

Contents

Fa	rewo	rd			page xiii			
Ta	ıble o	f autho	rities		xvii			
1	Intr	oduction						
	1.1	Form	onsibility in international criminal law	1				
	1.2	Scope	of this b	book and terminology used	4			
2	Joint criminal enterprise							
	2.1	-						
		in the jurisprudence of the <i>ad hoc</i> Tribunals						
	2.2	Limited application of JCE in the ICTR						
	2.3	· · · · · · · · · · · · · · · · ·						
		2.3.1	Physica	l elements	34			
			2.3.1.1	The JCE consisted of a plurality of persons:				
				first physical element	35			
			2.3.1.2	Common plan, design, or purpose: second				
				physical element	37			
			2.3.1.3	The accused participated in the JCE: third				
				physical element	44			
		2.3.2	Mental	elements	51			
			2.3.2.1	Mental elements of the first category of JCE	51			
				2.3.2.1.1 Voluntary participation	51			
				2.3.2.1.2 Shared intent	52			
			2.3.2.2	Mental elements of the second category of J	CE 57			
				2.3.2.2.1 Personal knowledge	57			
				2.3.2.2.2 Intent to further criminal purpose	e 59			
				2.3.2.2.3 Shared intent for specific-intent				
				crimes	67			
			2.3.2.3	Mental elements of the third category of JC	E 68			



vi					Contents				
				2.3.2.3.1	criminal purpose	68			
				2.3.2.3.2	and foreseeable commission				
					of charged crime	70 84			
	2.4	The <i>Brđanin</i> Trial Judgement: reining in the expansion of JCE? 2.4.1 The <i>Brđanin</i> Trial Judgement							
					_	85			
					ore the <i>Brđanin</i> Trial Judgement	89			
					red in the <i>Brđanin</i> Trial Judgement	93			
				đanin jurisp		96 103			
	2.5	Indirect co-perpetration: a new form of common-purpose							
		liabili	-			104			
				<i>kić</i> Trial Ju	_	105			
		2.5.2	-		esponse to the <i>Brđanin</i> and <i>Stakić</i>				
				dgements		109			
					Milutinović decision	112			
					Judgement	114			
				_	opeal Judgement	116			
		2.5.6			ect of Milutinović, Stakić and				
			Gacumb		121				
	2.6			_	and its analogues in the	124			
	International Criminal Court and internationalised tribuna 2.6.1 The International Criminal Court								
		2.6.1				124			
	2.6.2 The Internationalised Tribunals					128			
			2.6.2.1	Special Co	ourt for Sierra Leone (SCSL)	128			
			2.6.2.2	East Time	or: Special Panels for Serious Crimes				
				(SPSC)		133			
			2.6.2.3	The Extra	ordinary Chambers in the Courts				
				of Cambo	odia (ECCC)	136			
			2.6.2.4	Supreme 1	Iraqi Criminal Tribunal (SICT),				
				formerly	known as the Iraqi Special				
				Tribunal	(IST)	137			
	2.7 Conclusion								
3	Superior responsibility								
	3.1 Origins and development of the superior responsibility								
		doctrine							
		3.1.1	The roo	ts of the su	perior responsibility doctrine	145			
	3.1.2 Developments subsequent to the Second World W					148			



				Contents	vii		
	3.1.3	Historic	cal evolutio	on of the elements of superior			
		respons	ibility		152		
		3.1.3.1	Historical	evolution of the subordinate-superior			
			relationsh	nip element	152		
			3.1.3.1.1	Post-Second World War cases	153		
			3.1.3.1.2	Additional protocols	157		
			3.1.3.1.3	Statutes of the ad hoc Tribunals	158		
		3.1.3.2	Historical	evolution of the mental element	159		
			3.1.3.2.1	Post-Second World War cases	159		
			3.1.3.2.2	Additional protocols	167		
			3.1.3.2.3	The Kahan Report (Israeli			
				Commission of Inquiry)	168		
			3.1.3.2.4	The Statutes of the <i>ad hoc</i> Tribunals	169		
			3.1.3.2.5		169		
		3.1.3.3	Historical	evolution of the 'necessary and			
			reasonabl	e measures' element	170		
			3.1.3.3.1	Post-Second World War cases:			
				'necessary and reasonable measures'	170		
			3.1.3.3.2	Post-Second World War cases:			
				duty to prevent as a separate duty?	172		
			3.1.3.3.3	Additional protocols	173		
3.2	Eleme		its of superior responsibility				
	3.2.1	Elemen			181		
		3.2.1.1	_	r-subordinate relationship existed			
				he accused and the person for whose			
				conduct he is alleged to be responsible	181		
		3.2.1.2		sed knew or had reason to know that			
				nal conduct in question was about to			
				eing, or had been realised by one			
				ubordinates	200		
			3.2.1.2.1	Actual knowledge: first alternative			
				mental element	203		
			3.2.1.2.2	Constructive knowledge: second			
				alternative mental element	205		
		3.2.1.3		sed failed to take the necessary			
				nable measures to prevent or punish			
				dinate criminal conduct in question	221		
			3.2.1.3.1	Common sub-element for the			
				failure to prevent and the failure			
				to punish	224		



vii	i				Contents					
				3.2.1.3.2	First form of superior responsibility: the failure					
					to prevent	227				
				3.2.1.3.3	±					
					responsibility: the failure to punish	229				
	3.3	The se	The scope of the subordinate criminal conduct that may give							
		rise to superior responsibility								
	3.4	Super	the International Criminal Court							
		and internationalised tribunals								
		3.4.1	The Int	The International Criminal Court						
			3.4.1.1	A bifurca	ted standard	253				
			3.4.1.2	Mental el	ement: a higher standard for civilian					
				superiors		258				
				Causation		260				
					es and independent obligations	262				
		3.4.2			sed tribunals	264				
			3.4.2.1	-	ourt for Sierra Leone (SCSL)	264				
			3.4.2.2		or: Special Panels for Serious Crimes					
				(SPSC)		268				
			3.4.2.3		nordinary Chambers in the Courts					
					odia (ECCC)	271				
	2.5		3.4.2.4	Supreme	Iraqi Criminal Tribunal (SICT)	272				
	3.5		lusion			274278				
4		replicity and aiding and abetting								
	4.1									
	4.2		or forms of responsibility? The relationship between 'aiding and abetting genocide'							
	4.2			_		291				
	4.2	and 'complicity in genocide' Elements of aiding and abetting								
	4.3	betting	303 304							
		4.3.1	•	l elements	assistance anacyregement or marel	304				
		4.3.1.1 Practical assistance, encouragement, or moral support: first physical element								
				4.3.1.1.1	The accused lent practical assistance,	305				
				4.3.1.1.1	encouragement, or moral support to					
					the physical perpetrator in					
					committing a crime	305				
				4.3.1.1.2	The accused may aid and abet by	303				
				7.3.1.1.2	mere presence at the scene of					
					the crime	307				
					the crime	JU 1				



				Contents	ix
			4.3.1.1.3	Does a form of responsibility known as 'aiding and abetting by omission' exist in international criminal law?	310
			4.3.1.1.4	The accused may aid and abet in the planning, preparation, or execution of a crime, and before, during, or after the crime of the physical	
				perpetrator	315
			4.3.1.1.5	physically present when the	
				physical perpetrator commits the crime	316
		4.3.1.2	Substanti	al effect: second physical element	317
		7.3.1.2	4.3.1.2.1	The practical assistance,	317
				encouragement, or moral support had a substantial effect on the	
				commission of the crime by the	
				physical perpetrator	317
	4.3.2		elements		319
		4.3.2.1	Intention		319
			4.3.2.1.1	ž	
				with knowledge or awareness that	
				his act would lend assistance,	
				encouragement, or moral	
				support to the physical	
				perpetrator	319
		4.3.2.2	Awarenes		321
			4.3.2.2.1	essential elements of the physical	
				perpetrator's crime, including the	
				perpetrator's mental state	321
		4.3.2.3		site intent of the accused aider and	
				or specific-intent crimes	324
4.4			mplicity in		327
	4.4.1			e, encouragement, or moral	
				ical element	328
		4.4.1.1		sed lent practical assistance,	
			·	ement, or moral support to the	226
			physical p	perpetrator in committing a crime	328



> Х 4.4.2 Substantial effect: second physical element 328 The practical assistance, encouragement, or moral support had a substantial effect on the commission of the crime by the physical 328 perpetrator 4.4.3 Mental elements: intentional action and awareness of crime 329 The accused acted intentionally, and was aware of the essential elements of the crime of genocide, including the perpetrator's mental state 329 4.5 Complicity and aiding and abetting in the International Criminal Court and internationalised tribunals 330 The International Criminal Court 4.5.1 330 4.5.2 The internationalised tribunals 334 Special Court for Sierra Leone (SCSL) 4.5.2.1 334 4.5.2.2 East Timor: Special Panels for Serious Crimes (SPSC) 336 4.5.2.3 The Extraordinary Chambers in the Courts of Cambodia (ECCC) 337 4.5.2.4 Supreme Iraqi Criminal Tribunal (SICT) 339 4.6 Conclusion 341 5 Planning, instigating and ordering 343 Evolution of the elements of planning, instigating and ordering in the jurisprudence of the *ad hoc* tribunals 344 5.2 Elements of planning 354 Design of conduct with intent or awareness 5.2.1 of substantial likelihood 354 5.2.2 Substantial contribution 357 5.3 Elements of instigating 358 5.3.1 Prompting of conduct with intent or awareness of substantial likelihood 358 5.3.2 Substantial contribution 362 5.4 Elements of ordering 364 5.4.1 Instruction to engage in conduct with intent or awareness of substantial likelihood

Contents

5.4.2 Authority of accused

5.4.3 Direct and substantial contribution

5.5.1 The International Criminal Court

5.5 Planning, instigating and ordering in the International

Criminal Court and internationalised criminal tribunals

364

367

370

371

371



				Contents	xi			
		5.5.2 The internationalised tribunals						
			5.5.2.1	Special Court for Sierra Leone (SCSL)	373			
			5.5.2.2	East Timor: Special Panels for Serious Crimes				
				(SPSC)	376			
			5.5.2.3	The Extraordinary Chambers in the Courts				
				of Cambodia (ECCC)	377			
			5.5.2.4	Supreme Iraqi Criminal Tribunal (SICT)	378			
	5.6	Concl	lusion		379			
6	Con	curren	t convict	ions and sentencing	381			
	6.1	Choosing among forms of responsibility						
		6.1.1 Concurrent convictions pursuant to more than						
			one Art	icle 7/6(1) form of responsibility	388			
		6.1.2	Concur	rent convictions pursuant to Article 7/6(1)				
			and Art	ticle 7/6(3)	393			
	6.2							
7	Con	onclusion						
	7.1	1 2						
		ad hoc Tribunals 4						
	7.2	The <i>ad hoc</i> Tribunals' emphasis on 'commission' liability						
	7.3	E						
			ponsibili	•	423 424			
	7.4	The future development of the law on forms of responsibility						
Ar	ınex:	Elemer	nts of for	ms of responsibility in international criminal law	426			
Inc	dex				430			