

THE CRIMINAL RESPONSIBILITY OF INDIVIDUALS FOR VIOLATIONS OF INTERNATIONAL HUMANITARIAN LAW BY ELIES VAN SLIEDREGT. THE HAGUE, THE NETHERLANDS: T.M.C. ASSER PRESS. 2003. PP. XXIV, 437. \$110. HARDBACK. ISBN: 90-6704-166-1.

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It has taken centuries for the principle of individual criminal responsibility to evolve in national law. The concept that a person is only culpable to the extent of his own free will or guilty mind can be traced to canonical law and the insights of Italian jurists in the Renaissance. Today, the national concept of individual criminal responsibility is represented by recognition of the concept's emancipation from collective responsibility, the release from immunity of state officials who previously relied on release based on the Act of State doctrine. As to international individual criminal responsibility, culpability was recognized and applied by the first generation of international criminal tribunals, namely the Nuremberg and Tokyo Tribunals in the early post-World War II era.

The second generation of international criminal tribunals carried forward individual culpability with respect to international criminal law in the ad hoc International Criminal Tribunal for the former Yugoslavia (ICTY), and the ad hoc International Criminal Tribunal for Rwanda (ICTR). Evolution of individual criminal responsibility is carried on in the codification-process of international criminal law in the adoption of the 1998 Rome Statute of the International Criminal Court, which has created a permanent criminal forum, potentially with universal reach, on July 1, 2002.

Nuremberg's International Military Tribunal represented the starting point of modern war crimes law on the international level in holding individual war criminals responsible for international crimes; it ended the Act of State doctrine previously claimed as immunity by government officials to escape criminal liability for international crimes. The laws of war or armed conflict also included humanitarian interests, and from the international war crimes law there has now developed a separate, but related, body of international humanitarian law that is now a branch of the international criminal law.

This book is divided into three parts plus an epilogue. Part I, entitled "Modes of Individual Responsibility," provides an historical survey of both collective criminality theory and individual responsibility. As individual criminal responsibility for violation of international

humanitarian law (IHL) was already accepted with the Treaty of Versailles and the trial of Kaiser Wilhelm II after World War I, it was based on a factual outlook. The Nuremberg Tribunal did not clearly distinguish between perpetrators and participants, so that any form of participation in Hitler's military or administrative apparatus was sufficient to generate responsibility. Convictions based on the collective criminality theory of the major war criminals and the second and third level Nazi criminals in subsequent proceedings are analyzed. Subsequent Anglo-American practice in treatment of facilitators and perpetrators equally, and continental courts doing the same, followed the common ground of the Nuremberg and Tokyo law, although in the latter domestic courts there was deviation from national complicity law.

Readers are then taken through different stages of the codification process at the international level concerning perpetrating and participating in crimes under international law, including work of the International Law Commission, the 1948 Genocide Convention, the 1949 Geneva Conventions and the 1977 First Additional Protocol, the 1984 Torture Convention, the Statutes of the 1993 ICTY and 1994 ICTR, and finally on the most recent provision on individual criminal responsibility in international law found in Article 25 (3) of the ICC Statute.

Article 25 of the ICC Statute provides for three types of perpetrators: it encompasses the direct or physical perpetrator, indirect perpetrators, and the joint perpetrator. It recognizes both instigators and facilitators, and it contains a specific concept of "group complicity." Discussion compares Article 25 with criminal participation at the ad hoc Tribunals and with national underpinnings. The extension of Article 25's ambit does not cause concern as the author suggests that the ICC may apply the jurisprudence of the ad hoc Tribunals. He concludes that Article 25 enables the ICC to establish a real individual threshold in attributing criminal responsibility.

Part II concerns "Superior Responsibility." It begins with an historical survey of command responsibility, from military origin, to attribute responsibility to superiors who have failed to prevent or punish crimes committed by subordinates. As a concept, it is broader than being just applicable in a military context as it also extends to political and civilian superiors. Two types of responsibility are coalesced: collective and individual responsibility. Dr. Van Sliedregt reaches back to Hugo Grotius' description of the subject and then quickly advances to the most illustrative post-World War II examples of superior responsibility—the trial of the Japanese General Tomoyuki Yamashita. He explains why it was not employed at Nuremberg, but was used by subsequent U.S. military tribunals at both Nuremberg under the Allied Control Council Law No. 10 and at the 1948 Tokyo Tribunal for the 28 former leaders of Japan. It was also used by the Allied military courts for lower level superiors who stood trial, and whose judgments are documented by the UN War Crimes

Commission. From the Vietnam War era, the case of Captain Ernest Medina is reviewed. Lastly, there is some reflection on the concept of superior responsibility by the Israeli Kahan Commission in its investigation of the 1982 massacres in the Palestinian refugee camps Sabra and Shatila in Lebanon.

The concept underwent a spectacular development since the establishment of the ad hoc Tribunals whose jurisprudence is analyzed and assessed in respect of constituent elements. On the basis of the record of the two ad hoc Tribunals, the author explains the legacy and the next progression, the so-called “novelties” of superior responsibility as espoused in Article 28 of the ICC Statute. This part concludes with an overview limited to a few national systems to illustrate rules encapsulating concepts analogous to that of superior responsibility. These areas include responsibility of corporate officers and employees, parents, and members of government. He also brings to the reader’s attention provisions in the U.S., British, and German military manuals that involve superior responsibility. These national concepts serve to identify various forms that the concept has adopted, ranging from active criminal participation/complicity to a separate crime of negligence. These counterparts are compared with Article 28 of the Rome Statute that makes the latter a genuine crime of omission.

Part III is devoted to criminal law defenses in international criminal law. Before the ICC Statute, defenses in war crimes law were basically concerned with the defense of superior orders. The international criminal systems of Nuremberg, Tokyo, the ICTY, and ICTR did not really deal with the “averting-side” of criminal responsibility. This imbalance was made up by Articles 31-33 of the ICC Statute.

There is a discussion concerning the national underpinning for the defenses of mental incapacity, intoxication, self-defense, and duress, followed by consideration of the duress from the Nuremberg and post-Nuremberg jurisprudence national decisions. Next, one finds a full analysis and evaluation of the 1996 Erdemovic judgment by the ICTY, the leading case from the ad hoc Tribunals. All of these defenses appear in Article 31 of the ICC Statute. Three other defenses that are applicable in Article 31, that have no national counterpart, are briefly discussed (these all originate in the international context of the laws and customs of war, namely, belligerent reprisal, *tu quoque* or the “eye for an eye” principle, and military necessity). The catalogue of defenses in Article 31 of the ICC Statute is a welcomed step towards a sophisticated system of international criminal law. A recurring theme used by the author in the Article 31 defenses is the distinction between justification and excuse.

Article 32 of the ICC Statute heralds a breakthrough to a more comprehensive understanding of culpability that requires some sort of normative blameworthiness in discussing the defense of mistake. Here the author takes a close look at mistake of fact and law and the *sui generis*

defense of mistake: superior orders to discover the scope of “moral blameworthiness.”

In considering the catalogue of defenses in Articles 31-33, Dr. Van Sliedregt would have the ICC consider cultural differences, a distinction between the accused’s public and private capacity, and a distinction between international and criminal law defenses when the two legal systems—international law and criminal law—come together. As the ICC will be a criminal court and not a military tribunal, the author finds it only logical that the list of defenses contain that of superior orders.

Part III is followed by both an Epilogue and Summary. In the Epilogue, the author reminds the reader how we arrived at this present point, what the ICC will likely attempt to achieve, and that international criminal law is still in the process of maturation. There has been a rapprochement between national and international law. In the Summary, he reminds us of the scope and content of the concept of individual criminal responsibility for violations of international humanitarian law—genocide, crimes against humanity, and war crimes, the last-mentioned to express their origin, the laws and customs of war, but no less violations of international humanitarian law. Again, he puts into precise form what we were to glean from each Part of this book and the individual chapters that comprise each Part.

In addition to a workable index, there is a list of abbreviations, annex of selected provisions of the statutes of the ICTY, ICTR, and ICC, an alphabetical bibliography, and tables of cases, treaties, and documents. One has to appreciate the author’s planned arrangement of this presentation and the periodic evaluations that marshal related groups of his thoughts into an orderly progression.

