

## 32 ESZTER KIRS: PERPETRATORS AND ACCESSORIES IN THE YUGOSLAV WARS

*The International Criminal Law Background of the Acquittal of Gotovina, Perišić, Šešelj and Orić*

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***Kirs Eszter: Tettesek és bűnrészesek a délszláv háborúban – Gotovina, Perišić, Šešelj és Orić felmentésének nemzetközi büntetőjogi háttere. L'Harmattan, Budapest, 2018.***

The timeliness and importance of a scholarly work centering around the jurisprudence of the International Criminal Tribunal for the former Yugoslavia (ICTY) is adequately underpinned by the recent dissolution of the ICTY itself. Its pivotal role in paving the way for a larger international consensus on war crimes justice, mentioned by Professor Sands, is evidenced not only by the general and first-instance work it has done, but also through the appeal judgments revisiting and overturning its very own decisions. However, as Professor Sands pointed out, the ICTY's jurisprudence did not bring about absolute tranquility among the ethnicities involved in the atrocities. The book of Eszter Kirs therefore, on the one hand, monitors and synthesizes decisions, where the acquittal of persons involved in war crimes contributed to the deterioration of legally accurate responsibility concepts in international criminal law. On the other hand, it examines decisions which resulted in the social dissension among the ethnicities – contrary to the general aim of ethnical reconciliation set for the ICTY at its formation.

Eszter Kirs is a renowned professional in the field of international criminal law, war crimes and transitional justice, having served as a member of the defence team at the ICTY between 2010 and 2015. Currently she is an associate professor at the Department of International Law at Corvinus University of Budapest. She also works as a legal officer at the Hungarian Helsinki Committee since 2013. She obtained her PhD degree in 2009, and she is the author of several scientific papers on transitional justice and international criminal law. This prominent professional background and practical experience is equally echoed in the substance, methodology, and structure of her new book. Kirs is at her best at finding the perfect balance between providing a lecture book for familiarizing her readers with individual responsibility concepts in international criminal law, and critically assessing the legal implications of the ICTY's work.

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Although the title of the book immediately assures us that its substance will not be just another addition to the already existing list of assessments of the ICTY jurisprudence, it elicits a number of questions in the reader: By what pattern did the author choose the particular cases involving the persons mentioned in the title to be analyzed? Will the book concentrate on the cases in particular, or will it rather give a general introduction to concepts of responsibility under international criminal law? Will she criticize the outcome of the judgments or endorse them? These questions do not await their answers for long, as Kirs sums up her motivations and methodology in the introduction. She points out that her work focuses on individual responsibility concepts in international criminal law, and she chose the respective cases both for facilitating the understanding of each concept, and to shed light on iconic figures involved in military and political responsibility, whose acquittal generated, at the same time, an exuberance of joy and boisterous criticism among ethnic communities.

What makes the book more thought-provoking and compels the reader to formulate his very own opinion before getting to know that of Kirs' is that the author summarizes her hypothesis for her book only in the very last chapter. Up until that point, she solely poses questions along which the reader receives the minimum information about the directions of the upcoming chapters. Based on such questions and by reading the table of contents, one starts reading the book with the following information: (1) the book will analyze four different individual responsibility concepts: contribution to a group crime, aiding and abetting, instigating and ordering; (2) the responsibility of both military and political leaders will be demonstrated; (3) the decisions will underpin problematic questions with regard to the legal punctuality of the ICTY's jurisprudence in this regard; (4) the author will examine judgments which also exemplify how decisions of international tribunals may affect the political and historical discussions in particular sensitive areas of international law, such as war crimes; and that (5) the author not only used scholarly research for substantiating her opinion, but also interviewed civil and governmental organisations, scholars, and local experts of the topic.

In terms of the structure and methodology of the book, it is divided in five parts. In the first four chapters the author describes each individual responsibility concept mainly through decisions of the ICTY – and in some cases through relevant decisions of the International Criminal Court (ICC) or the International Criminal Tribunal for Rwanda (ICTR). This is followed by the introduction and comprehensive analysis of the divisive cases specified in the title of the book as well. This structure and the thorough legal analysis underpinning the flaws and questionable legal implications within the decisions represent a novelty among scientific publications dealing with the jurisprudence of the ICTY.

In the first chapter, the author introduces the individual's responsibility under international criminal law for contribution to a group crime. Kirs starts with a detailed description of the conditions of *actus reus* and *mens rea*, and the case law regarding *actus*

*reus* by which one may distinguish three types of joint criminal enterprise under the ICTY case law (the basic, the systemic, and the extended form). She lists the case law pertaining to each form, addresses the criticism about the extended type of responsibility and explores the ICC's and the ICTR's relevant jurisprudence. As a closure to the topic of joint criminal enterprises, the author illustrates the concept with the case of Ante Gotovina, a Croatian lieutenant, who had a primary role in Operation Storm. Gotovina, found guilty in the first-degree verdict, was later acquitted on appeal, which provoked mixed international reactions. Kirs addresses both verdicts and highlights the sensible defects in the arguments underlying them, and ends the chapter by concluding the ICTY's failure to create a judgment that is solid and excludes any doubts as to its legal foundations.

In chapter two, Kirs continues with addressing responsibility for the aiding and abetting of international crimes by reflecting on decisions before and after World War II, and analyzing the *actus reus* and *mens rea* components – similarly to the first chapter. Among the components the most debated one was whether 'specific direction' is a required element of the *actus reus* of aiding and abetting liability. First, we are familiarized with the case of Šainović, where the ICTY, after the extensive examination of national legal systems, ruled that special direction is not required for finding the individual's responsibility. This makes the case of Perišić even more controversial, as the ICTY reversed its 2011 first-instance verdict in 2013 by referring solely to the disputed Tadić decision in order to substantiate the specific direction requirement. After the Gotovina and Haradinaj acquittals, the overturned judgment of Perišić resulted in an even more condemning reaction from Serbia towards the ICTY's work and legitimacy.

Chapter three and four address the *mens rea* and *actus reus* components through the ICTY's and other courts' case law. Chapter three addressing instigating a crime is centered around the acquittal of Vojislav Šešelj. Kirs discusses the mistakes and legal lacunae in the judgment of the ICTY and by doing so she introduces the reader to the criminal liability concepts of instigation and aiding and abetting. In the Šešelj case, the ICTY assessed the evidence on hate speeches and the recruitment of volunteers who became the perpetrators of the crimes. It concluded that he was not guilty due to the lack of a criminal purpose, the lack of an inherent link to the fulfilment of the 'greater Serbia vision', and the lack of a subordinate relation between Šešelj and the volunteers. In the opinion of Kirs, this was a result of the neglectful evidentiary process on the side of the tribunal, and although the Appeals phase may give us a slight hope for overturning the judgment, it will certainly not erase how Šešelj returned to Serbia waving the acquitting decision.

Chapter four concerns the ordering of the commission of a crime, besides the requirement of a subordinate relation between the person giving and the person receiving the order. Here the author reflects more on the ICTY case law addressing the *mens rea*. As such, the person ordering the commission of a crime must know about or must have reasonably expected the possible commission of a crime on the side of the subordinate.

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In this part, Kirs brings about the example of Orić, who was acquitted due to the fact that his subordinate, Krdzić was not found guilty during the trials and this would have made the individual responsibility of Orić too abstract under the ICTY jurisprudence. This certainly does not mean that the crimes against the Srebrenica people did not happen, nevertheless, judgments like this open up serious questions about the interpretative work of the ICTY, and unquestionably result in the shaken faith of Serbians in the tribunal's legitimacy.

As a closure and conclusion to the analysis of an enormous amount of case law through which Kirs familiarized her readers with the individual responsibility concepts, the fifth chapter reflects on the impacts of ICTY judgments on the Bosnian society. The author summarizes the hypothesis – which we all can perfectly infer already from reading the previous four chapters – namely, that the judgments examined contain massive legal scruples and are seriously detrimental to the communities involved. As already noted, the above mentioned, widely criticized decisions not only resulted in academic confusion and disfavour, but also in the condemnation of the ICTY as a biased, politically motivated institution by the ethnicities involved. One may think that these reactions are caused by the inadequate reasoning of the tribunal. However, Kirs shows that the social attitude is predestined by the result of the trial itself, namely whether the crimes are avenged through the conviction of the persons involved. And exactly this attitude is the reason why the author suggests that the legal correctness of the judgments is of utter importance: that would fortify the legitimacy of any decision, be it a conviction or an acquittal, against the political conjecture of the public.

In conclusion, one can only commend Eszter Kirs for providing us with a detailed, but at the same time, also sufficiently concise analysis on individual criminal responsibility, and explaining the academic background by placing it within the often criticized case law of the ICTY. This methodology, coupled with an easy-to-read style, makes this book a useful and highly recommendable tool not only for professionals, but also for any laymen, who is interested in this particular legal and/or historical context.