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.

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ELEMENTS OF CRIMES UNDER INTERNATIONAL LAW

International Criminal Law Practitioner Library Series

VOLUME II

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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.
## Contents

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Foreword</td>
<td>xv</td>
</tr>
<tr>
<td>Table of Authorities</td>
<td>xvii</td>
</tr>
<tr>
<td>1 An overview of crimes under international law</td>
<td>1</td>
</tr>
<tr>
<td>1.1 Legal sources for definitions of crimes under international law</td>
<td>5</td>
</tr>
<tr>
<td>1.2 Structure of crimes under international law</td>
<td>9</td>
</tr>
<tr>
<td>2 Crimes against humanity</td>
<td>14</td>
</tr>
<tr>
<td>2.1 Evolution of crimes against humanity</td>
<td>18</td>
</tr>
<tr>
<td>2.1.1 Development through the Second World War</td>
<td>18</td>
</tr>
<tr>
<td>2.1.2 Post-Second World War development</td>
<td>22</td>
</tr>
<tr>
<td>2.1.3 Developments through the <em>ad hoc</em> Tribunals and beyond</td>
<td>26</td>
</tr>
<tr>
<td>2.2 Elements of crimes against humanity</td>
<td>31</td>
</tr>
<tr>
<td>2.2.1 Requirements unique to the <em>ad hoc</em> tribunals</td>
<td>32</td>
</tr>
<tr>
<td>2.2.1.1 ICTY: armed conflict as a jurisdictional requirement</td>
<td>32</td>
</tr>
<tr>
<td>2.2.1.2 ICTR: discriminatory basis as a jurisdictional requirement</td>
<td>33</td>
</tr>
<tr>
<td>2.2.2 General requirements</td>
<td>35</td>
</tr>
<tr>
<td>2.2.2.1 Preliminary question: whose conduct and mental state may satisfy the contextual general requirements?</td>
<td>35</td>
</tr>
<tr>
<td>2.2.2.2 The attack requirement</td>
<td>41</td>
</tr>
<tr>
<td>2.2.2.3 The targeting requirement</td>
<td>42</td>
</tr>
<tr>
<td>2.2.2.3.1 The definition of a ‘civilian’</td>
<td>43</td>
</tr>
<tr>
<td>2.2.2.3.2 The definition of a ‘civilian population’</td>
<td>49</td>
</tr>
<tr>
<td>2.2.2.3.3 The meaning of ‘directed against’</td>
<td>50</td>
</tr>
</tbody>
</table>
2.2.4 The ‘widespread or systematic’ requirement
2.2.5 The first contextual requirement: the underlying offence as part of the attack
2.2.6 The second contextual requirement: the knowledge that the offence is part of the attack

2.2.3 Underlying offences
2.2.3.1 Murder
2.2.3.2 Extermination
2.2.3.3 Enslavement
2.2.3.4 Deportation
  2.2.3.4.1 The displacement of persons was caused by expulsion or other coercive acts
  2.2.3.4.2 The persons displaced were lawfully present in the area
  2.2.3.4.3 The displacement occurred without grounds permitted under international law
  2.2.3.4.4 Is intent that the removal be permanent an element of forcible displacement?
  2.2.3.4.5 Additional element for deportation
2.2.3.5 Imprisonment
2.2.3.6 Torture
  2.2.3.6.1 The severity requirement
  2.2.3.6.2 The prohibited purpose requirement
2.2.3.7 Rape
2.2.3.8 Persecution on political, racial, and religious grounds
  2.2.3.8.1 Specific requirements for persecution as a crime against humanity
    The equal gravity requirement
    The requirement of discrimination ‘in fact’
    The discriminatory intent requirement
2.2.3.8.2 Underlying offences qualifying as persecution as a crime against humanity

2.2.3.9 Other inhumane acts

2.2.3.9.1 Specific requirements for inhumane acts as crimes against humanity

The suffering or attack on dignity requirement
The similar gravity requirement
The requirement of direct or indirect intent

2.2.3.9.2 Underlying offences qualifying as inhumane acts as crimes against humanity

2.3 Crimes against humanity in the International Criminal Court and Internationalised Tribunals

2.3.1 The International Criminal Court

2.3.1.1 The Rome Statute
2.3.1.2 The elements of crimes

2.3.2 The Internationalised Tribunals

2.3.2.1 Special Court for Sierra Leone (SCSL)
2.3.2.2 East Timor: Special Panels for Serious Crimes (SPSC)
2.3.2.3 The Extraordinary Chambers in the Courts of Cambodia (ECCC)
2.3.2.4 Supreme Iraqi Criminal Tribunal (SICT) (also known as the Iraqi High Tribunal (IHT))

3 Genocide

3.1 Evolution of genocide as an international crime

3.1.1 Development through the Second World War
3.1.2 Post-Second World War development
3.1.3 Developments in the ad hoc Tribunals and beyond

3.2 Elements of genocide

3.2.1 General requirements
3.2.1.1 Preliminary question: who must have the genocidal intent?
3.2.1.2 Genocidal intent
3.2.1.2.1 Specific intent
3.2.1.2.2 Material destruction
3.2.1.2 Definitions of the protected group and the targeted group 168
3.2.1.3 Requirement of actual membership in the group? 173
3.2.2 Underlying offences 176
  3.2.2.1 Killing 178
    3.2.2.1.1 Physical elements 178
    3.2.2.1.2 Mental element 178
  3.2.2.2 Causing serious bodily or mental harm 181
    3.2.2.2.1 Physical elements 181
    3.2.2.2.2 Mental element 183
  3.2.2.3 Deliberate infliction of eventually destructive conditions of life 183
    3.2.2.3.1 Examples of qualifying conduct 183
    3.2.2.3.2 Mental element? 186
  3.2.2.4 Prevention of births 186
    3.2.2.4.1 Examples of qualifying conduct 186
    3.2.2.4.2 Mental element? 187
  3.2.2.5 Forcible transfer of children 187
    3.2.2.5.1 Mental element? 188
3.3 Elements of conspiracy to commit genocide 188
3.4 Elements of direct and public incitement to commit genocide 191
3.5 Elements of attempt to commit genocide 197
3.6 Genocide in The International Criminal Court and Internationalised Tribunals 198
  3.6.1 The International Criminal Court 198
    3.6.1.1 The Rome Statute 198
    3.6.1.2 The Elements of Crimes 201
  3.6.2 The Internationalised Tribunals 206
    3.6.2.1 Special Court for Sierra Leone (SCSL) 206
    3.6.2.2 East Timor: Special Panels for Serious Crimes (SPSC) 206
    3.6.2.3 The Extraordinary Chambers in the Courts of Cambodia (ECCC) 207
    3.6.2.4 Supreme Iraqi Criminal Tribunal (SICT) (also known as the Iraqi High Tribunal (IHT)) 210
4 War crimes 213
  4.1 Evolution of war crimes 219
    4.1.1 Ancient to modern conceptions of war crimes 219
4.1.2 The birth of modern international humanitarian law sanctioning war crimes

4.1.3 The distinction between international and non-international armed conflict in war crimes law

4.1.4 Contribution of the ad hoc Tribunals to the development of war crimes law

4.2 Elements of war crimes

4.2.1 General requirements for war crimes

4.2.1.1 Existence of an armed conflict

4.2.1.1.1 Is knowledge of the existence of the armed conflict an element of war crimes?

4.2.1.2 Nexus between the underlying offence and the armed conflict

4.2.1.3 Additional general requirements for grave breaches of the Geneva conventions: war crimes committed in international armed conflict

4.2.1.3.1 The requirement of an international armed conflict

4.2.1.3.2 Knowledge of the nature of the armed conflict

4.2.1.4 Additional general requirement for violations of Common Article 3 and Additional Protocol II under Article 4 of the ICTR Statute: war crimes committed in non-international armed conflict

4.2.1.5 Additional general requirements for violations of the laws or customs of war under Article 3 of the ICTY Statute: war crimes committed in any armed conflict

4.2.1.5.1 The alleged underlying offence infringes a rule of customary or conventional international humanitarian law

4.2.1.5.2 The violation is ‘serious’
4.2.1.5.3 The violation of the rule entails the individual criminal responsibility of the person breaching the rule 262

4.2.1.5.4 Knowledge of status of targets of underlying offences 263

4.2.2 Underlying offences 263

4.2.2.1 Destruction of property 264

4.2.2.1.1 Extensive destruction under Article 2(d) of ICTY Statute 264

4.2.2.1.2 Wanton destruction and unjustified devastation under Article 3(b) of the ICTY Statute 266

4.2.2.1.3 Destruction or wilful damage to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science under Article 3(d) 268

4.2.2.2 Hostage-taking 270

4.2.2.3 Inhuman treatment or cruel treatment 271

4.2.2.4 Murder or wilful killing 273

4.2.2.5 outrages upon personal dignity 275

4.2.2.6 Plunder, pillage, or extensive appropriation 278

4.2.2.7 Rape 280

4.2.2.8 Slavery or unlawful labour 281

4.2.2.9 Terror 281

4.2.2.10 Torture 284

4.2.2.11 Unlawful attack on civilians and civilian objects 285

4.2.2.12 Unlawful confinement 287

4.2.2.13 Unlawful deportation or transfer 288

4.2.2.14 Violence to life and person 288

4.2.2.15 Wilfully causing great suffering or serious injury to body or health 290

4.2.2.16 Other underlying offences 290

4.3 War crimes in the International Criminal Court and Internationalised Tribunals 291

4.3.1 The International Criminal Court 291

4.3.1.1 The Rome Statute 291

4.3.1.2 The Elements of Crimes 297
4.3.2 The Internationalised Tribunals 304
4.3.2.1 Special Court for Sierra Leone (SCSL) 304
4.3.2.2 East Timor: Special Panels for Serious Crimes (SPSC) 310
4.3.2.3 The Extraordinary Chambers in the Courts of Cambodia (ECCC) 312
4.3.2.4 Supreme Iraqi Criminal Tribunal (SICT) (also known as the Iraqi High Tribunal (IHT)) 314

5 Cumulative convictions and sentencing 318
5.1 Cumulative and alternative charging 319
5.2 Cumulative convictions 324
5.2.1 Pre-Čelebići jurisprudence 324
5.2.2 The February 2001 Čelebići appeal judgement 326
5.2.3 Application of the Čelebići test to different statutory crimes (‘inter-article’ convictions) 331
5.2.4 Application of the Čelebići test to different underlying offences of the same statutory crime (‘intra-article’ convictions) 334
5.2.4.1 Intra-article convictions for crimes against humanity 335
5.2.4.2 Intra-article convictions for war crimes 348
5.2.4.3 Intra-article convictions for genocide 349
5.2.5 Effect of trial chamber error in failing to convict cumulatively when cumulative convictions are available 354
5.3 Sentencing 356
5.3.1 No coherent sentencing practice 359
5.3.2 No hierarchy of crimes 363
5.3.3 The Appeals Chamber’s interference in sentence determination by trial chambers 367

6 Conclusion 370
6.1 The content and context of international crimes 371
6.1.1 Definitions of the crimes should not refer only to the accused or the physical perpetrator 372
6.1.2 The elements of the crimes and the elements of the forms of responsibility answer separate legal inquiries 373
6.1.3 Judgements should specify, in their dispositions, the precise conduct for which the accused has been convicted 374
6.2 The relative importance of the crimes in the different courts and tribunals 375
Contents

6.3 Variations in the definitions of crimes in the different courts and tribunals 379
6.4 The need for a more coherent conviction and sentencing practice 383

Annex: Elements of core international crimes and sample combinations with forms of responsibility 387

1. Common underlying offences 390
   1.1 Arbitrary deprivation of liberty 390
   1.2 Destruction of real or personal property 390
   1.3 Forcible displacement 390
   1.4 Murder 391
   1.5 Rape 391
   1.6 Torture 391

2. Crimes against humanity 391
   2.1 General requirements for crimes against humanity 391
   2.2 Murder as a crime against humanity 392
   2.3 Extermination as a crime against humanity 392
   2.4 Enslavement as a crime against humanity 392
   2.5 Deportation as a crime against humanity 393
   2.6 Imprisonment as a crime against humanity 393
   2.7 Torture as a crime against humanity 393
   2.8 Rape as a crime against humanity 393
   2.9 Persecution as a crime against humanity 394
   2.10 Other inhumane acts as crimes against humanity 396

3. Genocide and related crimes 397
   3.1 General requirements for genocide 397
   3.2 Genocide by killing 397
   3.3 Genocide by causing serious bodily harm 397
   3.4 Genocide by causing serious mental harm 398
   3.5 Genocide by deliberate infliction of eventually destructive conditions of life 398
   3.6 Genocide by prevention of births 398
   3.7 Genocide by forcibly transferring children to another group 399
   3.8 Conspiracy to commit genocide 399
   3.9 Direct and public incitement to commit genocide 399
   3.10 Attempt to commit genocide 399

4. War crimes 399
   4.1 General requirements for all war crimes 399
   4.2 Additional general requirements for grave breaches of the Geneva Conventions of 1949 400
4.3 Additional general requirements for war crimes arising from breaches of Common Article 3 of the Geneva Conventions (‘Common Article 3’) or Additional Protocol II to the Geneva Conventions (‘Additional Protocol II’) 400

4.4 Additional general requirements for violations of the laws or customs of war under Article 3 of the ICTY Statute 400

4.5 ‘Extensive destruction of property, not justified by military necessity and carried out unlawfully and wantonly’ as a grave breach 401

4.6 ‘Wanton destruction’ of property as a violation of the laws or customs of war 401

4.7 ‘Unjustified devastation’ of property as a violation of the laws or customs of war 402

4.8 ‘Destruction or wilful damage to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science’ as a violation of the laws or customs of war 402

4.9 Hostage-taking as a grave breach 403

4.10 Hostage-taking as a violation of the laws or customs of war 403

4.11 Inhuman treatment as a grave breach 403

4.12 Cruel treatment as a violation of the laws or customs of war 404

4.13 Wilful killing as a grave breach 404

4.14 Murder as a violation of the laws or customs of war 404

4.15 Outrages upon personal dignity as a violation of Additional Protocol II / the laws or customs of war 405

4.16 ‘Extensive appropriation of property, not justified by military necessity and carried out unlawfully and wantonly’ as a grave breach 405

4.17 Plunder as a violation of the laws or customs of war 406

4.18 Rape as a grave breach 406

4.19 Rape as a violation of the laws or customs of war 406

4.20 Slavery as a violation of the laws or customs of war 407

4.21 Unlawful labour as a violation of the laws or customs of war 407

4.22 Terror as a violation of the laws or customs of war 407

4.23 Torture as a grave breach 408

4.24 Torture as a violation of the laws or customs of war 408

4.25 Unlawful attack on civilians as a violation of the laws or customs of war 408
4.26 Unlawful attack on civilian objects as a violation of the laws or customs of war 409
4.27 Unlawful confinement of a civilian as a grave breach 409
4.28 Unlawful confinement as a violation of the laws or customs of war 409
4.29 Unlawful deportation or transfer as a grave breach 410
4.30 Wilfully causing great suffering or serious injury to body or health as a grave breach 410

5. Sample combinations of elements of crimes and forms of responsibility 410
5.1 Torture as a crime against humanity 411
5.2 Murder as a form of persecution as a crime against humanity 415
5.3 Genocide by killing 421
5.4 Extensive destruction of property as a grave breach 424
5.5 Plunder as a violation of the laws or customs of war 429

Index 435
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
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
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
## Table of Authorities

**International Criminal Tribunal for the Former Yugoslavia (ICTY) materials**

- Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991

- **Prosecutor v. Aleksovski**, Case No. IT-95-14/1
  - Trial Judgement: 231, 258, 276, 277, 278
  - Appeal Judgement: 55, 72, 244, 247, 253, 275–277, 324, 341, 342, 344, 345, 357, 361

- **Prosecutor v. Blagojević and Jokić**, Case No. IT-02-60
  - Decision on Motion of Accused Blagojević to Dismiss Cumulative Charges: 322
  - Appeal Judgement: 94, 156, 157, 167, 186

- **Prosecutor v. Blaškić**, Case No. IT-95-14
  - Second Amended Indictment: 288
### Table of Authorities


**Prosecutor v. Brđanin and Talić, Case No. IT-99-36**

- Decision on Objections by Momir Talić to the Form of the Amended Indictment 322
- Decision on Motion for Acquittal Pursuant to Rule 98 bis 62


Appellant Brđanin’s Brief on Appeal 80

- Appeal Judgement 11, 63, 79–82, 90, 238, 244, 248, 269, 341

**Prosecutor v. Delalić, Mucić, Delić and Landžo, Case No. IT-96-21 (‘Čelebići Case’)**

- Trial Judgement 82, 84–86, 100, 141, 228, 232, 235, 240, 248, 253, 260, 273, 275, 278, 280, 290, 293, 295, 298

**Prosecutor v. Erdemović, Case No. IT-96-22**

- Sentencing Judgement 360
- Sentencing Appeal Judgement 363, 365

**Prosecutor v. Furundžija, Case No. IT-95-17/1**

- Decision on the Defendant’s Motion to Dismiss Counts 13 and 14 of the Indictment (Lack of Subject Matter Jurisdiction) 280


**Prosecutor v. Galić, Case. No. IT-98-29**

- Indictment 282

**Prosecutor v. Hadžihasanović and Kubura, Case No. IT-01-47**

- Amended Indictment 288
- Third Amended Indictment 260
- Decision on the Form of the Indictment 289, 322
- Decision on Motions for Acquittal Pursuant to Rule 98 bis of the Rules of Procedure and Evidence 293
- Decision on Joint Defence Interlocutory Appeal of Trial Chamber Decision on Rule 98 bis Motions for Acquittal 226
<table>
<thead>
<tr>
<th>Table of Authorities</th>
</tr>
</thead>
<tbody>
<tr>
<td>Trial Judgement 226, 236, 240, 259, 262, 264, 266–269, 273, 274, 279, 280, 357, 376</td>
</tr>
<tr>
<td><strong>Prosecutor v. Halilović</strong>, Case No. IT-01-48</td>
</tr>
<tr>
<td>Indictment 260</td>
</tr>
<tr>
<td>Trial Judgement 45, 48, 241, 258, 259, 262, 263, 376</td>
</tr>
<tr>
<td><strong>Prosecutor v. Jelisić</strong>, Case No. IT-95-10 365</td>
</tr>
<tr>
<td>Trial Judgement 37, 44, 48, 59, 154, 156, 168, 169, 171, 172, 174, 175, 178, 179, 273</td>
</tr>
<tr>
<td><strong>Prosecutor v. Kordić and Ćerkez</strong>, Case No. IT-95-14/2</td>
</tr>
<tr>
<td>Decision on the Joint Defence Motion to Dismiss the Amended Indictment for Lack of Jurisdiction Based on the Limited Jurisdictional Reach of Articles 2 and 3 261</td>
</tr>
<tr>
<td>Decision Authorising Respondent’s Brief to Exceed the Limit Imposed by the Practice Direction on the Length of Briefs and Motions and Granting an Extension of Time to File Brief 343</td>
</tr>
<tr>
<td><strong>Prosecutor v. Krajinišnik</strong>, Case No. IT-00-39</td>
</tr>
<tr>
<td>Trial Judgement 42, 48, 55, 90, 156, 158, 163, 165, 168, 169, 176, 178, 182, 184, 238, 256, 259, 263, 269, 342, 347, 360</td>
</tr>
<tr>
<td><strong>Prosecutor v. Krnojelac</strong>, Case No. IT-97-25</td>
</tr>
<tr>
<td>Decision on the Defence Preliminary Motion on the Form of the Indictment 319</td>
</tr>
<tr>
<td>Trial Judgement 41, 43, 54–56, 58, 65, 66, 69, 70, 73, 75–77, 79, 80, 82–84, 88, 90–94, 100, 102, 103, 134, 272, 273, 281, 335</td>
</tr>
<tr>
<td>Appeal Judgement 67, 69, 70, 72, 73, 75, 90, 91, 93–95, 98, 108, 163, 330, 337–339, 341, 343, 345, 355</td>
</tr>
<tr>
<td><strong>Prosecutor v. Krstić</strong>, Case No. IT-98-33</td>
</tr>
<tr>
<td>Amended Indictment 339</td>
</tr>
<tr>
<td>Decision on Defence Preliminary Motion on the Form of the Amended Indictment 32</td>
</tr>
</tbody>
</table>
Table of Authorities

Prosecutor v. Kunarac, Kovac and Vuković, Case No. IT-96-23 & IT-96-23/1

Prosecutor v. Kupreškić, Kupreškić, Kupreškić, Josipović and Šantić, Case No. IT-95-16
    Decision on Defence Challenges to Form of the Indictment 320
    Decision on Evidence of the Good Character of the Accused and the Defence of Tu Quoque 41
    Trial Judgement 31, 32, 38, 41, 43, 47, 48, 54, 56, 59, 90, 91, 95, 98, 99, 103, 104, 123, 273, 275, 293, 320, 325–327, 336–337

Prosecutor v. Kvočka, Radić, Žigić and Prča, Case No. IT-98-30
    Decision on Preliminary Motions filed by Mlado Radić and Miroslav Kvočka et al. Challenging Jurisdiction 261
    Decision on Defence Preliminary Motions on the Form of the Indictment 320, 323
    Trial Judgement 80, 82, 84, 92, 101, 272, 273, 276, 277, 295, 338, 339
    Appeal Judgement 90, 91, 94, 95, 98, 274, 275, 280, 336, 337, 342, 357, 360, 367

Prosecutor v. Limaj, Bala and Musliu, Case No. IT-03-66
    Decision on Prosecution’s Motion to Amend the Amended Indictment 322
    Appeal Judgement 237, 273

Prosecutor v. Martić, Case No. IT-95-11
    Amended Indictment 347

Prosecutor v. Dragomir Milošević, Case No. IT-98-29/1 282

Prosecutor v. Mrkić, Radić and Šljivancanin, Case No. IT-95-13
    Review of Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence 36, 37, 47, 51
    Third Amended Indictment 260
    Trial Judgement 32, 36, 43, 44, 46, 47, 51, 54–56, 79, 83, 107, 228, 234, 236, 238–241, 272, 273, 331

Prosecutor v. Naletilić and Martinović, Case No. IT-98-34
    Decision on Defendant Vinko Martinović’s Objection to the Indictment 319, 323
xxii

Table of Authorities

Prosecutor v. Dragan Nikolić, Case No. IT-02-60 359–360, 361, 363
Prosecutor v. Momir Nikolić, Case No. IT-02-60 359, 361, 367
Prosecutor v. Plavić, Case No. IT-00-39 & 40 360, 384
Prosecutor v. Popović, Beara, Nikolić, Borovčanin, Miletić, Gvero, and Pandurević, Case No. IT-05-88
Indictment 186, 347
Decision on Further Amendments and Challenges to the Indictment 350
Prosecutor v. Šešelj, Case No. IT-03-67
Decision on the Interlocutory Appeal Concerning Jurisdiction 28, 33
Decision on Motion for Reconsideration of the Decision on the Interlocutory Appeal Concerning Jurisdiction Dated 31 August 2004 33, 37
Prosecutor v. Simić, Tadić, and Zarić, Case No. IT-95-9
Appeal Judgement 73, 77, 342, 366
Prosecutor v. Strugar, Case No. IT-01-42 267, 269–270, 348–349
Third Amended Indictment 260
Decision on Interlocutory Appeal 261
Decision on Strugar’s Request to Reopen Appeal Proceedings 349
Prosecution’s Addendum on Recent Case-Law Pursuant to Order of 23 August 2007 269
Prosecutor v. Tadić, Case No. IT-94-1
Table of Authorities

Decision on the Form of the Indictment 41, 320
Sentencing Judgement 294, 365
Appeal Judgement 32, 33, 36, 41, 42, 51–53, 55, 56, 163, 236, 244–248, 252, 253, 324
Judgement in Sentencing Appeals 141, 324, 366–365
Prosecutor v. Trbić, Case No. IT-94-1
Indictment 189, 351
Decision on Referral of Case Under Rule 11 bis with Confidential Annex 141–142, 189, 351, 363
Prosecutor v. Vasiljević, Case No. IT-98-32
Amended Indictment 288
Trial Judgement 50, 55, 61–64, 92, 100, 103, 117, 241, 272, 273, 289, 330, 331, 338

International Criminal Tribunal for Rwanda (ICTR) materials

Art. 2 156–157, 176–177, 210–212, 349–354
Prosecutor v. Akayesu, Case No. ICTR-96-4
Amended Indictment 257
Appeal Judgement 29, 34, 38, 115, 240, 242
Prosecutor v. Bagilishema, Case No. ICTR-95-1A
Amended Indictment 258
Prosecutor v. Bagosora, Kabiligi, Nsengiyumva and Ntabakuze, Case No. ICTR-98-41 (‘Military I Case’) 90, 231, 256, 258, 322
Prosecutor v. Gacumbitsi, Case No. ICTR-2001-64 87–88, 367–368
Trial Judgement 34, 35, 41, 52, 92, 157, 158, 161, 168, 180, 350
Appeal Judgement 37, 52, 53, 56, 64, 87, 88, 157, 160, 161, 367, 368
xxiv Table of Authorities

Prosecutor v. Kajelijeli, Case No. ICTR-98-44-A
Amended Indictment 258
Decision on Kajelijeli’s Motion for Partial Acquittal Pursuant to Rule 98 bis 232
Trial Judgement 34, 61, 62, 64, 92, 102, 103, 161, 171, 174–176, 189, 193, 350–352

Prosecutor v. Kambanda, Case No. ICTR-97-23
Trial/Sentencing Judgement 140, 141, 200, 352, 359, 363, 365, 366
Appeal Judgement 352

Prosecutor v. Kamuhanda, Case No. ICTR-99-54A 169
Indictment 258
Trial Judgement 61, 62, 64, 102, 169, 181, 232, 243, 256

Prosecutor v. Kayishema and Ruzindana, Case No. ICTR 95-1
Indictment 257
Appeal Judgement 158, 163

Prosecutor v. Mpambara, Case No. ICTR-01-65
Decision on the Defence Preliminary Motion Challenging the Amended
Indictment 322, 323
Trial Judgement 61, 157, 160, 168, 171

Prosecutor v. Musema, Case No. ICTR-96-13
Decision on the Prosecutor’s Request for Leave to Amend the Indictment 323
Amended Indictment 258
Appeal Judgement 321, 330, 331, 333, 345, 353

Prosecutor v. Muvunyi, Case No. ICTR-00-55A

Prosecutor v. Nahimana, Barayagwiza, and Ngeze, Case No. ICTR-96-11 (‘Media Case’)
Decision on the Prosecutor’s Request for Leave to File an Amended Indictment 279–280
Trial Judgement 61, 156, 180, 181, 189, 190, 192, 194–197, 200, 321, 353, 354
Table of Authorities

International Criminal Court (ICC) materials

Art. 6 198
Art. 7 104–110, 115
Art. 8 291–303
Assembly of States Parties to the Rome Statute of the International Criminal Court,
First Session: Official Records, Part II(B): Elements of Crimes 203
Prosecutor v. Lubanga, Case No. ICC-01/04-01/06 114, 302–303
Situation in Darfur, Sudan, Case No. ICC-02/05
Warrant of Arrest for Ahmad Harun 114
Warrant of Arrest for Ali Kushayb 114
Situation in the Democratic Republic of the Congo, Case No. ICC-01/04-01/07
Warrant of Arrest for Germain Katanga 114
Situation in Uganda, Case No. ICC-02/04-01/05
Warrant of Arrest for Joseph Kony 114

Special Court for Sierra Leone (SCSL) materials

Statute of the Special Court for Sierra Leone
Art. 2 115–120
Art. 3 304–310
Art. 4 304–310
Prosecutor v. Norman, Case No. SCSL-2004-14 304–305
Prosecutor v. Sesay, Kallon, and Gbao (‘RUF Case’), Case No. SCSL-2004-15 305
Prosecutor v. Taylor, Case No. SCSL-2003-01 116–117, 305

Special Panels for Serious Crimes (SPSC, East Timor) materials

Prosecutor v. Armando dos Santos, Case No. LI-07-99-SC 122–124

Extraordinary Chambers in the Courts of Cambodia (ECCC) materials

Co-Prosecutors v. Ieng Sary, Investigation No. 002/19-09-2007 131
Co-Prosecutors v. Ieng Thirith, Investigation No. 002/19-09-2007 131
Co-Prosecutors v. Kaing, Investigation No. 001/18-07-2007 131
Co-Prosecutors v. Nuon, Investigation No. 002/19-09-2007 131
Extraordinary Chambers in the Courts of Cambodia, Internal Rules, 12 June 2007 130
Extraordinary Chambers in the Courts of Cambodia, Statement of the Co-Prosecutors, 18 July 2007 209–210
Report of the Group of Experts for Cambodia Established Pursuant to General Assembly Resolution 52/135 130, 208, 312, 370–375, 377

Supreme Iraqi Criminal Tribunal (SICT) materials

Statute of the Supreme Iraqi Criminal Tribunal
   Art. 11 210–211
   Art. 12 132–133, 314–317
   ‘Anfal Case’ 136–137, 211–212, 316–317
   Appeal Judgement
   ‘Dujail Case’ 133–136, 211, 316, 375–379

Other international cases


National cases and legislation
Jorgić, Bundesgerichtshof, Case No. 3 StR 215/98, 30 April 1999 151, 188–191

Treaties and other international agreements
1948 Genocide Convention 6, 11–12, 26, 30, 53–54, 102, 139–144, 147–153, 149–150, 176–177
   Art. 2 139, 140, 142, 144–154, 156–157, 183–186
   Art. 3 139–140, 142, 144–146, 149, 157–173, 183, 186, 199–201
   Art. 9 149–150, 187
Convention Against Torture (CAT) 78, 81–82, 83–84
Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight, 11 December 1868 (‘St. Petersbourg Declaration’) 223–224, 251
Geneva Conventions
   1864 Convention 3, 223, 250–256
Table of Authorities

Common Article 3 43–44, 94–96, 100–101, 260–261
Convention I 224, 251–317
Convention II 224, 251
Convention III 45, 105, 224, 251–252
Convention IV 72, 144, 168–173, 252, 253–254
Additional Protocol I 3, 10, 44–45, 104, 285–286
Art. 50 44, 45, 46, 49–50, 51, 75–76, 97–99, 104
Hague Conventions 3, 10, 224–226, 256–257, 258–263
Martens Clause 16, 18–19
International Declaration Concerning the Laws and Customs of War, 27 August 1874 (‘Brussels Declaration’) 224, 254–255
Treaty of Peace Between the Allied and Associated Powers and Turkey (‘Treaty of Lausanne’), 24 July 1923, 28 LNTS 11 21, 22–26
Treaty of Peace Between the Allied and Associated Powers and Turkey (‘Treaty of Sèvres’), 10 August 1920, reprinted in (1921) AJIL Supp. 179 20–22
Treaty of Peace Between the Allied and Associated Powers and Germany, 28 June 1919, 226 Consol, T.S. 188 (‘Treaty of Versailles’) 20, 21

Other international and United Nations materials

1991 revised version 6–8, 9
1996 revised version 6–8, 9, 29–30, 31, 52, 57–60, 164, 170, 193
Draft Statute for an International Criminal Court 1991 revised version 6–8, 9
xxx

Table of Authorities

Statute of the International Court of Justice 3, 5

Selected secondary sources

Carl Philipp Gottlieb von Clausewitz, Total War (1832) 222, 239–243
Hugo Grotius, De jure belli ac pacis: libri tres (1625) 221, 236–239
<table>
<thead>
<tr>
<th>Table of Authorities</th>
<th>xxxi</th>
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<tbody>
<tr>
<td>Jean Pictet (ed.), <em>Commentary I Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field</em> (1952) 251</td>
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