Accordingly, Article 6 must be read into each of the subject-matter articles of the particular statute. Whatever the nomenclature of most domestic legal systems, it will be recognizable in the Tribunal Statutes. The form of liability with which the individual is charged must be recognized by customary international law and the elements present as seen in the ICTY jurisprudence, while the author prognosticates on the issue of applicable law, *ratione personae* in the ICTR. Who can commit an international crime; planning, instigating, ordering, committing, aiding and abetting in all of the spectrum of their appearances are analyzed in great detail. Joint criminal enterprise or common purpose still remains

³ *Id.* at 147.

contentious after ten years of decisions. Although an attempt to commit genocide is an international crime under the Tribunal Statutes, the author concludes that the Tribunals would not have jurisdiction over attempted war crimes and attempted crimes against humanity as the statutes lack specificity in this regard. As the ICTY has found that command responsibility "is the most effective method by which international criminal law can enforce responsible command," the ambit of this principle is shown whether the superiors are civil or military and whether the conflict is international or internal. The two main streams of jurisprudence that have arisen on the issue of finding someone criminally responsible for commission of an international crime, say a commander, and reproach him for not preventing or punishing that same crime are questioned.

Part VI looks at the three categories of war crimes, crimes against humanity, and genocide and discusses them from the perspective of cumulative charging and cumulative convictions. Unfortunately, the author finds that the charging policy in the Office of the Prosecutor in both tribunals remains "completely obscure to most observers and practically beyond the reach of the Tribunals' supervision." Of course this means the prosecutor is under pressure to describe events that occurred in a particular way rather than purely on a legal assessment of the evidence available. The Prosecutor's Office is mindful then of the public messages that certain charges will convey. There is a tendency to bring extensive charges with a view to a plea agreement. Tests used by the Chambers of the Tribunals in relation to the same events and same conduct by the accused are spelled out as are tests employed for cumulative conviction.

Part VII deals with "Sentencing International Crimes," but as the author acknowledges in his preface, this coverage merely represents an introduction to the subject. Despite the abhorrence of the crimes addressed in the Statutes of the Tribunals, neither the statutes, nor applicable precedents, offer much guidance to the judges in respect of sentencing the perpetrators. The author set out the general directions contained in the statutes and their use by the Chambers. The relevant factors considered by the judges and where the sentences are carried out complete this Part.

The author's concluding remarks comprise Part VIII. Both ad hoc tribunals have uncovered dozens of rules, principles, criminal offences and forms of liability that can be said to be part of customary international law. Moreover, these Tribunals have brought a greater precision to international

⁴ *Id.* at 396.

⁵ *Id.* at 315.

law. Many of the legal developments attributable to the Tribunals' operation have found their way into the ICC Statute or the elements of crimes that accompany that statute. The boundaries of international humanitarian law have been extended by the tribunals' jurisprudence and serve as an incentive for further development.

Mr. Mettraux is to be congratulated in bringing this comprehensive coverage as an "insider" of one of the ad hoc tribunals on the judicial practices of both tribunals over the last decade. His scholarly analysis of the jurisprudence makes the book both practical and academic. It is most valuable in assisting the reader to understand the legal principles of each of the international crimes within the jurisdiction of the two Tribunals, and it shows the growth of international criminal law. The Statutes of the Tribunals, as amended, and pertinent reports of United Nations Secretary General, are included in annexes, as well as a select bibliography, table of cases, and a workable index.