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Gideon Boas, James L. Bischoff and Natalie L. Reid

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INTERNATIONAL CRIMINAL LAW PRACTITIONER LIBRARY

Volume II of the International Criminal Law Practitioner Library series focuses on the core categories of international crimes: crimes against humanity, genocide, and war crimes. The authors present a comprehensive and critical review of the law on the elements of these crimes and their underlying offences, and examine how they interact with the forms of responsibility discussed in Volume I. They also consider the effect of the focus in early ICTY and ICTR proceedings on relatively low-level accused for the development of legal definitions that are sometimes ill-suited for leadership cases, where the accused had little or no physical involvement in the crimes. The book's main focus is the jurisprudence of the ad hoc Tribunals, but the approaches of the ICC and the various hybrid tribunals are also given significant attention. The relevant jurisprudence up to 1 December 2007 has been surveyed, making this a highly useful and timely work.

GIDEON BOAS, a former Senior Legal Officer at the ICTY, is a Senior Lecturer in Law at Monash University Law Faculty and an international law consultant.

JAMES L. BISCHOFF, a former Associate Legal Officer at the ICTY, is an Attorney-Adviser in the Office of the Legal Adviser of the United States Department of State.

NATALIE L. REID, a former Associate Legal Officer at the ICTY, is an Associate with Debevoise & Plimpton LLP, New York.

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ELEMENTS OF CRIMES UNDER INTERNATIONAL LAW

International Criminal Law Practitioner Library Series

VOLUME II

GIDEON BOAS
JAMES L. BISCHOFF
NATALIE L. REID

The views expressed in this book are those of the authors alone. They do not necessarily reflect the views or official positions of the International Criminal Tribunal for the former Yugoslavia, the United Nations in general, the United States Department of State, or the United States government.



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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

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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

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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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