

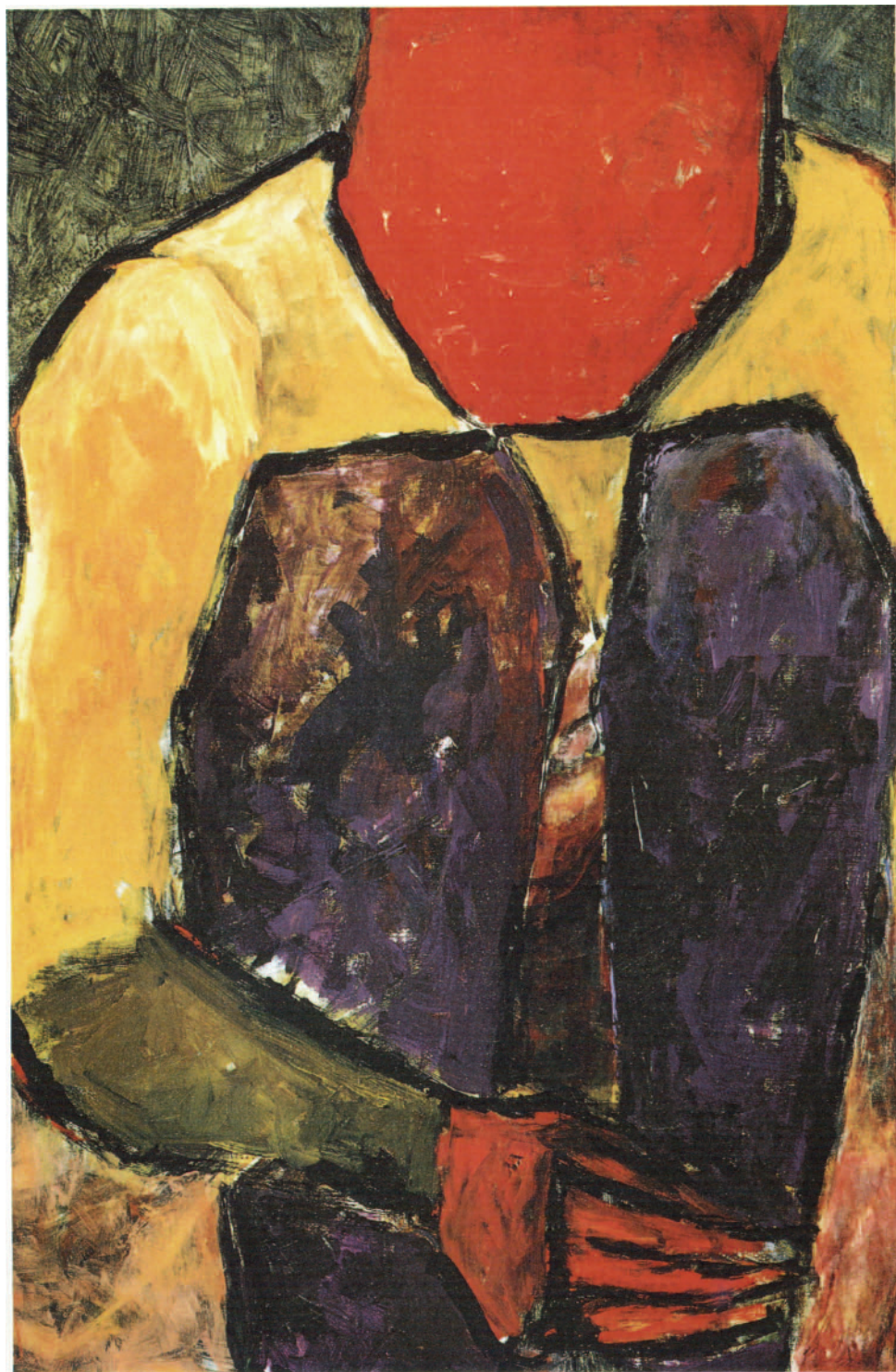
Substantive and Procedural Aspects of

International Criminal Law

The Experience of International and National Courts

Volume I

COMMENTARY



Madeleine Chechneya (Artist: Rosalyn A. Engelman)

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Editors

Gabrielle Kirk McDonald

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 **KLUWER LAW
INTERNATIONAL**
THE HAGUE – LONDON – BOSTON

Published by
Kluwer Law International
P.O. Box 85889
2508 CN The Hague
The Netherlands

Kluwer Law International
incorporates the publishing programmes of
Graham & Trotman Ltd.,
Kluwer Law and Taxation Publishers
and Martinus Nijhoff Publishers

Sold and distributed in the USA and Canada by
Kluwer Law International
675 Massachusetts Avenue
Cambridge MA 02139
USA

In all other countries, sold and distributed by
Kluwer Law International
P.O. Box 322
3300 AD Dordrecht
The Netherlands

ISBN 90-411-1133-6
Set ISBN 90-411-1135-2 (Volume I Commentary and
Volume II Documents and Cases)

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First Published 2000

British Library Cataloguing-in-Publication Data
A catalogue record of this work is available from the British Library

Typeset in 10/11 point Ehrhardt by
Newgen Imaging Systems (P) Ltd., Chennai, India
Printed and bound in Great Britain by
Selwood Printing Limited, Burgess Hill, West Sussex

Dedication

These volumes are dedicated to all those victimized by the conflicts in the former Yugoslavia, Rwanda and elsewhere.

Foreword

The enforcement of international humanitarian law through the use of criminal sanctions is a subject on which there has been a recent resurgence of interest, and one which is likely to come under intense scrutiny and analysis in years to come. Although the Nuremberg and Tokyo trials provided examples of multilateral criminal tribunals over half a century ago, this experience was initially not built on. In the decades following those trials, the possibility of an international criminal jurisdiction continued to be debated at a theoretical level, with varying degrees of interest at different times, but with little immediate prospect of the possibility becoming a reality. Then, in the 1990s, matters developed quite rapidly. As initiatives to restore and maintain international peace and security, the Security Council established the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda. The Rome Statute of the International Criminal Court has now been adopted and, I hope, will soon come into force. The multifarious and subtle issues raised by international criminal trials are suddenly of immediate practical concern.

The experiences of these judicial bodies can be expected to provide useful and revealing insights into the exportability of the rule of law to the profoundly lawless environment created by armed conflict, particularly by conflict plagued with the rampant commission of war crimes. Eventually, with some hindsight, it will be possible to reflect on and evaluate in detail all the various aspects of these new international criminal jurisdictions. However, for those of us who are presently participating in the unfolding of that experiment, there is a much more immediate need for such reflection and analysis. On the one hand, we must not lose sight of the theoretical underpinnings of the entire enterprise, without which we cannot hope to build a coherent legal structure. On the other hand, the pressing demands of day-to-day litigation require us to find rapidly concrete answers and solutions to legal issues as they arise. In this “real time” environment, lawyers turn intuitively to the traditional sources of law: legislation, case law and doctrinal writings. Our legislative framework is readily accessible. The jurisprudence of the two Tribunals will, I believe, compensate by its quality what it will always lack in volume. The challenge is to develop a substantial and versatile body of scholarly commentary, that will serve both the immediate needs of practitioners and the longer term theoretical reflection. This book, in my view, makes a timely and unique contribution to meeting both of these requirements.

Both in theory and in everyday practice, in the International Criminal Tribunals, we are always faced with the challenge of merging the analytical frameworks of very different branches of the law. Public international law, with its origins in the regulation of inter-state relations, is traditionally consensual. It prefers the principle to the

rule. It reflects concepts and traditions taken from a variety of legal systems. It is respectful of state interests, and the practising international lawyer, when advising, consulting or participating in international negotiations, must of necessity usually be sensitive to political factors. Criminal law, by contrast, is essentially coercive, authoritarian, and rigorous. The criminal lawyer in practice is focused on the detail of particular facts and of rules specific to that jurisdiction, and is likely to be unaccustomed to comparative law methodologies. In the practice of criminal law, political factors are regarded as at best irrelevant, at worse offensive and dangerous to the criminal process.

Yet, ultimately, there are fundamental considerations common to both branches of the law. Both strive to curtail the unbridled powers of the state, and to uphold individual rights. Both are grounded not only in the need to preserve order and peace in society, but also in the affirmation of basic, shared moral values.

The merger of these two disciplines, criminal law and international law, is a challenge compounded by the inevitable clash of legal traditions from different national systems. While economic imperatives and the demands of commerce may have bridged many of the distinctions between legal systems in civil and commercial matters, the criminal process has until now received less cross-fertilisation. A criminal trial in a “common law” jurisdiction remains something very different to a criminal trial in a “civil law” jurisdiction.

At present, few jurists would consider themselves as experts in both public international law and in their national criminal law, or as experts in the criminal law of more than one of the main legal systems. The lawyers working in my Office in The Hague or Kigali tend to come with a background in mainly one or the other. The practice of international criminal law, as a distinct legal specialisation, is still in the relatively early stages of its establishment. Indeed, international criminal law itself is still a developing body of law. For instance, certain elements of offences and doctrines of criminal responsibility, and a myriad of issues of procedure and evidence remain to be elaborated in all their detail. As the present work in this area continues, a more comprehensive and fully-developed international criminal law should take shape. In the process, approaches and analogies will no doubt be drawn from various national criminal justice systems, and the applicable principles of international law will be further adapted and refined. However, for this to occur effectively, it is necessary that the fundamental assumptions and methodologies of these various branches of the law be articulated and critically examined.

I see this book as one of the first attempts to open such a fruitful dialogue between international lawyers and criminal lawyers from different legal systems, a dialogue which is essential to the vitality of an international criminal law as a merged discipline in search of a coherent theoretical foundation. It is also one of the first attempts to open a dialogue in book format between those who are directly involved in the application of the law by the International Criminal Tribunals, and observers who are supportive of the Tribunals but willing to cast a necessary critical eye upon them. The chapters by Kai Ambos on individual criminal responsibility, and by Günter Heine and Hans Vest on murder and wilful killing, address from a very helpful criminal and comparative law perspective topics which are somewhat novel in international law. International law scholars such as Benjamin Ferencz, writing on aggression, George Aldrich, writing on laws or customs of war, and Yoram Dinstein, writing on defences, soberly assess aspects of substantive law. Others analyse emerging topics, such as Patricia Viseur Sellers, who discusses the range of international offences criminalising sexual violence, and Olivia Swaak-Goldman, who deals with the crime against

humanity of persecution in the light of recent developments. Others look at important aspects of the criminal justice process, such as Judge Adolphus Karibi-Whyte, who writes on appeals procedures and practices, and Christine Chinkin, who considers the fundamental matter of protection of victims and witnesses.

The work of all of the contributors, as presented in this book, individually and collectively enriches the understanding of the relatively novel disciplines of international humanitarian law and international criminal law, and will appeal to practitioners as well as to an academic audience. I am sure that in the process, they learned from each other, as we will from them, ways to bridge differences.

Louise Arbour

Judge, Supreme Court of Canada,
Prosecutor, International Criminal Tribunal
for the former Yugoslavia and International
Criminal Tribunal for Rwanda, from
1 October, 1996 to 14 September, 1999.

Introduction

As recently noted by Judge Cassese¹ international criminal law is, in general, still quite rudimentary and lacks the specificity of most municipal criminal law. He elaborated that by this he meant that many international criminal provisions do not detail the conduct that is prohibited, providing, for example, that murder is prohibited but without any corresponding definition of murder such as you would find in a municipal criminal code. Helping to overcome this deficit was precisely our intention in organizing a collection of commentaries on different aspects of substantive and procedural aspects of international criminal law. We sought to assist practitioners, scholars and students in moving beyond the broad conceptions of these crimes to arrive at a clear understanding of the parameters of the substantive offenses and procedural requirements.

The commentaries were drafted for an audience who has a general knowledge of the subject matter, but that perhaps needs some assistance in making the transition from, in the substantive field, different disciplines, such as general international law and human rights and, in the procedural field, from pure civil and common law traditions, to the newly revitalized specialty of international criminal law. As such, rather than focusing on the outer limits of these norms, a general overview of the selected subjects has been presented. You will find this evident throughout the commentaries, for example in the commentaries by Dr. Kai Ambos on individual criminal responsibility, Professor Yoram Dinstein on defenses and Professor Christine Chinkin on the protection of victims and witnesses. Additionally, it was our intention to encourage discussion about these various topics, and not every author necessarily agrees with the positions espoused by the others.

In terms of the topics to be addressed, we selected the subjects long before the contents of the Rome Statute of the International Criminal Court were finally decided in July 1998. Nevertheless, based on a variety of sources, including the International Law Commission's Draft Code of Crimes Against the Peace and Security of Mankind and its Draft Statute for an International Criminal Court, and the Statutes of the International Criminal Tribunals for the former Yugoslavia and Rwanda, we selected the areas that we considered the most relevant to a discussion of substantive and procedural aspects of international criminal law. Although some

1 The International Criminal Court: A Critical Review of the Results of the Rome Conference, Symposium in Honour of Judge Antonio Cassese at the Occasion of the Award of an Honorary Doctorate by the Erasmus University Rotterdam, 5 Nov. 1998.

of the selected topics proved not to be the subject of specific articles of the Rome Statute, they nevertheless retain their relevance. Thus, for example, although there is no specific article addressing crimes against United Nations and Associated Personnel in the Rome Statute, the commentary by Ms. Christiane Bourloyannis-Vrailas on this topic remains of great interest, both in terms of its status as a crime against the peace and security of mankind and its relevance under the heading of war crimes in Article 8 of the Rome Statute. Additionally, because of the important role that national courts continue to play in the prosecution of international offenses, we have included a chapter by Professor Ruth Wedgwood on prosecutions in national jurisdictions.

In addition to the general categories of crimes, we have also included commentaries on certain sub-classes of crimes that seemed most relevant, such as murder, torture and its related offenses, persecution and sexual assault (called “overlapping offenses” due to the fact that these crimes tend to fall under more than one general heading). Notably absent from the selected topics are those international crimes which we considered unlikely to be the subject of international adjudication in the near future, such as bribery.

Readers will note that many of the documents and cases referred to in the various commentaries have been reproduced in whole or in part in the sister volume to this book, entitled *Substantive and Procedural Aspects of International Criminal Law – The Experience of National and International Courts, Volume II, DOCUMENTS AND CASES* published by Kluwer Law International ISBN 90-411-1134-4.

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Many individuals deserve recognition for their assistance to this project. Included are: Ms. Nicole Piché for her tireless assistance on behalf of the publisher in preparing this volume for publication through the raising of queries, cite checking, language editing and footnote formatting; Ms. Lindy Melman, publisher, of Kluwer Law International who has been involved with this project from its inception; Ms. Madeleine D’Arcy for her work as Project Manager of the volume; Dr. Christof R.A. Swaak of Leiden University for his overall guidance; Ms. Virginia Morris of the United Nations for her advice concerning the scope of the volume and contributors; Dr. Kai Ambos of the Max Planck Institute for Foreign and Comparative Criminal Law for his suggestions concerning contributors; Ms. Marcy Ayanian and Mrs. Diane Schwab-Valk of the Iran–United States Claims Tribunal for their assistance in formatting the chapters; Ms. Laure Michel of the ICTY for her general assistance; and Judge Charles T. Duncan of the Iran–United States Claims Tribunal for his support.

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Table of Contents

Dedication	vii
Foreword	
<i>Judge Louise Arbour</i>	ix
Introduction	
<i>President Gabrielle Kirk McDonald and Mrs. Olivia Swaak-Goldman</i>	xiii
1. Individual Criminal Responsibility in International Criminal Law: A Jurisprudential Analysis – From Nuremberg to The Hague	
<i>Dr. Kai Ambos</i>	1
Table of Contents	3
2. The Crime of Aggression	
<i>Mr. Benjamin B. Ferencz</i>	33
Table of Contents	35
3. Grave Breaches of the 1949 Geneva Conventions	
<i>Professor Horst Fischer</i>	63
Table of Contents	65
4. Violations of the Laws or Customs of War	
<i>Judge George H. Aldrich</i>	95
Table of Contents	97
5. Genocide: A Crime Against Mankind	
<i>Professor Daniel D. Ntanda Nsereko</i>	113
Table of Contents	115
6. Crimes Against Humanity	
<i>Mrs. Olivia Swaak-Goldman</i>	141
Table of Contents	143
7. Overlapping Crimes	169
Table of Contents	171
A. Murder/Wilful Killing	
<i>Professor Dr. Günter Heine and Assistant Professor Dr. Hans Vest</i>	175

B. Torture and Other Offences Involving the Violation of the Physical or Mental Integrity of the Human Person	
<i>Associate Professor Andrew Byrnes</i>	197
C. Persecution	
<i>Mrs. Olivia Swaak-Goldman</i>	247
D. The Context of Sexual Violence: Sexual Violence as Violations of International Humanitarian Law	
<i>Mrs. Patricia Viseur Sellers</i>	263
8. Crimes Against United Nations and Associated Personnel	
<i>Ms. M.-Christiane Bourloyannis-Vrailas</i>	333
Table of Contents	335
9. Defences	
<i>Professor Yoram Dinstein</i>	367
Table of Contents	369
10. National Courts and the Prosecution of War Crimes	
<i>Professor Ruth Wedgwood</i>	389
Table of Contents	391
11. Rights of Suspects and Accused	
<i>Professor Michail Wladimiroff</i>	415
Table of Contents	417
12. The Protection of Victims and Witnesses	
<i>Professor Christine Chinkin</i>	451
Table of Contents	453
13. Pre-Trial Procedures and Practices	
<i>Judge Lal Chand Vohrah</i>	479
Table of Contents	481
14. Trial Procedures and Practices	
<i>President Gabrielle Kirk McDonald</i>	547
Table of Contents	549
15. Appeal Procedures and Practices	
<i>Justice Adolphus G. Karibi-Whyte</i>	623
Table of Contents	625
Index	669