
TABLE OF CONTENTS

| | |
|------------------------------------|-------|
| PREFACE TO THE FOURTH EDITION..... | V |
| ACKNOWLEDGMENTS..... | XI |
| TABLE OF CASES..... | XXXIX |
| LIST OF MAPS..... | XLIII |

PART I. INTRODUCTION

| | |
|--|----------|
| Chapter 1. What Is International Criminal Law?..... | 5 |
| I. Introduction..... | 5 |
| II. Transitional Justice Mechanisms..... | 5 |
| Ivan Šimonović, Attitudes and Types of Reaction Toward Past War Crimes and Human Rights Abuses, 29 YALE J. INT'L L. 343 (2004)..... | 5 |
| Notes & Questions..... | 12 |
| 1. Confronting the Past..... | 12 |
| 2. Spain..... | 12 |
| 3. Simple v. Complex Transitions..... | 13 |
| 4. Truth Commissions..... | 13 |
| 5. Kenya..... | 14 |
| 6. A Truth Commission for US Torture?..... | 16 |
| 7. <i>Gacaca</i> Courts..... | 17 |
| 8. Lustration..... | 18 |
| III. The Purposes of the Criminal Law..... | 19 |
| Miriam J. Aukerman, Extraordinary Evil, Ordinary Crime: A Framework for Understanding Transitional Justice, 15 HARV. HUM. RTS. J. 39 (2002)..... | 19 |
| Notes & Questions..... | 24 |
| 1. Criminal Trials..... | 24 |
| 2. Duty to Prosecute..... | 24 |
| 3. Deterrence..... | 26 |
| 4. Deterrence in Practice: The Sudan..... | 29 |
| 5. Creating an Historical Record..... | 30 |
| 6. Preventing Atrocities..... | 30 |
| 7. For Further Reading..... | 31 |
| Problem..... | 31 |

PART II. JURISDICTION

| | |
|---|-----------|
| Chapter 2. International Jurisdiction..... | 37 |
| I. Introduction..... | 37 |
| II. The World War II International Military Tribunals..... | 38 |
| Robert H. Jackson, Chief of Counsel for the United States, Nuremberg Germany, November 21, 1945..... | 39 |
| Notes & Questions..... | 44 |
| 1. The Defendants..... | 44 |
| 2. The Purpose of Prosecutions..... | 44 |

| | |
|---|-----------|
| 3. The Tokyo Tribunal..... | 44 |
| The United States of America v. Akaki, Sadao et al., International Military Tribunal for the Far East, Dissident Judgment of Justice R.B. Pal (IMTFE) | 45 |
| Notes & Questions | 49 |
| 1. The Origins of the WWII Tribunals | 49 |
| 2. The Tokyo Charter | 50 |
| 3. The Tokyo Tribunal..... | 51 |
| 4. Justice Radhabinod Pal | 52 |
| 5. Critiques of the Tribunals | 53 |
| 6. Occupation Trials | 53 |
| 7. Further Reading..... | 54 |
| III. The Modern <i>Ad Hoc</i> International Tribunals | 54 |
| Prosecutor v. Duško Tadić a/k/a “Dule,” Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (Oct. 2, 1995) | 56 |
| Notes & Questions | 68 |
| 1. Alternatives to Chapter VII Resolution..... | 68 |
| 2. Primacy over Domestic Courts | 68 |
| 3. The Political Question Doctrine in International Criminal Law..... | 69 |
| 4. <i>Compétence de la Compétence</i> | 70 |
| 5. Judicial Review of Security Council Resolutions | 70 |
| 6. Chapter VII and Internal Armed Conflicts | 71 |
| 7. Article 41 Powers of the Security Council | 71 |
| 8. “Established by Law” | 71 |
| 9. Other Options? | 73 |
| 10. Judge Pal on <i>Tadić</i> | 73 |
| 11. A New Victor’s Justice?..... | 74 |
| IV. Completion Strategy | 74 |
| Notes & Questions | 78 |
| 1. Rule 11 <i>bis</i> | 78 |
| 2. Rights of the Accused Under the Completion Strategy | 79 |
| 3. Further Reading..... | 79 |
| Chapter 3. Domestic Jurisdiction | 81 |
| I. Introduction..... | 81 |
| The American Law Institute, RESTATEMENT (FOURTH) OF FOREIGN RELATIONS..... | 86 |
| The American Law Institute, RESTATEMENT (THIRD) OF FOREIGN RELATIONS..... | 88 |
| United States v. Ali Mohamed Ali, Also Known as Ahmed Ali Adan, Also Known as Ismail Ali | 90 |
| Notes & Questions | 100 |
| 1. Case Outcome | 100 |
| 2. The Holding | 100 |
| 3. <i>United States v. Yunis</i> | 100 |
| 4. The Hostage Taking Act | 101 |
| 5. Passive Personality Jurisdiction | 102 |

| | | |
|------|---|------------|
| 6. | Jurisdictional Defenses..... | 103 |
| 7. | <i>Male Captus Bene Detentus</i> | 103 |
| 8. | Reasonableness..... | 105 |
| 9. | <i>Aut Dedere Aut Judicare</i> | 106 |
| II. | Universal Jurisdiction | 106 |
| | Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)..... | 108 |
| | Notes & Questions | 118 |
| 1. | Additional ICJ Opinions | 118 |
| 2. | The Vitality of the Lotus Principle..... | 120 |
| 3. | Types of Universal Jurisdiction..... | 120 |
| 4. | The Presence of the Defendant..... | 120 |
| 5. | Extradition and Universal Jurisdiction | 121 |
| 6. | <i>In Absentia</i> Proceedings..... | 122 |
| 7. | Human Rights Implications of <i>In Absentia</i> Proceedings | 122 |
| 8. | <i>Parties Civiles</i> | 123 |
| 9. | Amended Belgian Universal Jurisdiction Law..... | 124 |
| 10. | Crimes Subject to Universal Jurisdiction | 124 |
| 11. | Universal Jurisdiction Under the Genocide Convention | 125 |
| 12. | The Princeton Principles..... | 127 |
| 13. | Universal Jurisdiction and Immunities..... | 128 |
| 14. | Universal Jurisdiction in Spain | 128 |
| | Constitutional Court Judgment No. 237/2005 (Sept. 26, 2005) | 131 |
| | Notes & Questions | 138 |
| 1. | The Jurisprudence..... | 138 |
| 2. | Standing of Complainants | 138 |
| 3. | Subsidiarity | 138 |
| 4. | Peruvian Cases..... | 139 |
| 5. | Strategic Concerns | 139 |
| 6. | The Nexus Requirement | 140 |
| 7. | The 2009 and 2014 Amendments | 140 |
| 8. | <i>Caso Guatemala</i> : Case Update..... | 141 |
| 9. | The Empirics of Universal Jurisdiction Cases | 142 |
| 10. | Universal Jurisdiction and Neocolonialism..... | 142 |
| 11. | Universal Jurisdiction in the United States | 143 |
| 12. | Immigration Remedies..... | 144 |
| 13. | Universal Jurisdiction and Due Process..... | 145 |
| 14. | For Further Reading | 145 |
| III. | Courts Martial and Military Commissions | 146 |
| | Chapter 4. Hybrid Justice Institutions..... | 151 |
| I. | Introduction..... | 151 |
| II. | The Special Court for Sierra Leone | 152 |
| | Prosecutor v. Morris Kallon et al., Case No. SCSL–2004–15– AR72(E), Decision on Constitutionality and Lack of Jurisdiction (March 13, 2004) | 155 |
| | Notes & Questions | 161 |
| 1. | Case Outcome | 161 |
| 2. | The Constitutionality of the Special Court..... | 161 |

| | | |
|------|---|------------|
| 3. | International v. Domestic Court | 162 |
| 4. | Personal Jurisdiction and Prosecutorial Discretion | 164 |
| 5. | The Sierra Leone Truth and Reconciliation Commission.... | 164 |
| 6. | Information Sharing | 165 |
| 7. | The Risk of Political Spectacles..... | 165 |
| 8. | Right Against Self-Incrimination..... | 166 |
| 9. | Timor-Leste | 167 |
| 10. | Child Soldiers | 168 |
| 11. | Liability of Peacekeepers..... | 169 |
| 12. | Charles Taylor..... | 170 |
| III. | The Extraordinary Chambers in the Courts of Cambodia | 170 |
| | Notes & Questions | 175 |
| 1. | Mixed Composition..... | 175 |
| 2. | Sources of Criminal Procedure..... | 176 |
| 3. | Funding Justice..... | 176 |
| 4. | Subject Matter Jurisdiction..... | 177 |
| 5. | Genocide..... | 177 |
| 6. | Amnesty and Pardon..... | 178 |
| 7. | Statutes of Limitation..... | 178 |
| 8. | Statutes of Limitation and the Ex Post Facto Prohibition | 179 |
| 9. | Genocide Justice Act | 181 |
| 10. | Tortured Confessions | 181 |
| 11. | For Further Reading | 182 |
| IV. | Once and Future Hybrid Systems | 182 |
| A. | Former Yugoslavia | 182 |
| B. | Timor-Leste | 183 |
| C. | Lebanon | 183 |
| D. | Iraqi High Tribunal | 184 |
| E. | Central African Republic Special Criminal Court | 185 |
| | Problem..... | 186 |
| | Chapter 5. The International Criminal Court | 189 |
| I. | Introduction..... | 189 |
| II. | The ICC in Operation | 190 |
| | Ronald C. Slye & Beth Van Schaack, The International Criminal Court in Action: Anatomy of a Case (2019) | 190 |
| | Notes & Questions | 208 |
| 1. | Preconditions to the Exercise of Jurisdiction | 208 |
| 2. | Prosecutorial Discretion at the ICC..... | 208 |
| 3. | <i>Proprio Motu</i> Powers..... | 209 |
| 4. | The Security Council and the ICC | 209 |
| 5. | The African Union and the ICC | 210 |
| 6. | For Further Reading | 210 |
| III. | The United States and the ICC..... | 211 |
| | John Bolton, Protecting American Constitutionalism & Sovereignty from International Threats, The Federalist Society (Washington D.C., Sept. 10, 2018) | 211 |
| | Harold Hongju Koh, International Justice 5.0 (2012) | 214 |

| | |
|---|-----|
| Notes & Questions | 217 |
| 1. “Unsigning” the Treaty | 217 |
| 2. Binding Third Parties | 218 |
| 3. United States Fears | 218 |
| 4. “Article 98” Agreements | 219 |
| 5. American Servicemembers’ Protection Act of 2002 | 221 |
| 6. Funding for the Court | 222 |
| 7. Making Good on Its Threats | 223 |
| 8. For Further Reading | 224 |
| IV. Complementarity & Admissibility | 224 |
| Situation in the Democratic Republic of the Congo, Case No. ICC–01/04–168–US–Exp, Judgment on the Prosecutor’s Appeal against the Decision of Pre-Trial Chamber I entitled “Decision on the Prosecutor’s Application for Warrants of Arrest, Article 58” (July 13, 2006) | 225 |
| Notes & Questions | 230 |
| 1. Case Outcome | 230 |
| 2. Gravity | 231 |
| 3. Self-Referral and Complementarity | 231 |
| 4. The Test of Complementarity | 232 |
| <i>The Prosecutor v. Ruto et al.</i> , Judgment on the Appeal of the Republic of Kenya against the Decision of Pre-Trial Chamber II of 30 May 2011 entitled ‘Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute’, Case No. ICC–01/09–01/11–307 OA (Aug. 30, 2011) | 233 |
| Notes & Questions | 237 |
| 1. Primacy v. Complementarity | 237 |
| 2. Same Person/Conduct | 238 |
| 3. Complementarity and Due Process | 238 |
| Situation in Libya, Case No. ICC–01/11–01/11–344–Red, Decision on the Admissibility of the Case Against Saif Al-Islam Gaddafi (May 31, 2013) | 239 |
| Notes & Questions | 247 |
| 1. Case Update | 247 |
| 2. International v. Domestic Crimes | 250 |
| 3. Al-Senussi | 250 |
| 4. Amnesties and the ICC | 251 |
| 5. Universal Jurisdiction and the International Criminal Court | 251 |
| 6. Security Council Referrals and Complementarity | 252 |
| 7. The Afghanistan Situation | 252 |
| Situation in the Islamic Republic of Afghanistan, Decision Pursuant to Article 15 of the Rome Statute on the Authorisation of an Investigation into the Situation in the Islamic Republic of Afghanistan, Case No. ICC–02/17–33 (Apr. 12, 2019) | 253 |
| Notes & Questions | 258 |
| 1. The Interests of Justice | 258 |

| | |
|--|-----|
| 2. The Article 98 Agreement and SOFAs..... | 258 |
| 3. Politicized Opinions?..... | 258 |
| 4. Withholding Cooperation..... | 259 |
| Problems..... | 259 |
| 1. Myanmar/Burma..... | 259 |
| 2. United States-Mexico Border..... | 262 |

PART III. SUBSTANTIVE INTERNATIONAL CRIMINAL LAW

| | |
|---|------------|
| Introduction..... | 265 |
| Notes & Questions..... | 272 |
| 1. The Model Penal Code..... | 272 |
| 2. The <i>Mens Rea</i> of International Crimes..... | 273 |
| 3. Knowingly..... | 274 |
| 4. Recklessness and Negligence..... | 274 |
| 5. Motive..... | 275 |
| 6. Inchoate Crimes..... | 275 |
| Chapter 6. The Legal Regulation of Armed Conflict..... | 277 |
| I. Introduction..... | 277 |
| II. The Interface of International Humanitarian Law & International Criminal Law..... | 278 |
| A. When Does International Humanitarian Law Apply: The Definition of Armed Conflict..... | 278 |
| Prosecutor v. Bošković & Tarčulovski, Case No. IT-04-82-T, Judgement (July 10, 2008)..... | 280 |
| Notes & Questions..... | 299 |
| 1. Case History and Outcome..... | 299 |
| 2. Tadić and the Definition of Armed Conflict..... | 300 |
| 3. Declarations of War..... | 300 |
| 4. IHL in Domestic Courts..... | 301 |
| 5. Conflict Classification..... | 301 |
| B. International & Non-International Conflicts..... | 303 |
| Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04- 01/06, Judgment Pursuant to Article 74 of the Statute (March 14, 2012)..... | 306 |
| Notes & Questions..... | 320 |
| 1. Conflict Classification..... | 320 |
| 2. Effective v. Overall Control..... | 320 |
| 3. Armed Activities on the Territory of the Congo..... | 321 |
| 4. Occupation..... | 321 |
| 5. Regulation 55..... | 322 |
| 6. Children Associated with Armed Groups or Forces (So-Called “Child-Soldiers”)..... | 323 |
| 7. Peacekeeping and International Justice..... | 324 |
| Problem..... | 325 |
| C. Nexus to Armed Conflict..... | 328 |
| Prosecutor v. Clément Kayishema & Obed Ruzindana, Case No. ICTR-95-1-T, Judgement (21 May 1999)..... | 330 |

| | |
|---|------------|
| Notes & Questions..... | 336 |
| 1. Case Outcome | 336 |
| 2. Prosecutorial Burden | 337 |
| 3. Nexus and Causation | 337 |
| 4. Alternative Formulations of Required Nexus..... | 338 |
| 5. Relationship Between Genocide and Armed Conflict | 339 |
| 6. “Chapeau” Elements of War Crimes | 339 |
| Problem..... | 340 |
| Chapter 7. War Crimes..... | 343 |
| I. Introduction..... | 343 |
| II. “Hague Law”: The Means & Methods of Warfare..... | 343 |
| Prosecutor v. Milan Martić, Case No. IT–95–11–A, Decision (October 8, 2008) | 346 |
| Notes & Questions | 350 |
| 1. Case Update..... | 350 |
| 2. Cluster Bombs | 350 |
| 3. Landmines | 352 |
| 4. Other Prohibited Weapons | 353 |
| 5. Chemical Weapons Use in Syria | 354 |
| 6. Nuclear Weapons..... | 356 |
| 7. Robotics and Warfare..... | 356 |
| 8. Martić’s Article 58 Argument..... | 357 |
| 9. Implementing the Principle of Distinction | 358 |
| 10. Military Objectives | 358 |
| 11. The Martens Clause | 360 |
| 12. Implementing the Principle of Proportionality | 361 |
| 13. Implementing the Principle of Distinction | 361 |
| Prosecutor v. Ante Gotovina & Ivan Markač, Case No. IT–06–90–A, Decision (November 16, 2012)..... | 362 |
| Notes & Questions | 371 |
| 1. Case Update..... | 371 |
| 2. Error of Law or Fact? | 372 |
| 3. Competing Narratives..... | 372 |
| 4. Targeting Martić | 373 |
| 5. Assassination v. Targeted Killing | 374 |
| 6. Proportionality..... | 375 |
| 7. Direct Participation in Hostilities | 375 |
| 8. NATO Intervention in Kosovo..... | 376 |
| Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia..... | 378 |
| Notes & Questions | 383 |
| 1. Investigation Outcome | 383 |
| 2. Particular Incidents | 384 |
| 3. Jurisdiction | 385 |
| 4. Crime of Aggression | 385 |
| 5. Weapons Use: Depleted Uranium and Cluster Bombs | 386 |

| | | |
|------|---|------------|
| 6. | Banković v. Belgium | 387 |
| 7. | The Relativity of IHL | 388 |
| 8. | Negligence v. Recklessness | 388 |
| 9. | Humanitarian Intervention | 388 |
| 10. | Kosovar War Crimes | 389 |
| | Problem | 389 |
| III. | “Geneva Law”: Protected Persons and Things | 394 |
| A. | Civilians as Protected Persons | 394 |
| | Prosecutor v. Delalić et al., Case No. IT-96-21-A, Judgement (Feb. 20, 2001) | 397 |
| | Notes & Questions | 402 |
| | 1. Case Outcome | 402 |
| | 2. Nationality Test | 403 |
| | 3. <i>Stare Decisis</i> | 403 |
| | 4. Civilians as Perpetrators | 404 |
| B. | Combatants as Protected Persons | 404 |
| | Prosecutor v. Ntaganda, Case No. ICC-01/04-02/06, Judgment (July 8, 2019) | 407 |
| | Notes & Questions | 416 |
| | 1. Case Update | 416 |
| | 2. Sexual Violence Before the ICC | 417 |
| | 3. Inter-Unit Rape and the War Crimes Nexus Requirement | 417 |
| | 4. Cumulative Charging and Sexual Violence | 418 |
| | 5. War Crimes Prosecutions Involving Syria and Iraq | 418 |
| | 6. War Crimes Against Combatants | 420 |
| | 7. A Uniform Standard | 420 |
| | Problems | 420 |
| | 1. War Crimes Act of 1996 and Its Amendments | 420 |
| | 2. War Crimes Under the Military Commission Act of 2006 | 424 |
| | 3. Charging War Crimes | 430 |
| | Chapter 8. Aggression | 431 |
| I. | Introduction | 431 |
| | Jonathan A. Bush, “The Supreme . . . Crime” and Its Origins: The Lost Legislative History of the Crime of Aggressive War, 102 COLUM. L. REV. 2324, 2324–2369 (2002) | 432 |
| II. | Prosecuting Aggression: Nuremberg and Tokyo | 440 |
| | The United States of America, et al. v. Hermann Wilhelm Goering, et al. Opinion and Judgment (October 1, 1946), <i>reprinted in</i> 41 AM. J. INT’L L. 172, 186 | 440 |
| | Notes & Questions | 449 |
| | 1. The Elements of Crimes Against the Peace | 449 |
| | 2. Outcome | 449 |
| | 3. Dönitz and Heads of State in the Dock | 450 |
| | 4. Crimes Against the Peace at Tokyo | 450 |
| | 5. Crimes Against the Peace in Subsequent Proceedings | 451 |
| | 6. <i>Nullum Crimen Sine Lege</i> | 451 |

| | |
|---|------------|
| 7. Victor's Justice..... | 452 |
| 8. The Separation of the <i>Jus in Bello</i> and the <i>Jus ad Bellum</i> | 452 |
| III. The United Nations and the Prohibition on the Use of Force..... | 452 |
| Nico Schrijver, THE USE OF FORCE UNDER THE U.N. CHARTER: RESTRICTIONS AND LOOPHOLES (2003) | 453 |
| Notes & Questions | 460 |
| 1. The U.N. Charter and Aggression..... | 460 |
| 2. The General Assembly and Aggression | 460 |
| 3. The General Assembly's Definition of Aggression | 462 |
| 4. The ICJ and the Prohibition Against Aggression | 464 |
| 5. Self-Defense | 464 |
| 6. Libya..... | 465 |
| IV. Contemporary Definition of the Crime of Aggression | 466 |
| Notes & Questions | 471 |
| 1. Definition | 471 |
| 2. Leadership Clause..... | 471 |
| 3. Jurisdictional Filters..... | 471 |
| 4. The Jurisdictional Regime | 472 |
| 5. Negotiating Dynamics..... | 473 |
| 6. Complementarity and the Crime of Aggression | 474 |
| 7. Domesticating the Crime of Aggression..... | 474 |
| 8. The Understandings..... | 475 |
| 9. Humanitarian Intervention..... | 476 |
| Problems | 479 |
| 1. Kosovo | 479 |
| 2. North Korea | 480 |
| 3. Stuxnet..... | 481 |
| 4. Syria | 483 |
| Chapter 9. Genocide | 487 |
| I. Introduction..... | 487 |
| II. Protected Groups..... | 489 |
| The Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgement (Sept. 2, 1998)..... | 489 |
| Notes & Questions | 498 |
| 1. Genocide in Rwanda..... | 498 |
| 2. Protected Groups | 499 |
| 3. Objective v. Subjective Considerations | 499 |
| 4. Original Intent of the Drafters | 501 |
| 5. National Definitions of Genocide | 502 |
| 6. Codification..... | 504 |
| 7. A "One-Man Genocide Mission"..... | 505 |
| III. The Specific Intent to Commit Genocide | 505 |
| Prosecutor v. Jelisić, Case No. IT-95-10-T, Judgement (Dec. 14, 1999)..... | 506 |
| Prosecutor v. Jelisić, Case No. IT-95-10-A, Judgement (July 5, 2001)..... | 513 |

| | |
|--|-----|
| Notes & Questions | 517 |
| 1. Case Outcome | 517 |
| 2. The Genocide Count | 517 |
| 3. Prosecutorial Discretion | 518 |
| 4. Jelisić on a “One-Man Genocide Mission” | 519 |
| 5. Inferring Intent | 519 |
| 6. Premeditation | 520 |
| 7. Knowledge of the Inevitability of Destruction..... | 520 |
| 8. Proof of Genocide..... | 522 |
| 9. Ethnic Cleansing and Genocide in Yugoslavia..... | 523 |
| 10. Genocidal Intent in Darfur | 524 |
| Prosecutor v. Omar Hassan Ahmad Al Bashir, Case No. ICC–02/ 05–01/09, Decision on the Prosecution’s Application for a Warrant of Arrest Against Omar Hassan Ahmad Al Bashir (March 4, 2009) | 524 |
| Notes & Questions | 538 |
| 1. Case Update..... | 538 |
| 2. Security Council Referral | 539 |
| 3. Al Bashir on the Road | 540 |
| 4. Contextual Elements | 541 |
| 5. Policy or Plan? | 541 |
| 6. Intent | 542 |
| 7. Protected Groups..... | 542 |
| 8. <i>Actus Reus</i> | 543 |
| 9. Genocide in Darfur? | 543 |
| 10. ICC Article 16, Peace and Justice | 544 |
| IV. In Whole or in Part | 544 |
| Prosecutor v. Krstić, Case No. IT–98–33–T, Judgement (Aug. 2, 2001)..... | 547 |
| Notes & Questions | 556 |
| 1. Case Outcome | 556 |
| 2. Krstić in Prison | 557 |
| 3. The Responsibility of Dutchbat | 557 |
| 4. “In Part” | 558 |
| 5. Attempted Genocide | 559 |
| Problem..... | 560 |
| The Yanomami | 560 |
| V. The Constitutive Acts of Genocide..... | 560 |
| Prosecutor v. Akayesu, Case No. ICTR–96–4–T, Judgement (Sept. 2, 1998)..... | 561 |
| Notes & Questions | 569 |
| 1. Rape as Genocide | 569 |
| 2. Rape Under International Law | 570 |
| 3. Slow Death..... | 570 |
| 4. Mental Harm | 571 |
| 5. Preventative Action..... | 571 |
| 6. Judicial Notice | 571 |
| 7. State Responsibility for Genocide | 572 |
| 8. Burden of Proof? | 573 |

| | |
|---|------------|
| 9. Genocide and Crimes Against Humanity | 574 |
| 10. For Further Reading | 574 |
| Problems | 574 |
| 1. Cambodia | 574 |
| 2. Genocide Elsewhere | 577 |
| Chapter 10. Crimes Against Humanity | 579 |
| I. History of the Offense of Crimes Against Humanity | 579 |
| International Military Tribunal (Nuremberg), Judgment and Sentences, October 1, 1946, Reprinted in 41 AM. J. INT'L L. 172 (Jan. 1947) | 581 |
| Notes & Questions | 586 |
| 1. IMT Outcome | 586 |
| 2. The Role of the Crimes Against Humanity Count at Nuremberg | 587 |
| 3. A New Crime | 587 |
| 4. Crimes Against Humanity at Tokyo | 587 |
| II. The Contemporary Definition of Crimes Against Humanity | 588 |
| Notes & Questions | 590 |
| 1. The Elements of Crimes Against Humanity | 590 |
| 2. Crimes Against Humanity Within the ICTY | 591 |
| Prosecutor v. Zoran Kupreškić et al., Case No. IT-95-16-T, Judgement (Jan. 14, 2000) | 592 |
| Notes & Questions | 605 |
| 1. Case Outcome | 605 |
| 2. Crimes Against Humanity v. Domestic Crimes | 606 |
| 3. The Definition of Persecution | 606 |
| 4. Persecution in Refugee Law | 607 |
| 5. Klaus Barbie | 608 |
| 6. War Crimes v. Crimes Against Humanity | 609 |
| 7. Combatant Victims of Crimes Against Humanity | 610 |
| 8. <i>Mens Rea</i> | 612 |
| 9. The Longevity of the War Nexus | 612 |
| 10. The Policy Element | 613 |
| 11. The <i>Chapeau</i> Elements of Crimes Against Humanity Within the ICC | 614 |
| Situation in the Republic of Kenya in the Case of the Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, Case No. ICC-01/09-02/11, Decision on the Confirmation of Charges Pursuant to Article 61(7)(a) and (b) of the Rome Statute (January 23, 2012) (Public Redacted Version) | 615 |
| Notes & Questions | 628 |
| 1. Case Outcome and Update | 628 |
| 2. Interpretation of the Organizational Policy Requirement | 629 |
| 3. Targeted Population | 631 |

| | |
|--|------------|
| III. Constitutive Acts..... | 631 |
| A. Sexual Violence | 631 |
| Prosecutor v. Brima, Kamara & Kanu, Case No. SCSL–2004–16–A, Judgement (Feb. 22, 2008)..... | 633 |
| Notes & Questions | 640 |
| 1. Case Outcome and Subsequent Cases | 640 |
| 2. The Origins of the Charge | 640 |
| 3. Forced Marriage v. Arranged Marriage..... | 641 |
| 4. Sexual Violence..... | 642 |
| 5. Sierra Leonean Law | 643 |
| 6. Forced Marriage as Slavery..... | 643 |
| 7. Gravity | 644 |
| 8. Forced Marriage Before the ICC | 644 |
| 9. Sexual Violence in International Criminal Law | 644 |
| 10. Prosecutorial Policy..... | 645 |
| B. Extermination | 646 |
| Prosecutor v. Krstić, Case No. IT–98–33–T, Judgement (April 19, 2004)..... | 646 |
| Notes & Questions | 650 |
| 1. Genocide and Crimes Against Humanity | 650 |
| 2. Crimes Against Humanity and United States Law | 651 |
| Problems | 653 |
| 1. Female Genital Cutting | 653 |
| 2. Lebanon..... | 654 |
| Chapter 11. Torture | 657 |
| I. Introduction..... | 657 |
| John Langbein, The Legal History of Torture, in TORTURE: A COLLECTION, at 93 (Sanford Levinson ed., 2004)..... | 658 |
| II. Defining Torture in International Criminal Law | 660 |
| Prosecutor v. Kunarac, et al., Case No. IT–96–23 & 23–1, Judgement (Feb. 22, 2001) | 662 |
| Prosecutor v. Kunarac, et al., Case No. IT–96–23 & 23–1A, Judgement (June 12, 2002) | 670 |
| Notes & Questions | 674 |
| 1. Case Outcome | 674 |
| 2. State and Non-State Actors..... | 674 |
| 3. State Action | 675 |
| 4. The Committee Against Torture and State Action | 676 |
| 5. A Feminist Critique | 676 |
| 6. Prohibited Acts | 677 |
| 7. Purpose | 677 |
| 8. Specific Intent, General Intent and Motive..... | 678 |
| 9. Torture Before the ICC | 678 |
| 10. Severity: Torture v. Cruel, Inhuman or Degrading Treatment | 679 |
| Prosecutor v. Kunarac, et al., Case No. IT–96–23 & 23–1A, Judgement (June 12, 2002) | 680 |

| | |
|---|------------|
| Notes & Questions | 682 |
| 1. Other Outrages upon Personal Dignity | 682 |
| 2. Lasting Impact of Harm..... | 682 |
| 3. Torture v. CIDT | 683 |
| 4. Torture’s Effects | 685 |
| 5. “Torture Lite” | 686 |
| 6. <i>Incommunicado</i> Detention..... | 688 |
| Problems | 688 |
| 1. Criminal Abortion | 688 |
| 2. Child Separation Policy | 689 |
| III. United States’ Definitions of Torture | 692 |
| Notes & Questions | 697 |
| 1. Comparing the Memos | 697 |
| 2. The United States’ Understanding | 698 |
| 3. Specific Intent..... | 698 |
| 4. Additional Memoranda | 698 |
| Stephen Bradbury, U.S. Department of Justice Office of Legal Counsel | 699 |
| Notes & Questions | 714 |
| 1. Obama Administration Response..... | 714 |
| 2. Implementing the Memos | 714 |
| 3. Combined Techniques | 715 |
| 4. Interrogation Theory..... | 715 |
| 5. “The Waterboard” | 716 |
| 6. Waterboarding Through the Ages | 717 |
| 7. Conditions of Confinement | 718 |
| 8. The Committee Against Torture and the United States | 719 |
| 9. Extraterritorial Application..... | 720 |
| 10. SERE Training | 721 |
| 11. Doctors and Psychologists..... | 721 |
| 12. Advice-of-Counsel and Reliance Defenses | 722 |
| 13. Extraordinary Rendition..... | 723 |
| 14. Extraordinary Rendition and the European Justice System..... | 724 |
| 15. Does Torture “Work” | 725 |
| Problems | 725 |
| 1. Force-Feeding | 725 |
| 2. Prosecute or Praise..... | 727 |
| Chapter 12. Terrorism..... | 731 |
| I. Introduction..... | 731 |
| Notes & Questions | 737 |
| 1. A Separate Crime | 737 |
| 2. Asymmetrical Warfare | 738 |
| 3. Terrorism and Acts of War | 738 |
| 4. Law Enforcement, Trials, Efficiency and Efficacy | 739 |
| 5. International v. Domestic Terrorism | 740 |
| 6. <i>Mens Rea</i> | 740 |
| 7. Bases of Jurisdiction over Terrorism | 741 |

| | |
|---|------------|
| II. Prosecuting Terrorism at the International Level | 742 |
| Prosecutor v. Galić, Case No. IT-98-29-T, Judgement (Dec. 5, 2003)..... | 743 |
| Notes & Questions | 759 |
| 1. Case Outcome | 759 |
| 2. <i>Nullum Crimen Sine Lege</i> and Terrorism | 759 |
| 3. Terrorism Defined | 760 |
| 4. The <i>Actus Reus</i> of the Crime | 760 |
| 5. Prosecuting Terrorism Within U.S. Military Commissions..... | 760 |
| 6. Terrorism and the ICC..... | 761 |
| 7. The Special Tribunal for Lebanon..... | 761 |
| Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging, Case No. STL-11-01/I/AC/R176bis (Feb. 16, 2011)..... | 763 |
| Notes & Questions | 781 |
| 1. Advisory Opinion? | 781 |
| 2. Methodology..... | 782 |
| 3. <i>Nullum Crimen Sine Lege</i> | 782 |
| 4. Terrorism Under Customary International Law | 782 |
| 5. Terrorism and Armed Conflict | 783 |
| 6. <i>In Absentia</i> Proceedings..... | 783 |
| 7. Forms of Responsibility | 784 |
| 8. El Sayed | 784 |
| 9. Security Concerns | 785 |
| 10. For Further Reading | 785 |
| Problem..... | 785 |
| | |
| Chapter 13. Charging International Crimes | 787 |
| Prosecutor v. Kunarac, Case No. IT-96-23-T & IT-96-23/1-T, Judgement (Feb 22, 2001) | 788 |
| Prosecutor v. Kunarac, Case No. IT-96-23-A & IT-96-23/1-A, Judgement (June 12, 2002) | 791 |
| Notes & Questions | 797 |
| 1. Cumulative Charging | 797 |
| 2. Cumulative Charging at the ICC | 798 |
| Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC-01/05-01/08, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo (June 15, 2009) | 799 |
| Notes & Questions | 804 |
| 1. Case Updates..... | 804 |
| 2. Prosecutorial v. Judicial Discretion in Charging | 804 |
| 3. Fairness to the Accused? | 805 |
| 4. Cumulative Convictions | 806 |
| 5. Convicting Uncharged Crimes | 807 |
| 6. Regulation 55 | 807 |

| | |
|---|-----|
| Prosecutor v. Germain Katanga, Case No. ICC–01/04–01/07 OA 13, Judgment on the Appeal of Mr. Germain Katanga Against the Decision of Trial Chamber II of 21 November 2012 Entitled “Decision on the Implementation of Regulation 55 of the Regulations of the Court and Severing the Charges Against the Accused Persons” (March 27, 2013) | 809 |
| Notes & Questions | 818 |
| 1. Case Outcome | 818 |
| 2. Dissent | 819 |
| 3. Sources of Authority Before the ICC | 819 |
| 4. Defense Strategy and Right to a Fair Trial..... | 819 |
| 5. Regulation 55 and Victims | 820 |
| 6. Changes to Modes of Responsibility at the ICTY..... | 821 |
| 7. Charging v. Sentencing..... | 822 |
| 8. <i>Concursus Delictorum</i> in International Criminal Law..... | 822 |
| Problems..... | 822 |
| 1. Charging War Crimes and Crimes Against Humanity | 822 |
| 2. Extermination and Genocide..... | 823 |

PART IV. INDIVIDUAL CRIMINAL RESPONSIBILITY FOR INTERNATIONAL CRIMES

| | |
|---|------------|
| Chapter 14. The Responsibility of Superiors | 829 |
| I. Introduction..... | 829 |
| II. Ordering Offenses | 830 |
| Prosecutor v. Blaškić, Case No. IT–95–14–A, Judgement (July 29, 2004)..... | 834 |
| Notes & Questions | 836 |
| 1. Ordering Crimes..... | 836 |
| 2. <i>Mens Rea</i> | 837 |
| 3. Joinder and Severance | 837 |
| 4. Obeying Orders..... | 837 |
| III. The Doctrine of Superior Responsibility | 838 |
| A. History | 838 |
| Trial of General Tomoyuki Yamashita, United States Military Commission, Manila, 8th October–7th December, 1945 IV LAW REPORTS OF TRIALS OF WAR CRIMINALS 1 (1948) | 840 |
| Notes & Questions..... | 847 |
| 1. Case Outcome | 847 |
| 2. Defense Counsel | 847 |
| 3. General Douglas MacArthur | 847 |
| 4. The Law of Land Warfare Army Field Manual 27–10 | 848 |
| 5. <i>Habeas Corpus</i> | 849 |
| In re Yamashita..... | 850 |
| Notes & Questions..... | 855 |
| 1. Superior Responsibility Generally | 855 |
| 2. <i>Mens Rea</i> | 855 |
| 3. Admiral Toyoda | 855 |

| | | |
|-----|---|-----|
| 4. | Kōki Hirota and Civilian Superiors | 857 |
| 5. | Subsequent Proceedings | 858 |
| 6. | My Lai | 859 |
| 7. | Enforcing the Doctrine of Superior Responsibility..... | 860 |
| 8. | Modern Day Military Commissions | 861 |
| 9. | Abu Ghraib..... | 861 |
| 10. | For Further Reading | 862 |
| B. | Codification of the Superior Responsibility Doctrine | 862 |
| | Notes & Questions | 865 |
| 1. | Protocol I and <i>Mens Rea</i> | 865 |
| 2. | Military and Non-Military Superiors..... | 866 |
| 3. | Non-International Armed Conflicts | 866 |
| 4. | Superior Responsibility and the Khmer Rouge | 867 |
| C. | The Elements of the Modern Doctrine of Superior Responsibility | 867 |
| 1. | Subordination | 867 |
| | The Prosecutor v. Delalić et al., Case No. IT-96-21-A, Judgement (Feb. 20, 2001)..... | 869 |
| | Notes & Questions..... | 876 |
| 1. | “The Forgotten Case”..... | 876 |
| 2. | Effective Control and Substantial Influence | 876 |
| 3. | Superior Responsibility During Occupation | 877 |
| 4. | National Reconciliation | 877 |
| 5. | <i>De Jure v. De Facto</i> Superiors | 878 |
| 6. | The Chain of Command | 879 |
| 7. | The Defense..... | 879 |
| | Problem..... | 880 |
| 2. | Civilian Superiors | 885 |
| | Notes & Questions..... | 887 |
| 1. | Other Civilian Contexts | 887 |
| 2. | Head of State Liability | 890 |
| 3. | For Further Reading | 891 |
| 3. | Mens Rea | 892 |
| | Prosecutor v. Blaškić, Case No. IT-95-14-A, Judgement (July 29, 2004) | 893 |
| | Notes & Questions..... | 898 |
| 1. | Case Outcome | 898 |
| 2. | <i>Mens Rea</i> | 899 |
| 3. | Superior Responsibility for Genocide..... | 901 |
| 4. | For Further Reading | 902 |
| 4. | <i>Actus Reus</i> : Omission..... | 902 |
| | Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC- 01/05-01/08 A, Judgment (June 8, 2018)..... | 906 |
| | Prosecutor v. Jean-Pierre Bemba Gombo, Case No. ICC- 01/05-01/08 A, Dissenting Opinion of Judges Sanji Mmasenono Monageng & Judge Piotr Hofmański (June 8, 2018) | 912 |
| | Notes & Questions..... | 918 |
| 1. | Case Outcome | 918 |

| | | |
|---|--|------------|
| 2. | The Reaction of Commentators and Victims | 918 |
| 3. | Omissions and Causality..... | 919 |
| 4. | Standard of Review..... | 920 |
| 5. | Prevent or Punish..... | 921 |
| 6. | Dereliction of Duty | 923 |
| 7. | Sentencing..... | 923 |
| 8. | Causation | 924 |
| 9. | Causation and the ICC..... | 925 |
| 10. | An Assessment..... | 926 |
| 11. | For Further Reading | 927 |
| Problems | | 927 |
| 1. | <i>Yamashita</i> Redux..... | 927 |
| 2. | The Liability of Latecomers | 927 |
| Chapter 15. Direct and Indirect Responsibility | | 929 |
| I. | Introduction..... | 929 |
| II. | The World War II Experiment in Collective Responsibility | 930 |
| Notes & Questions | | 933 |
| 1. | Lustration After World War II | 933 |
| 2. | Concentration Camps as Illegal Organizations | 934 |
| 3. | Domestic Laws on Criminal Organizations..... | 935 |
| 4. | Providing Material Support for Terrorism | 935 |
| 5. | Designated Organizations | 937 |
| 6. | For Further Reading | 937 |
| III. | Complicity..... | 938 |
| Prosecutor v. Anto Furundžija, Case No. IT-95-17/1-T, Judgement (December 10, 1998)..... | | 939 |
| Notes & Questions | | 949 |
| 1. | Case Outcome | 949 |
| 2. | Principals and Accessories..... | 950 |
| 3. | The Elements of Complicity..... | 950 |
| 4. | <i>Mens Rea</i> | 950 |
| 5. | Causality | 951 |
| 6. | Complicity in Genocide | 951 |
| 7. | Mere Presence | 952 |
| 8. | Accessory After-the-Fact..... | 952 |
| 9. | Bystanders | 953 |
| 10. | Duties of Disclosure | 954 |
| 11. | Rape in International Humanitarian Law | 955 |
| 12. | The Punishment of an Accomplice | 955 |
| 13. | Corporate Complicity | 955 |
| 14. | Foreign Assistance to Armed Groups | 956 |
| Prosecutor v. Momčilo Perišić, Case No. IT-04-81-A, Judgement (February 28, 2013)..... | | 957 |
| Prosecutor v. Momčilo Perišić, Case No. IT-04-81-A, Partially Dissenting Opinion of Judge Liu (Feb. 28, 2013)..... | | 969 |
| Notes & Questions | | 971 |
| 1. | Specific Direction..... | 971 |
| 2. | <i>Mens Rea</i> or <i>Actus Reus</i> ? | 972 |

| | |
|--|-------------|
| 3. Paragraph 72 | 973 |
| 4. Charles Taylor | 975 |
| 5. Foreign Assistance to Armed Groups, Redux | 976 |
| 6. For Further Reading | 977 |
| IV. Joint Criminal Enterprise | 977 |
| Prosecutor v. Tadić, Case No. IT-94-1-A, Judgement (July 15, 1999)..... | 979 |
| Notes & Questions | 990 |
| 1. The Common Purpose Doctrine and Article 7(1) | 990 |
| 2. <i>Pinkerton</i> Liability | 990 |
| 3. <i>Mens Rea</i> | 991 |
| 4. The Reach of Type 3 Liability..... | 993 |
| 5. The Breadth of the JCE | 993 |
| 6. Charging Preferences..... | 995 |
| 7. JCE and Other Forms of Liability | 995 |
| 8. The ICC..... | 995 |
| V. Co-Perpetration..... | 996 |
| Prosecutor v. Lubanga, Case No. ICC-01/04-01/06, Judgment Pursuant to Article 74 of the Statute (March 14, 2012) | 997 |
| Prosecutor v. Lubanga, Case No. ICC-01/04-01/06, Separate Opinion of Judge Adrian Fulford (March 14, 2012)..... | 1011 |
| Notes & Questions | 1013 |
| 1. Case Update..... | 1013 |
| 2. Co-Perpetration | 1014 |
| 3. <i>Mens Rea</i> | 1014 |
| 4. Co-Perpetration and the <i>Ad Hoc</i> Tribunals..... | 1014 |
| 5. <i>Katanga & Chui</i> | 1015 |
| 6. Other Offenses..... | 1016 |
| 7. Girl Soldiers..... | 1017 |
| 8. <i>Brady</i> Obligations Under International Criminal Law | 1018 |
| 9. Witness Proofing | 1019 |
| Problem..... | 1020 |
| Chapter 16. Inchoate Crimes: Conspiracy & Incitement | 1023 |
| I. Introduction..... | 1023 |
| II. Conspiracy in International Criminal Law..... | 1023 |
| III. Conspiracy in Modern International Criminal Law | 1026 |
| Notes & Questions | 1033 |
| 1. Conspiracy in Comparative Law | 1033 |
| 2. Merger of Conspiracy and Substantive Offense..... | 1034 |
| IV. Conspiracy as a War Crime..... | 1035 |
| Ali Hamza Ahmad Suliman Al Bahlul v. United States of America..... | 1039 |
| Notes & Questions | 1040 |
| 1. The Impact of <i>Bahlul</i> | 1040 |
| 2. The Role of Defense Counsel | 1041 |
| 3. For Further Reading | 1041 |
| Problem..... | 1041 |
| V. Incitement in International Criminal Law | 1043 |

| | |
|---|-------------|
| VI. The Modern Law of Incitement..... | 1045 |
| Prosecutor v. Ferdinand Nahimana, Jean-Bosco Barayagwiza & Hassan Ngeze, Case No. ICTR-99-52-A, Judgement (Nov. 28, 2007)..... | 1046 |
| Notes & Questions | 1058 |
| 1. Case Outcome | 1058 |
| 2. A Theory of Criminal Speech..... | 1059 |
| 3. Elements of Incitement | 1060 |
| 4. The Genocide Convention | 1060 |
| 5. Incitement and Instigation | 1061 |
| 6. Incitement and Persecution..... | 1062 |
| 7. Incitement via Social Media | 1062 |
| 8. Jurisdiction <i>Ratione Temporis</i> | 1063 |
| 9. The Free Speech International Standard | 1064 |
| 10. Georges Ruggiu..... | 1064 |
| 11. Prevention | 1065 |
| 12. A Threat to Free Speech and Democracy? | 1066 |
| 13. Protection of Journalists | 1067 |
| 14. For Further Reading | 1067 |
| Problem..... | 1068 |
| Chapter 17. Defenses Under International Criminal Law | 1073 |
| I. Introduction..... | 1073 |
| II. <i>Nullum Crimen Sine Lege</i> | 1073 |
| Prosecutor v. Sam Hinga Norman, Case No. SCSL-2004-14- AR72(E), Decision on Preliminary Motion Based on Lack of Jurisdiction (May 31, 2004) | 1075 |
| Prosecutor v. Sam Hinga Norman, Case No. SCSL-2004-14- AR72(E), Dissenting Opinion of Justice Geoffrey Robertson (May 31, 2004) | 1083 |
| Notes & Questions | 1088 |
| 1. Case Outcome | 1088 |
| 2. Sources of Law | 1089 |
| 3. Customary International Law | 1089 |
| 4. State Practice..... | 1090 |
| 5. The Relativity of International Criminal Law | 1090 |
| 6. Notice to Defendants..... | 1091 |
| 7. Common Law Crimes | 1091 |
| 8. Treaties as Sources of Law | 1093 |
| 9. Human Rights Treaties | 1093 |
| 10. The ICC Statute's Criminalization of Child Recruitment | 1094 |
| 11. The Principle of Specificity | 1094 |
| 12. <i>Lubanga</i> : A Reprise..... | 1095 |
| III. Superior Orders..... | 1095 |
| Notes & Questions | 1098 |
| 1. The ICC Formulation | 1098 |
| 2. Superior Orders | 1098 |
| 3. Superior Orders and Duress..... | 1098 |

| | |
|--|------|
| Prosecutor v. Erdemović, Case No. IT-96-22-A, Joint Separate Opinion of Judge McDonald and Judge Vohrah (Oct. 7, 1997)..... | 1099 |
| Prosecutor v. Erdemović, Case No. IT-96-22-A, Joint Separate Opinion of Judge Cassese (Oct. 7, 1997)..... | 1106 |
| Notes & Questions | 1108 |
| 1. Case Outcome | 1108 |
| 2. A Clash of Titans..... | 1108 |
| 3. Civil Law v. Common Law Approaches | 1109 |
| 4. For Further Reading | 1109 |
| Problem..... | 1109 |
| IV. Necessity..... | 1110 |
| Judgment Concerning the Legality of the General Security Service's Interrogation Methods, 38 I.L.M 1471, 1474-84 (1999) | 1111 |
| Notes & Questions | 1118 |
| 1. Necessity Defense..... | 1118 |
| 2. Ticking Time Bombs | 1118 |
| 3. Necessity and U.S. Interrogation Practices..... | 1120 |
| 4. Professional Responsibility..... | 1121 |
| 5. The ICC and Necessity | 1121 |
| V. Combat Immunity..... | 1121 |
| United States v. John Phillip Walker Lindh..... | 1122 |
| Notes & Questions | 1129 |
| 1. Lindh's Confession | 1129 |
| 2. The Plea | 1129 |
| 3. Combat Immunity | 1130 |
| 4. Duress or Necessity..... | 1130 |
| 5. Prisoners of War and Citizenship | 1131 |
| 6. Treason | 1131 |
| 7. Sedition | 1131 |
| 8. Defense Strategy | 1132 |
| 9. For Further Reading | 1133 |
| VI. <i>Tu Quoque</i> & Reprisals..... | 1133 |
| Prosecutor v. Zoran Kupreškić, Case No. IT-96-12-T, Judgement (Jan. 14, 2000) | 1134 |
| Notes & Questions | 1138 |
| 1. Case Outcome | 1138 |
| 2. <i>Tu Quoque</i> | 1138 |
| 3. The Doctrine of Reprisals | 1138 |
| 4. Reprisals and Protected Persons and Objects | 1139 |
| 5. Reciprocity in IHL..... | 1140 |
| 6. <i>Dicta</i> and the Development of International Criminal Law..... | 1140 |
| VII. Head of State Immunity | 1140 |
| Prosecutor v. Omar Hassan Ahmad Al Bashir, Case No. ICC-02/05-01/09 OA2, Judgment in the Jordan Referral re Al Bashir Appeal (May 6, 2019) | 1144 |

| | |
|---|-------------|
| Notes & Questions | 1157 |
| 1. Al Bashir Overthrown..... | 1157 |
| 2. Customary International Law v. Security Council Referral | 1158 |
| 3. Other Relevant Treaties | 1158 |
| 4. Domestic Jurisprudence on Efforts to Arrest Al Bashir | 1159 |
| 5. Referral to the Assembly of State Parties and the U.N. Security Council | 1159 |
| 6. Personal v. Functional Immunities..... | 1160 |
| 7. Heads of State in the Dock | 1161 |
| 8. The African Union and Immunity for Government Officials | 1162 |
| 9. Yerodia | 1163 |
| 10. Diplomatic Immunity..... | 1163 |
| 11. State Immunity | 1164 |
| 12. Immunities Under International and Domestic Law | 1164 |
| VIII. Amnesty..... | 1165 |
| Prosecutor v. Kallon, Case No. SCSL–2004–15–R72(E), Decision on Challenge to Jurisdiction: Lomé Accord Amnesty (Mar. 13, 2004)..... | 1166 |
| Notes & Questions | 1173 |
| 1. Peace Agreements | 1173 |
| 2. South Africa and Amnesty..... | 1175 |
| 3. Inter-American Human Rights System and Amnesties | 1175 |
| 4. Amnesty in Cambodia | 1178 |
| Case of Ieng Sary, Case No. 002/19–09–2007–ECCC/OCIJ (PTC03), Decision on Appeal against Provisional Detention Order of Ieng Sary, Pre-Trial Chamber (October 17, 2008) | 1178 |
| Notes & Questions | 1181 |
| 1. Case Update..... | 1181 |
| 2. Amnesties Before the ICC | 1181 |
| 3. Amnesties in International Humanitarian Law | 1181 |
| 4. For Further Reading | 1182 |
| Chapter 18. Sentencing & Reparations | 1183 |
| I. Introduction..... | 1183 |
| II. A Hierarchy of Crimes? | 1184 |
| Prosecutor v. Erdemović, Case No. IT–96–22–A, Separate and Dissenting Opinion of Judge Li (Oct. 7, 1997) | 1184 |
| Notes & Questions | 1188 |
| 1. A Hierarchy of Crimes | 1188 |
| 2. Plea Bargaining in Comparative Perspective | 1189 |
| 3. Plea Bargaining in International Criminal Law..... | 1191 |
| 4. Kambanda..... | 1191 |
| 5. Plea Bargaining at the ICC | 1192 |
| 6. The Death Penalty | 1192 |
| III. The Term of Incarceration..... | 1193 |
| Prosecutor v. Erdemović, Case No. IT–96–22–T, Sentencing Judgement (March 5, 1998)..... | 1194 |

| | |
|--|-------------|
| Prosecutor v. Plavšić, Case No. IT-00-39 & 40/1-T, Sentencing Judgement (Feb. 27, 2003) | 1201 |
| Notes & Questions | 1212 |
| 1. Case Outcomes | 1212 |
| 2. Principles of Sentencing and Sources of Law | 1212 |
| 3. The Interests of the Victims | 1213 |
| 4. Hierarchy and Sentencing | 1213 |
| 5. Reconciliation and Justice | 1214 |
| 6. Deterrence and Incentives..... | 1214 |
| 7. Critiques and Further Reading..... | 1214 |
| IV. Reparations | 1215 |
| Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06, Decision on Sentence Pursuant to Article 76 of the Statute (July 10, 2012)..... | 1216 |
| Notes & Questions | 1217 |
| 1. Lubanga's Sentence and Imprisonment | 1217 |
| 2. Dissent | 1218 |
| 3. Sexual Violence Charges..... | 1218 |
| 4. Child Soldiers | 1218 |
| 5. The Lubanga Reparations Decisions | 1219 |
| Prosecutor v. Thomas Lubanga Dyilo, Case No. ICC-01/04-01/06, Judgment on the Appeals against Trial Chamber II's 'Decision Setting the Size of the Reparations Award for which Thomas Lubanga Dyilo is Liable' (July 18, 2019) (Public Redacted)..... | 1220 |
| Notes & Questions | 1233 |
| 1. Lubanga's Liability for Reparations | 1233 |
| 2. The ICC and Reparations | 1233 |
| 3. The ICC Trust Fund for Victims | 1234 |
| 4. Types of Reparations..... | 1235 |
| 5. Gender and Reparations: Girl Soldiers..... | 1235 |
| 6. Inter-American System and Reparations | 1236 |
| 7. Reparations Before the ECCC..... | 1236 |
| Appendix: Maps | 1239 |
| INDEX | 1253 |