

Horst Fischer/Claus Kress/Sascha Rolf Lüder (eds)  
**International and National Prosecution  
of Crimes under International Law: Current  
Developments**

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The adoption of the Rome Statute of the International Criminal Court on 17 July 1998 is widely seen as the starting point for a new phase in the history of international criminal justice. In the three years following the breakthrough in Rome, highly significant developments have taken place at both the international and the national level. They include the submission by the Preparatory Commission for the International Criminal Court of Draft Rules of Procedure and Evidence and Draft Elements of Crimes, important judicial pronouncements by the International Criminal Tribunals for the former Yugoslavia and for Rwanda and an increasing amount of national case law on the prosecution of crimes under international law.

*Horst Fischer, Claus Kress and Sascha Rolf Lüder* have successfully taken up the challenge of publishing a book on a matter of keen interest to today's political and legal world. In the family of international humanitarian law the editors' names are all well known: *Horst Fischer* is Academic Director of the Bochum Institute for International Law of Peace and Armed Conflict, which is one of the world's focal points for international humanitarian law teaching and research. He is also Professor for International Humanitarian Law at the University of Leyden and is recognized as one of the eminent authorities in that field. *Claus Kress* is Senior Research Fellow at the University of Cologne's Institute for Foreign and International Criminal Law. From 1996 to 2000, he was Counsellor at the German Federal Ministry of Justice and in that capacity was a member of the German delegation to the Diplomatic Conference in Rome. A wide range of publications testify to his excellent knowledge both of international humanitarian law and of international criminal law. *Sascha Rolf Lüder*, the youngest of the editorial trio, is Counsellor to the General Representative of the *Johanniter Orden* to the European Union. From 1995 to 2000, he worked at the Bochum Institute for International Law of Peace and Armed Conflict and has been carefully tutored by Knut Ipsen and Horst Fischer.

The book, composed of contributions by authors from all parts of the world, is a timely presentation of the fascinating post-Rome developments. It contains a comprehensive insider's account of the negotiations on the Draft Rules of Procedure and Evidence and the Draft Elements of Crimes, a thorough appraisal of the evolving jurisprudence of the two *ad hoc* Tribunals by officials thereof and by distinguished academics, and detailed expert commentaries on the most recent national case law in Italy, Germany, Belgium, Senegal, the United Kingdom and Spain. The book will therefore be extremely useful for practitioners, scholars and students in the field of international criminal law, for politicians and government officials and for interested members of civil society, especially those working in humanitarian assistance and human rights organizations.

The first part of the book is centred on the International Criminal Court (ICC). In his enthralling account of the continuing struggle with regard to the Court's jurisdiction, *Hans-Peter Kaul* raises some topical questions concerning the United States' participation in the process of ratification of the Rome Statute. Despite the very understandable satisfaction, indeed joy, over the decision by former President Clinton to ratify the Rome Statute, the fact remains that his signing statement of 31 December 2000 contained some elements which warrant caution. The well-known United States' argument that the Rome Statute is allegedly "flawed" was once again reiterated, and this, in the opinion of Kaul, the German senior negotiator, cannot and should not be overlooked by anyone. His contribution also highlights the steady support that the NGO Coalition for the International Criminal Court and its leading member organizations have given to the endeavour to fully safeguard the integrity of the jurisdictional system of the Rome Statute, and indeed the enormous contribution they have made to it: "Through their relentless and untiring effort the NGO Coalition and in particular Human Rights Watch, Lawyers Committee for Human Rights, Amnesty International and the Women's Caucus made clear that they regard themselves as advocates and 'guardians' of the Rome Statute. They saw a possible dilution of the jurisdiction as contained in Art. 12 as a fundamental threat to the progress achieved in Rome. For many like-minded States it was a

source of encouragement that time and again problematic aspects of various proposals floated by the United States were in the first instance identified and criticised by able and knowledgeable lawyers of American human rights organisations” (p. 22).

In his contribution on the legal nature of the International Criminal Court *Sascha Rolf Lüder* assumes that the ICC is not only a subject of international law but also an international organization, i.e. the Court constitutes a new kind of integrated international judiciary organization. Extending in a wider sense to the Assembly of States Parties, the new international justice system is an even more complex organization including executive and above all legislative powers. Finally, the Rome Statute contains a number of supranational elements. First, there is the power to conduct on-site investigations. In addition, the summons of suspects and the issuance of arrest warrants entail direct effects. Finally, it can be argued that all orders made by the Court directly *vis-à-vis* individuals in the course of the criminal proceedings before it qualify as supranational.

The second part of the book concentrates on the ICC's substantive and procedural law. *Wiebke Rückert*, *Georg Witschel* and *Knut Dörmann* give a very penetrating analysis of genocide, war crimes and crimes against humanity as defined in the Elements of Crimes. The latter are the result of an unprecedented effort to enhance the specificity and thus the legal certainty of substantive international criminal law. A number of articles show that the Rules of Procedure and Evidence complement the procedural regime set up by the Rome Statute. They complete what may be called the first instrument in history that comes close to offering a code of international criminal procedure on the universal level with the very substantial support of representatives of international civil society.

*Håkan Friman*, for example, draws our attention to the Rules of Procedure and Evidence at the investigative stage. In his opinion they provide primarily procedural rules that supplement the already relatively detailed proceedings provided for in Part 5 of the Rome Statute. They also help in interpreting the relationship between different parts of the Statute. However, they were never intended to provide further substantive provisions. Consequently, a number of

difficult issues that could not be resolved in the negotiations on the Rome Statute are not conclusively regulated in the Rules of Procedure and Evidence either, and are thus left to the Court to determine. *Kress* focuses on witnesses in proceedings before the ICC and gives an analysis in this regard in the light of comparative criminal procedure. He concludes that a workable witness regime appears to have been set up by the Preparatory Commission. To his mind, it only remains to be seen to what extent witnesses will be the “eyes and the ears of international justice” in a system which operates on the basis of the principle of voluntary appearance. The second part ends with some remarks on cooperation and enforcement, which are among the major questions in international criminal justice.

In its third part, the book deals with the International Criminal Tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR). Unlike the ICC, these *ad hoc* Tribunals were not established by treaty but by a resolution of the United Nations Security Council. This part is intended to present a variety of views in three respects. First, the contributions cover the whole spectrum of international criminal law ranging from the Elements of Crimes to the enforcement of international sentences. Secondly, an effort has been made not to deal exclusively with the ICTY but to adequately highlight the significance of its “younger sister”, the ICTR. Thirdly, the investigation into the NATO air campaign in the Federal Republic of Yugoslavia of 1999 has been made the object of an analysis not only because of the important legal issues at stake, but also because it is a good example of how the universal reach of international criminal law is more than a vain ideal.

This part of the book also contains a brilliant analysis by *Christopher Greenwood* on belligerent reprisals in the jurisprudence of the ICTY. The author concludes that the assertion by the Trial Chambers in the *Kupreskic* and *Martić* cases that there is a customary law prohibition of reprisals against all civilians and civilian property, identical to the treaty prohibition in Additional Protocol I for international armed conflicts, is difficult to accept. He holds that the reasons advanced in support of that assertion in the two decisions are unconvincing; there are strong grounds, he says, for thinking that those

provisions were not seen as codification of customary law rules at the time of their adoption in 1977, and indeed that seems to have been accepted by the Trial Chamber in *Kupreskic*. In his view the conclusion that they have become customary law in the years since 1977 flies in the face of most of the State practice which exists and is built upon the shaky foundations of an unduly extensive interpretation of the Martens Clause in one case and Article 1 common to the Geneva Conventions in the other. He points out, moreover, that the persuasive value of the two decisions is further undermined by the fact that in neither case was it necessary for the Chamber to determine whether such a customary law prohibition existed.

Finally, the third part of the book turns to a selection of relevant national case law on international criminal law. The focus of the contributions differs: whereas the Italian case law sheds light on a number of important general principles of international criminal law, the primary significance of the German case law probably lies in the interpretation given to the crime of genocide. A recurring theme of all contributions and the central issue of the studies pertaining to Belgium, Spain, Senegal and United Kingdom is the exercise of universal jurisdiction. It is not very prophetic to predict that for the time being this question will remain prominent on the agenda of international criminal law.

In conclusion, the book provides the reader with a very useful source of information on the latest stage of development of international criminal law and should convey some idea of the humanitarian importance of the subject. This would be most welcome. I am convinced that the very interesting developments in international criminal law will also stimulate the dissemination of international humanitarian law in the world.

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