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978-1-107-06772-1 - Interpreting Crimes in the Rome Statute of the International Criminal Court

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Excerpt

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Introduction

1.1 Introduction

Interpretation is central to the practice of law. Sometimes a legal victory or defeat turns on the meaning a judge attributes to a single word in a legal text. The stakes may be low or incredibly high. For example, the International Court of Justice (ICJ) in its *Genocide Decision* (2007) held that the killing of approximately 7,000 Muslim men in Srebrenica between 13 and 15 July 1995 was an act of genocide and that Serbia was responsible for failing to prevent and punish the individuals involved.¹ For conduct to qualify as genocide in a legal sense, the victim group must be protected by the *Convention on the Prevention and Punishment of the Crime of Genocide* (1948) (*Genocide Convention*).² Accordingly, the judges had to satisfy themselves that the victims formed whole or ‘part’ of a national, ethnical, racial or religious ‘group’.

The parties disputed inter alia whether the death of 7,000 Muslim men satisfied this element of the crime. Given the gravity of genocide, does the killing of 7,000 men result in the destruction of ‘part’ of a group? If the argument is that the number of people forming ‘part’ of the group is substantial in a quantitative sense, should this be assessed in absolute terms or relative to the size of the whole group? On this point, can ‘group’ be defined in geographically limited terms even if large diasporas of persons exist who share the same nationality, ethnicity, race or religion as the victim group? Ultimately, one important justification for the ICJ’s finding that genocide occurred in Srebrenica was its interpretation of the words ‘part’ and ‘group’.

Judges deciding cases at the International Criminal Court (Court) will be forced to engage in similar interpretive exercises. The difference is that their decisions will be used to justify findings of individual culpability for the most serious crimes of concern to the international community as a whole. Indeed, one judge of the International Criminal Tribunal for the former Yugoslavia

¹ *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia-Herzegovina v. Serbia and Montenegro)* Judgment (26 February 2007).

² 78 UNTS 277 (adopted 9 December 1948, entered into force 12 January 1951).

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(ICTY) described the task of interpreting the law as ‘both the most challenging and the most anxiety-ridden part of the job’.³ These decisions could lead to the imprisonment of individuals and the compensation of victims, contribute to or disturb transitional justice efforts in situation countries, influence the development of customary international law, encourage or dissuade Non-States Parties to join the Court and help to strengthen or undermine the Court’s legitimacy as an independent and impartial international judicial organ.

The Rome Statute has to date been ratified by 122 States Parties, thirteen of which have ratified the aggression amendments and sixteen the recently added crimes committed in the course of a non-international armed conflict. The Court is seized of situations in Uganda, the Democratic Republic of the Congo, Darfur (the Republic of the Sudan), the Central African Republic, Kenya, Libya and Cote d’Ivoire. It is investigating eight situations, conducting preliminary examinations of an additional eight, is considering the appeals of two cases, has acquitted one individual, has one ongoing trial, is scheduled to commence two more trials, has several cases that are at the pretrial stage and has twelve arrest warrants that remain outstanding, the oldest ones dating back to 2005 (e.g., Joseph Kony).⁴

Given that the Court is the world’s first permanent international criminal court, the legitimacy factor is a serious concern. As a young judicial body that only came into existence in 2004, it does not have the luxury of being able to rest on its laurels as an established and well-respected institution. Unlike domestic criminal courts, any missteps the Court might make will occur under the watchful gaze of those who thumb their noses at the international criminal justice enterprise and would welcome the Court’s failure. Unfortunately, judges do not currently have an agreed method for interpreting the more than ninety international crimes that fall within the Court’s jurisdiction. One of its strongest critics suggested that ‘the Court’s discretion ranges far beyond normal or acceptable judicial responsibilities, giving it broad and unacceptable powers of interpretation that are essentially political and legislative in nature’.⁵

The purpose of this book is to offer judges of the Court and counsel appearing before them a tool known as a ‘legal methodology’ for interpreting

³ PM Wald, Interview for The Third Branch (2002), www.uscourts.gov/News/TheThirdBranch/02-03-01/An_Interview_with_Judge_Patricia_Wald.aspx, accessed 23 April 2014.

⁴ Report of the International Criminal Court to the UN General Assembly (13 August 2013), UN Doc. A/68/314, 2, 4; The Global Campaign for Ratification and Implementation of the Kampala Amendments on the Crime of Aggression, ‘Status of Ratification and Implementation’, <http://crimeofaggression.info/the-role-of-states/status-of-ratification-and-implementation/>, accessed 23 April 2014.

⁵ JR Bolton, former Under Secretary for Arms Control and International Security, ‘The United States and the International Criminal Court’, Remarks to the Federalist Society in Washington, DC, 2002, www.iccnw.org/documents/USBoltonFedSociety14Nov02.pdf, accessed 2 November 2013.

the definitions of crimes that fall within the Court's jurisdiction. The Rome Statute of the International Criminal Court (Rome Statute or Statute) grants the Court jurisdiction to hear cases of genocide, other crimes against humanity, war crimes and, once States Parties activate the Court's jurisdiction for this crime not earlier than 2017, aggression.⁶ These crimes are currently defined in articles 6, 7, 8 and 8 *bis* of the Rome Statute.⁷ These provisions resemble a criminal code of sorts. Part III of the Statute sets out general principles of criminal law, and articles 55, 66 and 67 contain various due process guarantees for individuals. Other parts of the Rome Statute deal with diverse subject matter. For example, part IV is concerned with the composition and administration of the Court, part IX with international cooperation and judicial assistance, part X with enforcement and part XII with financing. A method of interpretation for these other parts of the Rome Statute might well differ from anything developed for crimes in the Rome Statute and be informed *inter alia* by international institutional law.

To understand the exact scope of this study and its import, this introductory Chapter will set out the following: (1) a working definition of interpretation; (2) sources of interpretive problems; (3) a working definition of legal methodology; (4) an explanation of the method for developing this methodology; (5) the practical benefits of this study; and (6) how to use this book.

1.2 Interpretation

In this section and the one that follows, a working definition of 'interpretation' will be introduced in three stages. First, the concept of operative interpretation will be defined. Second, this concept will be distinguished from gap filling and other judicial responsibilities. Finally, the line between operative interpretation and gap filling will be brought into sharper relief by introducing the reader to all of the interpretive problems that are covered by this study.

1.2.1 Operative interpretation

Every time a court publicly expresses its view on how a legal text should be construed, it engages in the act of interpretation.⁸ Recognizing that no universally accepted legal definition of interpretation exists, the following definition of 'operative interpretation' will be adopted in this study:

⁶ Article 5, Rome Statute for the Establishment of the International Criminal Court, 2187 UNTS 90 (adopted 17 July 1998, entered into force 1 July 2002).

⁷ See also First Review Conference of the Rome Statute, Official Records, Resolution on the Crime of Aggression (adopted 11 June 2010) RC/Res.6, www.icc-cpi.int/iccdocs/asp_docs/Resolutions/RC-Res.6-ENG.pdf, accessed 2 November 2013.

⁸ Z Bankowski, DN MacCormick, RS Summers and J Wróblewski, 'On Method and Methodology' in DN MacCormick and RS Summers (eds.), *Interpreting Statutes: A Comparative Study* (Ashgate 1991) 9, 12.

Interpretation in its narrow sense (*sensu stricto*) is a subclass of interpretation *sensu largo* and occurs where there are doubts in the understanding of a language when it is used, in a particular context, in an act of communication. . . . For example, if I say I will meet you at ten o'clock on Wednesday, you may experience doubt as to which Wednesday I mean (this Wednesday? next Wednesday?) and as to whether I mean ten in the morning or ten at night. However you resolve this doubt (and perhaps even if you do so by asking me for a clarification), you make an interpretive choice among possibilities which you view as conceivable but conflicting. . . . Such a choice among alternatives in a setting of real doubt or dispute is a case of interpretation *sensu stricto*.

Interpreting in this strict sense often occurs in law. A jurist preparing a commentary on some statute may find significant ambiguity in some of its provisions. The commentary should draw attention to these and should state a reasoned preference for one or other of the possible interpretations. Again, a legal adviser seeking to advise a client on, for example, the tax implications of some transaction or another may encounter doubt as to the meaning of the tax statute for this purpose. The giving of advice requires some resolution of this doubt. The citizen who receives a contractual offer through the post may notice an ambiguity and respond to the offer on the basis of the seemingly most reasonable interpretation in view. None of these instances of interpretation *sensu stricto*, however, is what we call 'operative interpretation'. That occurs only when there is an act of interpretation *sensu stricto* performed by a judicial or other tribunal for the purpose of making a binding legal decision in an actual trial or litigated controversy. That is, it takes place when a court or other legal tribunal has to determine the meaning of legal language in a way sufficiently precise to make a decision in the case and to provide a justification for the decision on the ground of the interpreted meaning of the provision in issue. Operative interpretation, then, occurs in the official application of law and is determined by the requirements of justified decision making in concrete cases.⁹

By adopting a narrow definition of interpretation, one that is limited to 'operative interpretation', it is important to be clear about what the present study does not address. This study does not concern itself with non-public interpretive processes experienced by judges prior to writing a decision. These processes are acknowledged by the author but set aside in favour of making public interpretive processes the subject of this study.¹⁰ Judgments from courts and tribunals are authoritative and binding on the parties to the dispute. They are read, reported and critiqued. But judges, like all people, cannot escape the fact that their understanding of words is informed by everything

⁹ Ibid. 12–13.

¹⁰ For a short discussion on the merits of concentrating on published written opinions as opposed to looking behind them in search of judges' real motives, see Bankowski and Others (n. 8) 16–18.

that is in their minds at the time of reading a text. This information comprises 'linguistic and social conventions which the reader has internalized and the broad range of cultural assumptions absorbed through family, school, religion, work and leisure activities like reading and watching television. It includes everything the reader knows or thinks she knows...' ¹¹ If one accepts that judges cannot avoid experiencing internal, subjective, interpretive processes, this entails the impossibility of any legal methodology on interpretation being able to fully guide them. This observation is not intended, however, to suggest that the non-public interpretive dialogue is very different from the public one that appears in judgments. What matters is how legal analysis on the construction of a treaty is disciplined by the formal requirement to provide public and legally compelling written reasons. Interpretive reasoning is not an internal psychological thought process but an exercise in 'competent legal argument'. ¹² This is one of the highest aspirations that those concerned with the rule of law can have. Indeed, these are reasons that must be able to withstand the scrutiny of appellate judges, lawyers, commentators and other interested parties.

Briefly, the Rome Statute expressly admits both the real possibility of interpretive problems arising as well as their judicial resolution. Article 9(1) provides that the Elements of Crimes shall assist judges in the 'interpretation and application of articles 6, 7, 8 and 8 *bis*'. Article 22(2) requires judges to strictly construe the definitions of crimes in the Rome Statute. It also prohibits judges from expanding the definitions of these crimes by analogy and states that in case of ambiguity, the definition of a crime 'shall be interpreted in favour of the person being investigated, prosecuted or convicted.' Article 21(3) requires judges to, above all else, interpret the Rome Statute consistent with internationally recognized human rights. In light of these express references to interpretation, it seems untenable to suggest that judges have not been tasked with interpreting the Rome Statute. While drafters of the Statute are to be commended for attempting to provide as much detail and clarity to the text as possible, they nevertheless anticipated interpretive issues arising and made provision for their judicial resolution.

Even if the Rome Statute contains these imperatives, does this logically entail that judges are required to provide public reasons every time they interpret the definitions of genocide, other crimes against humanity, war crimes and aggression? The better legal view suggests that it does. Interpretation is a major judicial function that the system admits, and judges are obliged to issue written

¹¹ R Sullivan, 'The Plain Meaning Rule and Other Ways to Cheat at Statutory Interpretation', <http://aix1.uottawa.ca/~resulliv/legdr/pmr.html>, accessed 5 November 2013.

¹² M Koskeniemi, 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law: Report of the Study Group of the International Law Commission' (4 April 2006), UN Doc. A/CN.4/L.682, 197.

decisions containing ‘full and reasoned’ statements of their conclusions.¹³ As well, both the prosecutor and the convicted individual have an automatic right to appeal alleged errors of law.¹⁴ A number of legal objections to an interpretive outcome could be raised, such as its inconsistency with a particular human right or its failure to favour the accused. All of this renders it likely that judges are obliged to provide reasons for their interpretation of crimes in the Statute. Even if one doubts the existence of a legal obligation in this regard, it is nevertheless good policy for the Court to provide reasons; it is young and in need of establishing its legitimacy among States Parties upon which it heavily relies for its successful operation.

To be clear, this study does not advance a utopic vision of how a methodology can assist with the task of interpretation. An attempt is made to constrain the interpretive choices available, but there is no denying that interpretation includes an essential discretionary creative or developmental component; laws rarely, if ever, have a single, clear meaning that a method of interpretation can simply discover. This study also does not assume that interpretation is the most decisive factor in all judicial decisions – other legal tasks or ascertaining the facts may be as or even more important in individual cases.¹⁵

1.2.2 *Interpretation versus gap filling*

In addition to excluding non-public interpretive processes, the narrow working definition of interpretation for this study must be distinguished from gap filling and other judicial tasks. In deciding a case, judges are expected to move through different stages of legal analysis that are often reflected in their decisions, including: statement of the issue(s); identification of potentially relevant provision(s) in the Rome Statute, Elements of Crimes and Rules of Procedure and Evidence; interpretation of these provisions; identification of outstanding legal issues not addressed by these instruments (gaps); resolution of these issues through the analysis of applicable law set out in article 21 of the Rome Statute (gap filling); identification of legally relevant facts; application of all relevant law to the facts; and statement of finding(s). The reasons in a judgment might not appear in the order presented or contain all of these stages. For example, if the Rome Statute adequately resolves an issue, there is no need to apply other law to the facts of a case. As well, a judgment will likely contain several non-reasoning components, such as statements describing the facts, the procedural background of a case or the arguments of the parties.

¹³ Article 74(5), Rome Statute. ¹⁴ Articles 81(1)(a)(iii), 81(1)(b)(iii), Rome Statute.

¹⁵ J Pauwelyn and M Elsig, ‘The Politics of Treaty Interpretation: Variations and Explanations Across International Tribunals’ (3 October 2011), 1, 5, <http://ssrn.com/abstract=1938618>, accessed 16 October 2013.

This study is concerned with only one of the aforementioned stages of reasoning: interpretation of crimes in the Rome Statute. While other stages of legal analysis may be characterised as interpretive *sensu largo* insofar as judges are explaining the meaning of the law, the word interpretation in this study is intended to capture the judicial function of giving meaning to words in the Rome Statute. Perhaps the hardest distinction to be drawn between the aforementioned stages of legal analysis is the task of interpreting the Rome Statute, maybe with the aid of applicable law set out in article 21 and the analysis and application of law set out in article 21 *directly* to the facts of a case – gap filling. The task of gap filling in the Rome regime has been usefully defined as follows:

[A] gap in the Statute may be defined as an “objective” which could be inferred from the context or the object and purpose of the Statute, an objective which would not be given effect by the express provisions of the Statute or the Rules of Procedure and Evidence, thus obliging the judge to resort to the second or third source of law – in that order – to give effect to that objective. In short, the subsidiary sources of law described in Article 21(1)(b) or (c) cannot be used just to add . . . to the Statute and the Rules of Procedure and Evidence.¹⁶

As can be seen from this definition, the line between interpreting the Rome Statute using an aid to interpretation, such as treaty or customary law, and directly applying treaty or custom to the facts of a case may be fine in some cases.¹⁷ One gap that ICTY judges have had to fill in their statute is determining whether duress is a defence to killing innocent human beings.¹⁸ The practical significance of the distinction between interpretation and gap filling can also be understood by considering which materials might aid each process. Article 21 provides:

1. The Court shall apply:

- (a) In the first place, this Statute, Elements of Crimes and its Rules of Procedure and Evidence;

¹⁶ G Bitti, ‘Article 21 of the Statute of the International Criminal Court and the Treatment of Sources of Law in the Jurisprudence of the ICC’ in C Stahn and G Sluiter (eds.), *The Emerging Practice of the International Criminal Court* (Brill 2009) 281, 295.

¹⁷ Consider, for example, the difficulty of interpreting article XX(1)(d) of the *Treaty of Amity, Economic Relations and Consular Rights between US and Iran* (1955), 284 UNTS 93 (adopted 15 August 1955, entered into force 16 June 1957), against the backdrop of customary law on the use of force in *Case Concerning Oil Platforms (Islamic Republic of Iran v. United States of America)* [2003] ICJ Rep. 161, especially the separate opinions of Judges Higgins, Buerghenthal and Kooijmans.

¹⁸ *Prosecutor v. Erdemović*, Judgment, ICTY-96-22-A, 7 October 1997.

- (b) In the second place, where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict;
 - (c) Failing that, general principles of law derived by the Court from national laws of legal systems of the world including, as appropriate, the national laws of States that would normally exercise jurisdiction over the crime, provided that those principles are not inconsistent with this Statute and with international law and internationally recognized norms and standards.
2. The Court may apply principles and rules of law as interpreted in its previous decisions.
 3. The application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights, and be without any adverse distinction founded on grounds such as gender as defined in article 7, paragraph 3, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status.

Whereas the task of gap filling is limited to applicable law set out in article 21 of the Rome Statute, interpretation might be aided by sources of law set out in article 21 but also by dictionary definitions, UN General Assembly resolutions, *obiter* statements contained in post-WWII jurisprudence, expert commentaries to relevant conventions and so on. Because some aids to interpretation are also applicable law for purposes of gap filling, any resulting confusion about the performance of these distinct legal tasks is understandable. At the very outset, the distinction requires one to not presume that the hierarchy of sources of law set out in article 21 is the same relationship that these sources of law will have to one another as aids to interpreting the Rome Statute. For example, whereas customary and treaty law must be analysed to fill a legal gap not adequately addressed by the Rome Statute, Elements of Crimes and Rules of Procedure and Evidence, their roles as interpretive aids might be more or less prominent.

1.3 Sources of interpretive problems

Thus far, interpretation has been defined as the public or external expression by judges of how the Rome Statute is to be construed. As well, interpretation has been distinguished from the judicial task of filling gaps in the Rome Statute. However, these elaborations only take us so far. It remains unclear which types of issues necessitate interpreting the Rome Statute. For example, is a judicial statement about the relationship between the Rome Statute and the

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1.3 SOURCES OF INTERPRETIVE PROBLEMS

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four *Geneva Conventions on the Laws of War* (1949)¹⁹ (*Geneva Conventions*) an act of interpretation or gap filling? What about a judicial statement on so-called ‘unstated assumptions’ underlying the Rome Statute?

Before it is possible to develop a legal methodology on how to interpret the crimes in the Rome Statute, it is necessary to understand which legal issues are considered interpretive for the purposes of this study. After all, it is precisely these problems that this study seeks to address. The definition of operative interpretation was coined by Jerzy Wróblewski. He was a member of the ‘Bielefelder Kreis’, an academic group that carried out a landmark comparative study of the interpretive practices of appellate courts in nine countries.²⁰ In the course of their study, Robert Summers, another member of the group, identified several common sources of interpretive problems. As will be seen, these sources also exist at the international level.

Judges of the International Criminal Tribunals for the former Yugoslavia and Rwanda (ICTY and ICTR respectively) have had the unenviable task of resolving a huge number of interpretive problems over the years in the absence of any guidance from their constitutive statutes.²¹ At first blush, this jurisprudence appears to comprise a random universe of single and unique interpretive instances. However, a careful examination of these decisions renders discernable the same sources of interpretive problems that Summers identified. It is anticipated that judges of the Court will be similarly challenged.

The following sources of interpretive problems, which are not necessarily mutually exclusive, are introduced below: (1) linguistic issues; (2) background principles; (3) internal structure; (4) inadequate design; (5) value conflicts; (6) methodology; (7) special features of the case; (8) drafting errors; (9) inherent indefiniteness; (10) Elements of Crimes; (11) inter-treaty relationships; (12) the relationship between a constitutive statute or treaty and customary international law; and (13) subsequent agreements, practice and law.²² The final four

¹⁹ *Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, 75 UNTS 31; *Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*, 75 UNTS 85; *Convention (III) relative to the Treatment of Prisoners of War*, 75 UNTS 135; *Convention (IV) relative to the Protection of Civilian Persons in Time of War*, 75 UNTS 287 (all adopted 12 August 1949, all entered into force 2 October 1950).

²⁰ Bankowski and Others (n. 8). Nine countries were studied: Argentina, Germany, Finland, France, Italy, Poland, Sweden, United Kingdom and the United States.

²¹ ICTY statute, annexed to UNSC Res. 827 (25 May 1993, as amended); ICTR statute, annexed to UNSC Res. 955 (8 November 1994, as amended).

²² Several but not all of these interpretive issues take their inspiration from those identified in RS Summers, ‘Statutory Interpretation in the United States’ in DN McCormick and RS Summers (eds.), *Interpreting Statutes: A Comparative Study* (Ashgate 1991) 407, 408–11.

interpretive problems may be understood more generally as problems arising from interpretive aids.

1.3.1 Linguistic

Linguistic interpretive issues encompass syntactical²³ ambiguities in respect of ordinary words or sentences.²⁴ In these situations, judges must choose which ordinary (and there may be more than one), standard technical (legal or non-legal) or special (non-standard) meaning should be ascribed to a statutory (or treaty) term.²⁵ This category of interpretive issues also encompasses problems of vagueness,²⁶ generality and deciding what meaning to attribute to evaluative words.²⁷ The crimes of genocide and other crimes against humanity illustrate this point.

Article 4 of the ICTY statute and article 2 of the ICTR statute respectively define these tribunals' jurisdiction over the crime of genocide. These definitions are identical to one another and were taken from the *Genocide Convention* (1948). Numerous linguistic interpretive problems have arisen from this definition. In particular, judges have struggled to interpret what it means to 'destroy, in whole or in part, the group *as such*'.²⁸ Equally difficult was deciding whether to define the targeted 'group' positively or negatively²⁹ and how to define 'part' of the group.³⁰ There was also some confusion about whether a crime as grave as genocide committed by 'killing' required proof of intent to kill. The prosecutor argued that whereas '*meutre*' means deliberate homicide in French, the

²³ Syntax means: (1) 'orderly or systematic arrangement of parts or elements; constitution (of body); a connected order or system of things'; and (2) 'The order and arrangement of the words or symbols forming a logical sentence; the rules operating in formal systems.' Syntactical means 'belonging or relating to grammatical syntax.' Oxford English Dictionary, 2nd edn (Oxford University Press 1989).

²⁴ Summers (n. 22) 408. ²⁵ Ibid.

²⁶ A famous hypothetical of vagueness in a statute is repeated *ibid.* 409: "No vehicles may be taken into the park." Borderline cases can easily be imagined here: a military jeep no longer in running condition which is placed on a pedestal in the park as a war memorial; a toy airplane with a motor for flight subject to remote control from the ground; a motorized wheelchair; a horse; roller skates; a pram.'

²⁷ Evaluation means: (1) 'The action of appraising or valuing (goods, etc.); a calculation or statement of value;' or (2) 'The action of evaluating or determining the value of (a mathematical expression, a physical quantity, etc.), or of estimating the force of (probabilities, evidence, etc.).' Evaluative means: 'Of, pertaining to, or tending to evaluation; appraisive, estimative.' Oxford English Dictionary (n. 23).

²⁸ *Prosecutor v. Jelisić*, Judgment, ICTY-95-10-T, 14 December 1999, paras. 78ff. (emphasis added); *Prosecutor v. Blagojević and Others*, Judgment, ICTY-02-60-T, 17 January 2005, para. 665.

²⁹ *Prosecutor v. Stakić*, Judgment, ICTY-97-24-A, 22 March 2006, paras. 12ff.

³⁰ See, e.g., *Prosecutor v. Krstić*, Judgment, ICTY-98-33-A, 19 April 2004, paras. 6ff.; *Blagojević* (n. 28) para. 668.