# Contents

**Preface**
- xi

**Acknowledgments**
- xv

**Table of Abbreviations**
- xvii

**Introduction**
- xxvii

1. **Legal Nature** ................................................ 1
   - 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
     - §8. Some Philosophical Considerations 42
     - §9. Policy Considerations 45

2. **Phenomenological Considerations** ........................................ 51
   - 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
## Contents

### 3. Emergence in Positive International Law

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>§1. Early History</td>
<td>86</td>
</tr>
<tr>
<td>§2. The Concept of “Laws of Humanity” in the History of the Law of Armed Conflicts</td>
<td>96</td>
</tr>
<tr>
<td>§3. The Law of the London Charter: Crimes Against Humanity Acquires Its Own Identity</td>
<td>111</td>
</tr>
<tr>
<td>§4. The Legislative History of the London Charter’s Article 6(c)</td>
<td>117</td>
</tr>
<tr>
<td>§5. Law and Policy Considerations in the Making of the Charter</td>
<td>127</td>
</tr>
<tr>
<td>§7. The War-Connecting Link in the London Charter</td>
<td>136</td>
</tr>
<tr>
<td>§8. The London Charter as Declarative of Customary International Law and Subsequent Affirmations Confirming CAH as an International Crime</td>
<td>146</td>
</tr>
<tr>
<td>§10. The Allied Prosecutions of the CCL 10 Proceedings in the European and Far Eastern Theaters</td>
<td>156</td>
</tr>
<tr>
<td>Conclusion</td>
<td>163</td>
</tr>
</tbody>
</table>

### 4. Post-Charter Developments

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Introduction</td>
<td>167</td>
</tr>
<tr>
<td>part a: substantive developments</td>
<td>171</td>
</tr>
<tr>
<td>§1. The ILC’s Codification Efforts: 1947–1996</td>
<td>171</td>
</tr>
<tr>
<td>§2. The Security Council’s Codifications: The Statutes of the ICTY and the ICTR</td>
<td>183</td>
</tr>
<tr>
<td>§3. The Prosecutions for CAH at the ICTY and the ICTR</td>
<td>189</td>
</tr>
<tr>
<td>§4. The Rome Statute of the ICC</td>
<td>199</td>
</tr>
<tr>
<td>§5. The Status CAH Prosecutions before the ICC</td>
<td>204</td>
</tr>
<tr>
<td>§6. Other Normative Proscriptions Applicable to the Same Protected Human Interests</td>
<td>208</td>
</tr>
<tr>
<td>§6.1 1948 Genocide Convention</td>
<td>209</td>
</tr>
<tr>
<td>§6.2. The 1949 Geneva Conventions and 1977 Protocols</td>
<td>210</td>
</tr>
<tr>
<td>§6.3. 1973 Apartheid Convention</td>
<td>210</td>
</tr>
<tr>
<td>§6.4. 1984 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment</td>
<td>212</td>
</tr>
<tr>
<td>§6.5. International Convention for the Protection of All Persons from Enforced Disappearance</td>
<td>213</td>
</tr>
<tr>
<td>§6.6. The International Human Rights Law Regime</td>
<td>213</td>
</tr>
<tr>
<td>§7. The Mixed Model Tribunals</td>
<td>218</td>
</tr>
<tr>
<td>§7.1. Kosovo</td>
<td>222</td>
</tr>
<tr>
<td>§7.2. Bosnia and Herzegovina</td>
<td>225</td>
</tr>
<tr>
<td>§7.3. Sierra Leone</td>
<td>233</td>
</tr>
<tr>
<td>§7.4. Timor-Leste</td>
<td>240</td>
</tr>
<tr>
<td>§7.5. Cambodia</td>
<td>254</td>
</tr>
<tr>
<td>§8. Crimes Against Humanity as Part of Jus Cogens</td>
<td>263</td>
</tr>
<tr>
<td>part b: procedural development</td>
<td>269</td>
</tr>
<tr>
<td>§1. Aut Dedere aut Judicare</td>
<td>269</td>
</tr>
<tr>
<td>§2. The Post-Charter Duty to Prosecute or Extradite</td>
<td>273</td>
</tr>
<tr>
<td>§3. Nonapplicability of Statutes of Limitation</td>
<td>276</td>
</tr>
<tr>
<td>§4. Universal Jurisdiction</td>
<td>279</td>
</tr>
<tr>
<td>Conclusion</td>
<td>294</td>
</tr>
</tbody>
</table>
## Table of Contents

### 5. The Principles of Legality in the London Charter and Post-Charter Developments

- **Introduction**
- §1. Principles of Legality in International Criminal Law
- §2. The London Charter’s Approach
  - §2.1. Pragmatism Prevails
  - §2.2. The German Legal System
- §3. The Prosecution’s Treatment of the Question under the London Charter, the IMTFE, and Control Council No. 10
- §4. Assessment of Legality Issues in Post-World War II Prosecutions
- §5. The Principles of Legality in Post-Charter Developments
  - §5.1. The ICTY and the ICTR
  - §5.2. The ICC
- §5.3. Principles of Legality in Other Post-Charter Legal Developments

### 6. Specific Contents

- §1. Introduction
- §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
  - §2.1. Murder and Extermination
  - §2.2. Enslavement
  - §2.3. Deportation
  - §2.4. Persecution
  - §2.5. Other Inhumane Acts
  - §2.6. Torture
  - §2.7. Unlawful Human Experimentation
  - §2.8. Rape and Sexual Violence
  - §2.9. Imprisonment
- §3. The Additional Crimes of Article 7 of the Rome Statute
  - §3.1. Apartheid
  - §3.2. Enforced Disappearance of Persons
- §4. Normative Overlap
- §5. “General Principles of Law”: Meaning, Method, and Function
  - §5.1. The World’s Major Legal Systems
  - §5.2. Identifying Legal Principles
  - §5.3. Correlation Between the Sources of Law to Be Consulted and the Principle Sought to Be Identified

### 7. The Theories and Elements of Criminal Responsibility

- **Introduction**
- §1. International Criminal Responsibility of Individuals
  - §1.1. Doctrinal Differences in International Law and National Criminal Law Related to Individual, Group, and State Responsibility: General Considerations
  - §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
§ 2. Criminal Responsibility and the “General Part”: From the IMT to the ICC
  § 2.1. National Legal Norms and Standards and Their Relevance to International Criminal Law 494
  § 2.2. Problems in Identifying the Contents of the “General Part” of International Criminal Law: From the London Charter to the Rome Statute 500
  § 2.3. The Jurisprudential Application of the “General Part”: From the IMT to the ICC 505

§ 3. Knowledge of the Law and Intent
  § 3.1. Planning, Instigating, Ordering, and Committing 520
  § 3.2. Aiding and Abetting 524

§ 4. The Jurisprudence of the ICTY and ICTR on Individual Criminal Responsibility
  § 4.1. Planning, Instigating, Ordering, and Committing 521
  § 4.2. Aiding and Abetting 524

§ 5. Command Responsibility: Policy Considerations
  § 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
  § 6.1. Organisationsherrschaft 575
  Conclusion 577

8. Defenses and Exonerations ....................................................... 581
  Introduction 581
  § 1. Obedience to Superior Orders
    § 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. Tu Quoque 634
  § 5. Nonapplicability of Reprisals and Tu Quoque to Crimes Against Humanity 637
  § 6. Immunity of Heads of State
    Conclusion 644

  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
Contents

§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

10. Concluding Assessment: The Need for an International Convention . . . . . . . . . . . 724

Table of Authorities 743
Table of Cases 797
Index 819