

# Contents

<i>Preface</i>	<i>page xi</i>
<i>Acknowledgments</i>	xv
<i>Table of Abbreviations</i>	xvii
<i>Introduction</i>	xxvii
<b>1. Legal Nature</b> . . . . .	<b>1</b>
Introduction	1
§1. The Characteristics of International Crimes and Their Applicability to CAH	8
§2. The Concept and Relevance of State Policy	14
§3. The Legal Elements that Characterize CAH as an International Crime	19
§4. The Protected Civilian Population under CAH	28
§4.1. The Distinguishing Element of an Attack against a Civilian Population	30
§5. CAH's Historical Connection to War	33
§6. Imputability of Individual Conduct to the Responsibility of the State	34
§7. The Policy Requirement for Nonstate Actors	40
§8. Some Philosophical Considerations	42
§9. Policy Considerations	45
<b>2. Phenomenological Considerations</b> . . . . .	<b>51</b>
Introduction	51
§1. Etiology and Phenomenological Characteristics	53
§1.1. The Protagonists	58
§1.2. Neutralization	60
§1.3. Apathy, Indifference, and Passivity	61
§1.4. Dehumanization, Subhumanization, and Objectification	63
§1.5. The "Banality of Evil"	64
§1.6. Euphemisms and Rationalizations	66
§1.7. Motivation	69
§2. Legal Controls	71
§2.1. Considerations on Legal Philosophy	71
§2.2. International and Domestic Criminal Law Considerations	74
§2.2.1. ICL Considerations	77
§2.2.2. International Human Rights Law	80
§3. The Enforcement Gap	81
Conclusion	83

<b>3. Emergence in Positive International Law . . . . .</b>	<b>86</b>
§1. Early History	86
§2. The Concept of “Laws of Humanity” in the History of the Law of Armed Conflicts	96
§3. The Law of the London Charter: Crimes Against Humanity Acquires Its Own Identity	111
§4. The Legislative History of the London Charter’s Article 6(c)	117
§5. Law and Policy Considerations in the Making of the Charter	127
§6. Post-World War II Formulations Arising out of the London Charter: The IMTFE and Control Council Law No. 10	132
§7. The War-Connecting Link in the London Charter	136
§8. The London Charter as Declarative of Customary International Law and Subsequent Affirmations Confirming CAH as an International Crime	146
§9. Post-World War II Prosecutions Pursuant to the London Charter and the Tokyo Statute	150
§10. The Allied Prosecutions of the CCL 10 Proceedings in the European and Far Eastern Theaters	156
Conclusion	163
<b>4. Post-Charter Developments . . . . .</b>	<b>167</b>
Introduction	167
part a: substantive developments	171
§1. The ILC’s Codification Efforts: 1947–1996	171
§2. The Security Council’s Codifications: The Statutes of the ICTY and the ICTR	183
§3. The Prosecutions for CAH at the ICTY and the ICTR	189
§4. The Rome Statute of the ICC	199
§5. The Status CAH Prosecutions before the ICC	204
§6. Other Normative Proscriptions Applicable to the Same Protected Human Interests	208
§6.1 1948 Genocide Convention	209
§6.2. The 1949 Geneva Conventions and 1977 Protocols	210
§6.3. 1973 Apartheid Convention	210
§6.4. 1984 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment	212
§6.5. International Convention for the Protection of All Persons from Enforced Disappearance	213
§6.6. The International Human Rights Law Regime	213
§7. The Mixed Model Tribunals	218
§7.1. Kosovo	222
§7.2. Bosnia and Herzegovina	228
§7.3. Sierra Leone	233
§7.4. Timor-Leste	246
§7.5. Cambodia	254
§8. Crimes Against Humanity as Part of <i>Jus Cogens</i>	263
part b: procedural development	269
§1. <i>Aut Dedere aut Judicare</i>	269
§2. The Post-Charter Duty to Prosecute or Extradite	273
§3. Nonapplicability of Statutes of Limitation	276
§4. Universal Jurisdiction	279
Conclusion	294

<b>5. The Principles of Legality in the London Charter and Post-Charter Developments</b> . . . . .	296
Introduction	296
§1. Principles of Legality in International Criminal Law	301
§2. The London Charter’s Approach	307
§2.1. Pragmatism Prevails	317
§2.2. The German Legal System	320
§3. The Prosecution’s Treatment of the Question under the London Charter, the IMTFE, and Control Council No. 10	322
§4. Assessment of Legality Issues in Post-World War II Prosecutions	334
§5. The Principles of Legality in Post-Charter Developments	342
§5.1. The ICTY and the ICTR	342
§5.2. The ICC	349
§5.3. Principles of Legality in Other Post-Charter Legal Developments	353
Conclusion	358
<b>6. Specific Contents</b> . . . . .	359
§1. Introduction	359
§2. Identifying the Specific Crimes Contained in the Four Primary Formulations of Crimes Against Humanity: Article 6(c) of the London Charter, Article 5 of the ICTY Statute, Article 3 of the ICTR Statute, and Article 7 of the ICC Statute	361
§2.1. Murder and Extermination	365
§2.2. Enslavement	374
§2.3. Deportation	381
§2.4. Persecution	396
§2.5. Other Inhumane Acts	405
§2.6. Torture	411
§2.7. Unlawful Human Experimentation	419
§2.8. Rape and Sexual Violence	425
§2.9. Imprisonment	443
§3. The Additional Crimes of Article 7 of the Rome Statute	445
§3.1. Apartheid	445
§3.2. Enforced Disappearance of Persons	448
§4. Normative Overlap	452
§5. “General Principles of Law”: Meaning, Method, and Function	459
§5.1. The World’s Major Legal Systems	466
§5.2. Identifying Legal Principles	467
§5.3. Correlation Between the Sources of Law to Be Consulted and the Principle Sought to Be Identified	467
Conclusion	470
<b>7. The Theories and Elements of Criminal Responsibility</b> . . . . .	472
Introduction	472
§1. International Criminal Responsibility of Individuals	473
§1.1. Doctrinal Differences in International Law and National Criminal Law Related to Individual, Group, and State Responsibility: General Considerations	478
§1.2. Responsibility for the Conduct of Another and Group Responsibility in the Law of the IMT, IMTFE, and CCL 10: The Foundations of Contemporary Notions	482

§2. Criminal Responsibility and the “General Part”: From the IMT to the ICC	494
§2.1. National Legal Norms and Standards and Their Relevance to International Criminal Law	500
§2.2. Problems in Identifying the Contents of the “General Part” of International Criminal Law: From the London Charter to the Rome Statute	505
§2.3. The Jurisprudential Application of the “General Part”: From the IMT to the ICC	507
§3. Knowledge of the Law and Intent	512
§4. The Jurisprudence of the ICTY and ICTR on Individual Criminal Responsibility	520
§4.1. Planning, Instigating, Ordering, and Committing	521
§4.2. Aiding and Abetting	524
§5. Command Responsibility: Policy Considerations	526
§5.1. The Evolution of Command Responsibility in the Law of Armed Conflicts as Reflected in the Law and Jurisprudence of the ICTY, the ICTR, and the ICC	530
§5.2. Civilian Command Responsibility in the ICTY, the ICTR, and the ICC	557
§6. Joint Criminal Enterprise: The ICTY’s New Doctrine and Its Extended Influence	560
§6.1. Organisationsherrschaft	575
Conclusion	577
<b>8. Defenses and Exonerations . . . . .</b>	<b>581</b>
Introduction	581
§1. Obedience to Superior Orders	583
§1.1. Rationale	583
§1.2. Policy Considerations	586
§1.3. Scholarly Views	590
§1.4. The Judgments of Tribunals	594
§1.5. Post-Charter Developments	605
§1.6. Conclusion	612
§2. Coercion (Compulsion and Duress) and Necessity	613
§3. Reprisals	623
§3.1. Introduction	623
§3.2. Historical Evolution	624
§4. <i>Tu Quoque</i>	634
§5. Nonapplicability of Reprisals and <i>Tu Quoque</i> to Crimes Against Humanity	637
§6. Immunity of Heads of State	637
Conclusion	644
<b>9. A Survey of National Legislation and Prosecutions for Crimes Against Humanity . . . . .</b>	<b>649</b>
Introduction	649
§1. Pre-World War I National Prosecutions for International Crimes	651
§2. Post-World War I Prosecutions	655
§3. National Legislation and National Prosecutions for CAH after World War II	660
§3.1. National Legislation Criminalizing CAH	660

§3.2. Post-World War II Major National Prosecutions for CAH	664
§3.2.1. Germany	665
§3.2.2. Austria	668
§3.2.3. Israel	669
§3.2.4. France	671
§3.2.5. Italy	679
§3.2.6. Canada	680
§3.2.7. Spain	684
§3.2.8. Argentina	685
§3.2.9. Indonesia	692
§3.2.10. Iraq	695
§4. Other Recent Developments and National Prosecutions for CAH	697
§5. Selective Enforcement	715
Conclusion	720
<b>10. Concluding Assessment: The Need for an International Convention . . . . .</b>	<b>724</b>
<i>Table of Authorities</i>	743
<i>Table of Cases</i>	797
<i>Index</i>	819