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Antonio Cassese, Guido Acquaviva,
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INTERNATIONAL CRIMINAL LAW: CASES AND COMMENTARY

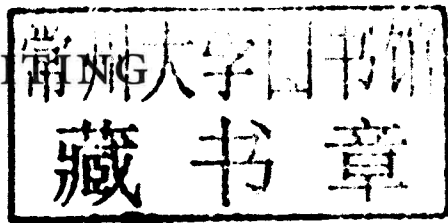
ANTONIO CASSESE

GUIDO ACQUAVIVA

MARY FAN

AND

ALEX WHITING



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PREFACE

This casebook is intended to offer a *concise and comprehensive* practice-oriented explanation of the development of major areas in substantive international criminal law through a selection of key illustrative cases from domestic and international jurisdictions. The focus is on the law related to individual criminal liability for war crimes, crimes against humanity, genocide, aggression, and the emerging practice on torture (as a discrete international crime) and terrorism, as well as the old and new practice relating to piracy. In the choice of cases, specific emphasis has been laid on fundamental principles of criminal responsibility as well as modes of international responsibility and defences. The casebook also briefly examines the interaction among domestic legal systems and between these systems and international courts or tribunals, including questions of primacy, complementarity, State cooperation, arrest or surrender, as well as some salient facets of international criminal procedural law.

Our purpose is not only to offer these decisions for discussion, but also to provide our readers with the conceptual tools for critically appraising them. This approach, we believe, is dictated by the very nature of international criminal law which results from the convergence of two different legal practices and traditions: that of common law countries and that of civil law States. Like the common law tradition, international criminal law relies heavily on case law and judicial precedent. Because of the paucity of national or international legal texts on international crimes, national and also international judicial decisions are at the origin of the gradual development of international criminal law and have potentially contributed to making it a fully fledged body of criminal law. Hence their crucial importance. Also like the civil law tradition (particularly that bearing the imprint of the German school of thought), international criminal law has gradually built a set of rigorous legal constructs in an effort to conceptualize disparate trends in the case law. This tendency has been strengthened first by the important and ground-breaking case law of the International Criminal Tribunals for Yugoslavia (ICTY) and Rwanda (ICTR) (from 1995 onwards) and then by the adoption (in 1998) and the current application of the Statute of the International Criminal Court (ICC). The drafters of this Statute have for the first time laid down in a written text notions and concepts of criminal law that are spelled out in a rigorous manner and set forth within a logically stringent general structure.

Consistent with these characteristics of international criminal law and in order to reflect the unique nature of this body of law, we offer, in addition to the relevant case law, general introductions to each of the five Parts of this volume, with a view both to laying out the major problems arising in that area and to providing the theoretical background necessary for putting those issues in their proper perspective. In addition, each chapter or section relating to a set of judicial decisions is preceded by a historical and conceptual survey, which should help as an introduction to the reading of the cases reported.

To make the casebook a useful teaching instrument, we have also expounded (i) the circumstances of the most important cases cited, adding after the decision, where warranted, (ii) a commentary on its importance, with cross-references to other relevant decisions on similar issues, plus (iii) questions for discussion and (iv) a short list of references to scholarly articles and books on the issues raised in the decision.

The casebook is intended to provide a truly international perspective, with excerpts from decisions rendered by national courts of various countries (USA, Canada, France,

UK, Japan, Belgium, Lebanon, Germany, Italy, Kenya, Netherlands, Israel, and others), as well as judgments handed down by international or 'mixed' tribunals (Nuremberg and the World War II tribunals, ICTY, ICTR, ICC, SCSL, ECCC, STL, SPSC). Most of these decisions, though not all, are from criminal courts. Thus, the casebook offers a number of hard-to-find decisions (or decisions existing only in languages other than English) which are highly relevant for the present and future development of international criminal justice as well as the most important international judgments on the matter. Relevant decisions or reports by the ICJ, the ECtHR and other bodies are also offered to enhance the understanding of the various issues presented.

Of course, not all the cases excerpted in this casebook remain 'good law'. Alas, development of international criminal law through cases requires judicious discerning of the developments of the law, which is why we added questions and commentaries to prompt reflection and discussion in the classroom. Readers particularly interested in these cases, their background and their rationale, may refer to the *Oxford Companion to International Criminal Justice* (2009), which provides short summaries of most of them as well as cross-references to related entries.

The views expressed in this book are those of the authors and do not necessarily reflect the views of the institutions with which they are, or have been, affiliated.

While the co-authors have worked jointly on this volume, retrieving material and discussing many issues, A. Cassese drafted the introductions to each Part, and the sections on General Principles of Law, Necessity, Mistake of Fact, Mistake of Law, and Mental Disorder; G. Acquaviva drafted the sections on International Custom and the Value of Precedents, Treaties and Instruments Establishing International Tribunals, International Criminal Law and Human Rights, Immunities, War Crimes, Terrorism, Joint Criminal Enterprise, Co-Perpetration, Self-Defence, Superior Orders, Duress, and Tu Quoque; M. Fan drafted the sections on Nullum Crimen Sine Lege (Legality), Ne Bis In Idem, Genocide, Torture, Commission, Incitement to Commit Genocide, Ordering, and Superior Responsibility; A. Whiting drafted the sections on Crimes Against Humanity, Aggression, Piracy, Planning, and Aiding and Abetting, as well as Part V.

Each of the authors has benefited greatly from comments and suggestions from the others. When not otherwise indicated, translations of the cases excerpted in this volume were provided by the authors.

The format of decisions and judgments excerpted in this volume, especially those first issued in languages other than English, does not always correspond to the original version.

a.c., g.a., m.d.f., a.w.

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We further acknowledge the ECtHR, ICJ, ICTY, ICTR, ICC, STL, ECCC, SCSL, SPSC as sources of the judgments and decisions excerpted in the volume.

LIST OF COMMON ABBREVIATIONS

| | |
|--|--|
| ABiH | <i>Armija Bosne i Hercegovine</i> – Army of Bosnia-Herzegovina [former Yugoslavia] |
| ACHR | American Convention on Human Rights |
| ACHPR | African Charter on Human and Peoples' Rights |
| Additional Protocol I | Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977 |
| Additional Protocol II | Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977 |
| AFRC | Armed Forces Revolutionary Council [Sierra Leone] |
| ARK | <i>Autonomna Regija Krajina</i> – Autonomous Region of Krajina [former Yugoslavia] |
| ASP | Assembly of State Parties [ICC] |
| ATCA | Alien Torts Claims Act [US] |
| Cassese, <i>International Criminal Law</i> | A. Cassese, <i>International Criminal Law</i> (2nd edn, Oxford: OUP, 2008) |
| C.C. Law 10 | Control Council Law Number 10 [World War II cases] |
| CDF | Civil Defence Force [Rwanda] |
| CERD | International Convention on the Elimination of All Forms of Racial Discrimination |
| CRC | Convention on the Rights of the Child |
| DRC | Democratic Republic of the Congo |
| ECCC | Extraordinary Chambers in the Courts of Cambodia |
| ECHR | European Convention on Human Rights |
| ECMM | European Community Monitor Mission |
| ECtHR | European Court of Human Rights |
| <i>Einsatzgruppen case</i> | <i>United States v. Ohlendorf et al.</i> , 10 April 1948, in TWC, vol. 4, at 411 |
| EJIL | European Journal of International Law |
| ESCOR | Economic and Social Council Official Records |
| ETS | European Treaty Series |
| Fletcher, <i>Rethinking Criminal Law</i> | G. Fletcher, <i>Rethinking Criminal Law</i> (Boston and Toronto: OUP, 2000) |

| | |
|--------------------------|--|
| FPLC | <i>Forces patriotiques pour la libération du Congo</i> – Patriotic Forces for the Liberation of Congo [DRC] |
| FRY | Federal Republic of Yugoslavia |
| GCIII Commentary | J. de Preux (ed.), <i>Commentary: III Geneva Convention Relative to the Treatment of Prisoners of War</i> (Geneva: ICRC, 1960) |
| GCIV Commentary | J. Pictet (ed.), <i>Commentary: IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War</i> (Geneva: ICRC, 1958) |
| Geneva Convention I | Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Geneva, 12 August 1949 |
| Geneva Convention II | Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Geneva, 12 August 1949 |
| Geneva Convention III | Convention (III) relative to the Treatment of Prisoners of War, Geneva, 12 August 1949 |
| Geneva Convention IV | Convention (IV) relative to the Protection of Civilian Persons in Time of War, Geneva, 12 August 1949 |
| Hague Convention of 1899 | Convention (II) with Respect to the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, The Hague, 29 July 1899 |
| Hague Convention of 1907 | Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, The Hague, 18 October 1907 |
| HVO | <i>Hrvatsko vijeće obrane</i> – Bosnian Croat forces [former Yugoslavia] |
| IAD | Immigration and Refugee Board (Canada) (Abbreviation used in <i>Mugesera v. Canada (Minister of Citizenship and Immigration)</i> , Judgment of 28 June 2005) |
| ICC | International Criminal Court |
| ICCSt. | Statute of the International Criminal Court |
| ICCPR | International Covenant on Civil and Political Rights |
| ICJ | International Court of Justice |
| ICRC Commentary | Sandoz <i>et al.</i> (eds), <i>Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949</i> (Geneva: ICRC, 1987) |
| ICRC Study | J.-M. Henckaerts and L. Doswald-Beck, <i>Customary International Humanitarian Law</i> (Cambridge: ICRC, Cambridge University Press, 2005), vol. 1 |
| ICTR | International Criminal Tribunal for Rwanda |
| ICTRSt. | Statute of the International Criminal Tribunal for Rwanda |

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|-------------------------|--|
| ICTY | International Criminal Tribunal for the Former Yugoslavia |
| ICTYSt. | Statute of the International Criminal Tribunal for the Former Yugoslavia |
| IFOR | Implementation Force [former Yugoslavia] |
| IMT | International Military Tribunal at Nüremberg |
| IMTFE | International Military Tribunal for the Far East |
| JAG | Judge Advocate General |
| JCE | Joint Criminal Enterprise |
| JICJ | Journal of International Criminal Justice |
| JNA | Jugoslovenska Narodna Armija – Yugoslav People’s Army |
| Justice case | <i>United States v. Josef Altstötter et al.</i> , 3–4 December 1947, in TWC, vol. 3, at 954. |
| KLA | Kosovo Liberation Army [former Yugoslavia] |
| LJIL | Leiden Journal of International Law |
| LRA | Lord’s Resistance Army [Uganda] |
| McGill L.J. | McGill Law Journal |
| MuP | <i>Ministarstvo Unutrašnjih Poslova</i> – Ministry of Internal Affairs (Police) [former Yugoslavia] |
| Nuremberg Charter | London Charter of the International Military Tribunal |
| OG | Operations Group, an abbreviation used in cases stemming from the Bosnian Conflict [former Yugoslavia] |
| OTP | Office of the Prosecutor |
| <i>Oxford Companion</i> | A. Cassese (ed.), <i>Oxford Companion to International Criminal Justice</i> (Oxford: OUP, 2009) |
| POW | Prisoner of War |
| RPE | Rules of Procedure and Evidence |
| RUF | Revolutionary United Front [Sierra Leone] |
| RSK | <i>Republika Srpska Krajina</i> – Republic of Serbian Krajina [former Yugoslavia] |
| RTLM | <i>Radio Télévision Libres des Mille Collines</i> [Rwanda] |
| RUF | Revolutionary United Front [Rwanda] |
| RuSHA | <i>Rasse- und Siedlungshauptamt-SS</i> – SS Race and Resettlement Office [World War II cases] |
| RuSHA case | <i>US v. Greifelt et al.</i> , 10 March 1948, in TWC, vol. 5, at 88. |
| SA | <i>Sturmabteilung</i> – Storm Division or Stormtroopers or Brownshirts [World War II cases] |
| SAO | <i>Srpska Autonomna Oblast</i> – Serb Autonomous District [former Yugoslavia] |
| SCSL | Special Court for Sierra Leone |
| SFOR | Stabilisation Force [former Yugoslavia] |

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| SIPO-SD | <i>Sicherheitspolizei-Sicherheitsdienst</i> – German State and National Socialist police [World War II cases] |
| SPSC | Special Panels for Serious Crimes [East Timor] |
| SRK | <i>Sarajevo-Romanija Korpus</i> – Sarajevo-Romanija Corps of the VRS [former Yugoslavia] |
| SS | <i>Schutzstaffel</i> – Paramilitary force under Adolf Hitler's control [World War II cases] |
| STL | Special Tribunal for Lebanon |
| SUA | Suppression of Unlawful Acts Against the Safety of Maritime Navigation |
| TO | <i>Teritorijalna odbrana</i> – Territorial Defence [former Yugoslavia] |
| TWC | <i>Trials of War Criminals before the Nürnberg Military Tribunals under Control Council Law no. 10</i> , 12 vols (Washington, DC: US Govt Printing Office, 1950) |
| UDHR | Universal Declaration of Human Rights |
| UN | United Nations |
| UNCLOS | United Nations Convention on the Law of the Sea |
| UNGA | United Nations General Assembly |
| UNICEF | United Nations Children's Fund |
| UNPROFOR | United Nations Protection Force [former Yugoslavia] |
| UNSC | United Nations Security Council |
| UNTAES | United Nations Transitional Administration for Eastern Slavonia, Baranja and Western Sirmium [former Yugoslavia] |
| UNTS | United Nations Treaty Series |
| UNWCC | United Nations War Crimes Commission |
| UPC | <i>Union des Patriotes Congolais</i> – Union of Congolese Patriots [DRC] |
| USC (also, U.S.C.) | United States Code |
| USCA | United States Code Annotated |
| VRS | <i>Vojska Srpske Republike Bosne i Hercegovine</i> , later <i>Vojska Republike Srpske</i> – Army of the Bosnian-Serb Republic [former Yugoslavia] |
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