

CONTENTS

<i>Preface</i>	vii
<i>Table of international cases</i>	xxiii
<i>Table of domestic cases</i>	xxxv
<i>Abbreviations:</i>	
<i>Leading tribunal judgments and decisions</i>	xxxvii
<i>Other frequently cited sources</i>	xlii
<i>Acronyms and initialisms</i>	xlvii

PART I INTRODUCTION TO THE TRIBUNALS AND INTERNATIONAL CRIMINAL LAW

1	INTERNATIONAL CRIMINAL TRIBUNALS: NEW FACES IN THE INTERNATIONAL LEGAL ORDER	3
1.1	Introduction	4
1.2	Establishment of international criminal tribunals	4
1.2.1	International Military Tribunal at Nuremberg and International Military Tribunal for the Far East	4
1.2.2	International Criminal Tribunal for the Former Yugoslavia and International Criminal Tribunal for Rwanda	6
1.2.3	International Criminal Court	11
1.2.4	Recent additions: 'internationalized' criminal tribunals	11
1.3	International legal personality	14
1.3.1	Incidence	14
1.3.2	Consequences: applicable law	15
1.4	Structure and powers	18
1.4.1	Internal organization	18
1.4.2	Attributed powers	20
1.4.3	Implied and inherent powers	21
1.5	Privileges and immunities	25
1.5.1	Applicable law	25
1.5.2	Content and scope	27

1.6	Relationship to other subjects of international law	28
1.6.1	States	28
1.6.2	United Nations and other international organizations	32
1.6.3	Other international courts	33
1.7	Conclusion	34
<hr/>		
2	PARTICIPANTS IN INTERNATIONAL CRIMINAL PROCEEDINGS	36
2.1	Introduction	36
2.2	Organization of international criminal proceedings	37
2.3	Judicial branch	46
2.4	Prosecutor	54
2.5	Defence	60
2.6	Registrar	69
2.7	Victims	70
2.7.1	Introductory remarks	70
2.7.2	Victims as witnesses	71
2.7.3	Power to initiate and/or join investigations and prosecutions	73
2.7.4	Victim participation in criminal proceedings	74
2.7.5	Victims submitting reparatory claims	76
2.8	Conclusion	78
<hr/>		
3	'CUSTOM' AND OTHER SOURCES OF SUBSTANTIVE INTERNATIONAL CRIMINAL LAW	79
3.1	Introduction	79
3.2	The uncertain insistence on customary international law	80
3.3	The battle over sources at the ICTY	88
3.4	Methods of discovery or methods of creation?	92
3.5	Conclusion	105
<hr/>		
PART II CRITICAL REVIEW OF THE SUBSTANTIVE LAW		
4	WAR-CRIMES LAW IN THE NEW CENTURY	109
4.1	Introduction: carte blanche	110
4.2	Common Article 3 offences	113

4.2.1	A law unto itself	113
4.2.2	General requirements	118
4.2.3	'Violence to life and person'	121
4.2.4	Murder	122
4.2.5	Cruel treatment and torture	123
4.2.6	'Outrages upon personal dignity' including rape	128
4.2.7	Taking of hostages	134
4.3	Residual categories of war crimes	134
4.3.1	Introduction	134
4.3.2	Attack on civilians	136
4.3.3	Terror	140
4.3.4	Unlawful labour	145
4.3.5	Slavery	145
4.3.6	Plunder of public or private property	145
4.3.7	Attack on civilian objects	148
4.3.8	Wanton destruction or devastation not justified by military necessity	149
4.3.9	Destruction or wilful damage to institutions dedicated to religion or education	151
4.4	Grave breaches of Geneva law in international armed conflict	152
4.5	Conclusion	154
5	GENOCIDE LAW: AN EDUCATION IN SENTIMENTALISM	155
5.1	Introduction	156
5.2	<i>Akayesu</i> and its influence	157
5.2.1	The problem of the group	158
5.2.2	Genocide's 'special' intent	163
5.2.3	Determination of intent against a backdrop of genocide	164
5.2.4	Complicity in genocide contrasted with aiding and abetting	165
5.2.5	Direct and public incitement to commit genocide	167
5.2.6	Rape as genocide	170
5.3	Post- <i>Akayesu</i> developments and problems	172
5.3.1	Proving the intent of genocide: a wider plan	173
5.3.2	Meaning of 'in whole or in part'	175
5.3.3	Motive, and the meaning of 'as such'	179
5.3.4	Complicity in genocide on appeal	181
5.3.5	Conspiracy to commit genocide	183
5.3.6	Direct and public incitement revisited	185
5.4	Conclusion	196

6	RISE TO PROMINENCE OF CRIMES AGAINST HUMANITY AND CODIFICATION OF 'ETHNIC CLEANSING'	197
6.1	Introduction	197
6.2	The early decisions	199
6.3	Constraints in the manner of perpetration	204
6.3.1	When committed in armed conflict	204
6.3.2	Directed against any civilian population	205
6.3.3	Widespread or systematic attack	209
6.4	Mens rea elements	210
6.5	Persecution and ethnic cleansing	211
6.6	Extermination	216
6.7	Deportation and forced transfer	217
6.8	Conclusion	218
7	FACETS OF PERSONAL LIABILITY FOR PARTICIPATION IN CRIMES	219
7.1	Introduction	219
7.2	Joint criminal enterprise	221
7.2.1	Differential utilization at ICTY and ICTR	221
7.2.2	Origins of the JCE doctrine	223
7.2.3	The outer limits of liability	230
7.2.4	The 'plurality' of a joint criminal enterprise	233
7.2.5	Application of the JCE doctrine	234
7.2.6	JCE doctrine at the brink	244
7.2.7	'The most appropriate mode of liability': JCE in the <i>Krajišnik</i> case	255
7.3	Command responsibility	257
7.3.1	Statutory provisions	258
7.3.2	The neglected element of duty	258
7.3.3	The superior–subordinate relationship	261
7.3.4	Application to non-military superiors	264
7.3.5	The knowledge element	267
7.3.6	Failure to prevent or punish	268
7.3.7	Erroneous decisions involving command responsibility	269
7.3.8	Conclusions on command responsibility	271

PART III PROCEDURE, EVIDENCE, AND DEFENCES

8	DUE PROCESS AND HUMAN RIGHTS	275
8.1	Introduction	275
8.2	Applicability of human rights standards	276
8.3	Scope of application	281
8.4	Habeas corpus rights	286
8.4.1	Pre-trial detention	286
8.4.2	Unlawful arrest	289
8.5	Fair trial rights	292
8.5.1	Right to a fair trial in general	293
8.5.2	Right to an independent and impartial tribunal	295
8.5.3	Right to be tried within a reasonable time	300
8.5.4	Right to be presumed innocent, and the privilege against self-incrimination	302
8.5.5	Right to be informed of the charges	307
8.5.6	Right to adequate time and facilities	308
8.5.7	Right to counsel or to defend oneself in person	309
8.5.8	Right to examine witnesses	314
8.5.9	Right to appeal	315
8.5.10	Right to compensation for wrongful arrest or conviction	316
8.5.11	Protection against double jeopardy	317
8.6	Rights of detained persons	319
8.7	Conclusion	321
9	LITIGATION LANDMARKS IN THE PREPARATION AND CONDUCT OF TRIALS	323
9.1	Introduction	323
9.2	Matters of jurisdiction	325
9.3	Improving the indictment	336
9.4	Provisional release	340
9.5	Evidence in lieu of oral testimony	341
9.6	Conclusion	348

10	EVIDENCE IN INTERNATIONAL CRIMINAL PROCEEDINGS	349
10.1	Introduction	350
10.2	Origin and development of the law of evidence: squaring inquisitorial law of evidence in an adversarial system	351
10.3	Which facts require proof?	356
10.4	Burden of proof	360
10.5	Collection of evidence	363
10.5.1	Equal distribution of powers to collect evidence	364
10.5.2	The need for judicial intervention	367
10.5.3	Compelling the appearance of witnesses	368
10.6	Presentation of evidence	372
10.6.1	Pre-trial disclosure	373
10.6.2	The principle of orality and cross-examination	375
10.7	Admission of evidence	378
10.7.1	Exclusionary rules in international criminal proceedings	379
10.7.2	Mandatory exclusion	380
10.7.3	Discretionary exclusion to ensure a fair trial	382
10.7.4	Exclusion of evidence lacking relevance and probative value	383
10.7.5	Special regime: the admission of written statements	387
10.8	Standard of proof/evaluation of evidence	391
10.8.1	Proof beyond a reasonable doubt	391
10.8.2	Minimum standards of evidence	392
10.8.3	Weight of evidence	393
10.9	Conclusion	394
11	DEFENCE PRACTICE AT THE INTERNATIONAL TRIBUNALS	395
11.1	Introduction	396
11.2	<i>In dubio mitius</i> and <i>nullum crimen sine lege</i> defences	397
11.3	<i>In dubio pro reo</i> and non-proof of elements of crimes	399
11.4	Uncorroborated, unreliable, or incredible witness testimony	407
11.5	Non-production of physical or documentary evidence	414
11.6	Invalid inferences from circumstantial evidence	417
11.7	Relativizing conduct to extreme circumstances and the defence of good character	419
11.8	Alibi, impossibility, and mistaken identity	423

11.9	Superior orders	425
11.10	Duress and force of circumstances (necessity)	426
11.11	Military necessity	430
11.12	Self-defence, provocation, reprisals, and the defence of reciprocity or <i>tu quoque</i>	433
11.13	Diminished mental responsibility	437
11.14	Plea of insanity	440
11.15	Politically motivated, ostentatious, or injudicious prosecution	441
11.16	Conclusion	443

**PART IV TRIBUNAL—STATE INTERACTIONS:
COORDINATION AND IMPACT**

12	RELATIONS WITH NATIONAL JURISDICTIONS	447
12.1	Introduction	447
12.2	Concurrent jurisdiction: primacy and complementarity	448
12.2.1	General remarks	448
12.2.2	Primacy: the ICTR, the ICTY, and the SCSL	450
12.2.3	Complementarity: the ICC	455
12.3	Cooperation with international criminal tribunals	456
12.3.1	Introductory remarks	456
12.3.2	Jurisprudential developments	458
12.3.3	Distinctive features of the vertical cooperation model	459
12.3.4	Duty to cooperate under international law	462
12.3.5	Enforcement of the duty to cooperate	472
12.4	Authority of final judgments: <i>ne bis in idem</i>	476
12.5	Conclusion	480
13	INTERNATIONAL CRIMINAL LAW AND THE DOMESTIC LEGAL ORDER: THE NATIONAL APPLICATION OF INTERNATIONAL CRIMINAL LAW	482
13.1	Introduction	482
13.2	National practices: an overview	484
13.3	The present stage: the effect of the ICC's principle of complementarity	488

13.4	International norms as domestic crimes: some observations on direct effect, over-inclusion, and under-inclusion	490
13.5	The question of universal jurisdiction	496
13.6	Immunities under international law as a bar to the application of international criminal law	503
13.7	The national application of some general principles of international criminal law	508
13.7.1	Command responsibility	508
13.7.2	Defences: the extent of availability of superior orders	512
13.7.3	The non-applicability of statutes of limitations	516
13.8	Conclusion	519
	<i>Index</i>	521