## Contents

Tal	ole oj	f Case	s and D	Documents	xxiii
1	A S	hort	History	of Crimes Against Humanity	1
	1.1	Fron	n the La	aws of Humanity to Crimes Against Humanity	1
				and the Invention of Crimes Against Humanity	8
				iremberg Charter	8
				uremberg Judgment	20
				kyo trial and subsequent prosecutions	25
				gacy of Nuremberg and Tokyo	29
	1.3		_	nberg to The Hague and Beyond	33
2	Cri	mes A	Against	<b>Humanity Under General International Law</b>	38
	2.1	Scop	e of Ap	plicability	38
				al considerations	38
			2.1.1.1	Crimes against humanity as crimes under international law	38
			2.1.1.2	No necessary linkage to other crimes	46
			2.1.1.3	Peace and war	50
		2.1.2	Person	al scope of application	56
			2.1.2.1	Individuals	56
				2.1.2.1.1 Nationality of victim irrelevant	56
				2.1.2.1.2 Membership in group irrelevant	57
				2.1.2.1.3 Private or public capacity irrelevant	59
				2.1.2.1.4 Applicable modes of liability	61
				2.1.2.1.5 Exclusion of the defence of superior orders	61
				2.1.2.1.6 Exclusion from refugee status	63
			2.1.2.2	States	66
				2.1.2.2.1 General considerations	66
				2.1.2.2.2 Responsibility of states to protect their population	
				and to prevent crimes against humanity	66
				2.1.2.2.3 Obligation not to engage in crimes against humanity	73
				2.1.2.2.4 Limitation of state's normative sovereignty	73
				2.1.2.2.5 Duty to punish	74
				2.1.2.2.6 Extradition and Cooperation	92
			2.1.2.3	Corporations and corporate actors	107
				2.1.2.3.1 Corporations	107
				2.1.2.3.2 Corporate leaders and employees	110
		2.1.3	Tempo	ral scope of application	140
		2.1.4	Territo	rial scope of application	144
	2.2	Grav	ity of th	ne Crime	145
		2.2.1	Ġenera	l considerations	145
		2.2.2	Crimes	against humanity and other international crimes	146
		2.2.3	Sentend	cing	147
	2.3	Norn	native S	tatus	149
		2.3.1	Custom	nary law status of prohibition and definitions	149
			Jus coge		151
			_	nnes obligations	154
	2.4		-	Interpretation	157
	2.1 1 melples of interpretation				

xiv Contents

3	3 Jurisdiction Over Crimes Against Humanity					
	3.1 Ju					
	Н	umanity—General Considerations	159			
	3.	1.1 A right for any state to exercise universal jurisdiction over				
		crimes against humanity	159			
		3.1.1.1 Relevant practice and precedents	159			
		3.1.1.2 Effect of the right to exercise universal jurisdiction				
		over crimes against humanity	165			
		3.1.1.3 Definition of the offence and right to				
		exercise (universal) jurisdiction	166			
		1.2 No general duty to exercise jurisdiction	167			
	3.2 To		169			
		nforced Disappearance and Apartheid	172			
		3.1 Enforced disappearance	172			
	3	3.2 Apartheid	174			
4	Immu	nities, Amnesties, and Statutes of Limitation	175			
	4.1 In	nmunities	175			
	4.2 A	mnesties	176			
	4.2	2.1 General considerations	176			
	4.2	2.2 Evaluating the validity of amnesties pertaining to crimes				
		against humanity	179			
	4.2	2.3 No extra-territorial effect of amnesties	184			
		2.4 The special case of torture	186			
	4.3 St	atutes of Limitation	187			
5	Chape	au or Contextual Elements	194			
	5.1 G	eneral Considerations	194			
	5.2 Aı	n 'Attack'	196			
	5.2	2.1 Definition	196			
		5.2.1.1 Customary international law	196			
		5.2.1.2 ICC framework	200			
	5.2	2.2 Element of scale	204			
	5.2	2.3 Individual components	207			
		2.4 Timing of the attack	210			
		2.5 Geographical scope of the attack	212			
	5.2	2.6 Reason for attack	214			
		5.2.6.1 General considerations	214			
		5.2.6.2 No general requirement of discrimination	214			
		5.2.6.3 No tu quoque justification	217			
	5.2	2.7 'Attack' and armed conflict	220			
		5.2.7.1 Two distinct notions	220			
	E -	5.2.7.2 An 'attack' in a military context 2.8 Evidential considerations	222 224			
	3.2	5.2.8.1 Standard of proof and object of proof	224			
		5.2.8.2 Factors relevant to establishing the attack	228			
	5.3 Di	rected Against Any Civilian Population	232			
		3.1 General considerations	232			
		5.2 'Directed against'	232			
	0.0	5.3.2.1 Raison d'être	232			
		5.3.2.2 Meaning	233			
		5.3.2.3 Evidential considerations	237			
	5.3	3.3 'Any' civilian population	242			

Contents xv

	5.3.4	'Civilia	nn population'	245
		5.3.4.1	'Population'	245
			5.3.4.1.1 Raison d'être	245
			5.3.4.1.2 Definition	246
			5.3.4.1.3 Identifying the attacked population	247
		5.3.4.2	'Civilian' population	248
			5.3.4.2.1 Raison d'être	248
			5.3.4.2.2 Definition	249
		5.3.4.3	Attacks on the armed forces	257
		5.3.4.4	Individual victims	259
5.4	'Wid	espread	d or Systematic' Character of the Attack	266
			al considerations	266
		5.4.1.1	Raison d'être	266
		5.4.1.2	Widespread or systematic—Alternative requirements	267
		5.4.1.3	Relative notions	269
	5.4.2	'Wides	pread'	270
	5.4.3	'Systen	natic'	273
	5.4.4	Eviden	itial considerations	277
	5.4.5	Policy	requirement	285
			Customary law—No requirement of policy	285
		5.4.5.2	ICC regime	287
			5.4.5.2.1 Normative framework	287
			5.4.5.2.2 Raison d'être	291
			5.4.5.2.3 Meaning	292
			5.4.5.2.4 Evidential issues	304
			5.4.5.2.5 State or an organization promotes or encourages	313
			5.4.5.2.6 'Pursuant to or in furtherance of'	323
		1000	5.4.5.2.7 <i>Mens rea</i> and policy requirement	325
5.5			een the Acts of the Accused and the Attack	327
	5.5.1		tion of the 'nexus'	327
			General considerations	327
			Acts of the accused are an objective part of the attack	328
			Exclusion of isolated acts	331
			Nexus and mens rea	333
			No policy requirement	334
	5.5.2		tial considerations	334
			Relevant factors	334
			Contextual appraisal of the requirement	338
			Exclusion of isolated acts	340
5.6	-		ate of Mind or Mens Rea	341
			al considerations	341
	5.6.2		edge by the accused of the attack and of his participation therein	342
			Extent of required knowledge	342
			Purpose and motives	344
			Mens rea of the accused or that of the perpetrator?	346
	F ( )		The ICC regime	349
			tial factors	351
Uno	derlyi	ng Offe	ences	357
6.1	Wha	t Crime	es Can Constitute Crimes Against Humanity	357
			ying crimes in the jurisdiction of international(ized)	
		crimina	al tribunals	357
			Nuremberg, Tokyo, and Control Council Law No. 10	357
		6112	The UN war crimes tribunals	357

xvi Contents

		6.1.1.3	The ICC	358
		6.1.1.4	Other international(ized) jurisdictions	359
	6.1.2	Custon	nary law and beyond	360
		6.1.2.1	Which crimes against humanity form part of customary	
			international law?	360
			Exhaustive nature of the list of crimes against humanity	366
		6.1.2.3	Conspiracy to commit crimes against humanity	367
6.2	Mur	der		369
	6.2.1	Genera	al considerations	369
			Murder as a crime against humanity—A brief history	369
			Elements of the offence—Customary international law	370
		6.2.1.3	Murder in the ICC regime	372
		Actus r		373
		Mens re		378
			r and associated offences	381
6.3		rminati		383
	6.3.1		al considerations	383
			Extermination as a crime against humanity—A brief history	383
		6.3.1.2	Elements of the offence—Customary international law	384
			6.3.1.2.1 Collective context; individual acts	384
			6.3.1.2.2 Elements of the offence	386
			Extermination in the ICC regime	387
	6.3.2	Actus r		388
		6.3.2.1	Large-scale killings	388
			6.3.2.1.1 Mass killings as a necessary element of the offence	388
			6.3.2.1.2 A single occurrence of mass killings or	201
			connected incidents	391
			6.3.2.1.3 Victims of the crime are a collection of individuals,	205
			not a group or population as such	395 396
		6222	6.3.2.1.4 Evaluating the element of scale	398
			Direct or indirect contribution to killings Method of killing irrelevant	401
			Creating inhuman conditions of life as a method of extermination	
	622	Mens re		403
	0.5.5		Elements of <i>mens rea</i>	403
			Motives, purpose, and discriminatory mindset	407
			Evidential considerations	408
	634		nination and associated offences	408
6.4		vemen		412
0.4			l considerations	412
	0.4.1		Enslavement as a crime against humanity—A brief history	412
			Elements of the offence—Customary international law	414
			Enslavement in the ICC regime	415
			Breadth of the prohibition	417
	6.4.2	Actus re		421
			Elements of the actus reus	421
			Absence of consent not an element of the offence	423
			Evidential considerations	424
	6.4.3	Mens re		426
			ement and associated offences	427
6.5			and Forcible Transfer of Population	430
_,_			l considerations	430
			Deportation and forcible transfer as crimes against	
			humanity—A brief history	430

Contents	xvii
Contents	xvii

			Elements of the offence under customary international law	433
		6.5.1.3	Deportation and forcible transfer in the ICC regime	436
	6.5.2	Actus re	eus	440
		6.5.2.1	Core elements	440
			Movement across borders for deportation	444
			No minimum distance of displacement required	449
		6.5.2.4	Unlawful displacement not limited to removal from usual	
			place of residence	450
		6.5.2.5	No minimum duration of displacement	452
		6.5.2.6	'Forced' or coerced nature of movement	452
		6.5.2.7	Displaced persons 'lawfully present'	462
			6.5.2.7.1 Broad and purposeful interpretation of the	
			notion of lawful presence	462
			6.5.2.7.2 Lawful presence to be determined in accordance	
			with international law	465
			6.5.2.7.3 Considerations pertaining to the status of the	
			displaced person	466
		6.5.2.8	Permissible grounds of removal under international law	467
			6.5.2.8.1 Permissible grounds of displacement	467
			6.5.2.8.2 Conditions and modalities of displacement	470
		6.5.2.9	Evidential considerations	474
	6.5.3	Mens re	ea .	478
			ation, forcible transfer, and associated offences	481
6.6		isonme		485
0.0			l considerations	485
	0.0.1		Imprisonment as a crime against humanity—A brief history	485
			Elements of the offence under customary international law	487
			Imprisonment in the ICC regime	489
	662	Actus re		492
	0.0.2		Arbitrary deprivation of liberty	492
		0.0.2.1	6.6.2.1.1 General considerations	492
			6.6.2.1.2 Existence of a valid legal basis for detention	497
			6.6.2.1.3 Protection of basic procedural safeguards	499
		6622	Relevant forms or types of deprivation of liberty	502
			Security detention	504
	663	Mens re	·	507
			onment and associated offences	507
67	Torti	-	minent and associated offences	509
0.7			considerations	509
	0.7.1		Torture as a crime against humanity—A brief history	509
			Normative status and scope of application	510
			1 11	517
			Elements of the offence under customary international law	517
	672	Actus re	Torture in the ICC regime	523
	0.7.2			523
			The infliction of severe pain	
	672		Form of the underlying act	527
	0.7.3	Mens re		529
			An intent to inflict severe pain and a prohibited purpose	529
	674		Evidential considerations	532
( 0			and associated offences	533
6.8	Rape		21-0-	536
	6.8.1		considerations	536
			Rape as a crime against humanity—A brief history	536
		0.8.1.2	Normative status	538

xviii Contents

		6.8.1.3	Elements of the offence under customary international law	539
		6.8.1.4	Rape in the ICC regime	541
		6.8.1.5	Select evidential challenges	548
	6.8.2	Actus 1		555
		6.8.2.1	Penetration	556
		6.8.2.2	Absence of consent	557
		6.8.2.3	Culpable contribution to the crime	563
	6.8.3	Mens r	rea	564
		6.8.3.1	Applicable standard	564
		6.8.3.2	Establishing the <i>mens rea</i>	565
	6.8.4	Rape a	and associated offences	567
6.9	Perse	ecution		569
	6.9.1	Persec	ution as a crime against humanity—A brief history	569
		6.9.1.1	Birth of the crime against humanity of persecution	
			at Nuremberg	569
			Persecution as a crime under customary law	571
	6.9.2	Raison	d'être and elements of the offence—General considerations	572
	6.9.3		mination against members of a group	573
		6.9.3.1	Targeting of individuals based on membership in a group	573
			6.9.3.1.1 Persecution as crime directed against	
			individuals or groups?	573
			6.9.3.1.2 Civilian or military character of victim irrelevant	575
		6.9.3.2	Membership of the victim in a discernible group	575
			6.9.3.2.1 Victim belongs to a targeted group whose	
			members are discriminated against	575
			6.9.3.2.2 Defining the group—Objective and subjective	
			considerations	576
			6.9.3.2.3 Victim mistakenly believed to belong to	
			targeted group	578
			6.9.3.2.4 The law of genocide <i>vs</i> the law of persecution	580
			6.9.3.2.4.1 The notion and relevance of the 'group'	580
			6.9.3.2.4.2 Protected interest: Individuals <i>vs</i> groups	582
	(0.1	0	6.9.3.2.4.3 Respective grounds of discrimination	583
	6.9.4		ds of persecution	584
			General considerations	584
		6.9.4.2	State of customary international law	584
			6.9.4.2.1 At the core: Political, racial, and religious grounds	584
		(012	6.9.4.2.2 Ethnic grounds and beyond	587
		0.9.4.3	Disjunctive and overlapping grounds of discrimination	589
			6.9.4.3.1 Disjunctive nature of grounds of discriminatory	589
		6011	6.9.4.3.2 Overlapping nature of grounds of discrimination	589 591
			Political grounds	596
			Racial grounds Religious grounds	596
			Ethnic grounds	597
			National grounds	599
			Gender grounds	602
			Social, cultural, or other grounds that are universally	002
		0.7.7.10	recognized as impermissible under international law	604
	6.95	Actus r		608
	0.7.0		General considerations	608
		2.2.0.1	6.9.5.1.1 The many possible forms of persecutory acts	608
			/ r	

Contents xix

		6.9.5.1.2	Underlying act need not itself be a recognized	
			criminal offence; severe rights violations may qualify	614
		6.9.5.1.3	Requirement of equal gravity	618
			6.9.5.1.3.1 Not every violation of rights constitutes	
			persecution—Equal gravity requirement	618
			6.9.5.1.3.2 Gross or blatant violations of rights only	619
			6.9.5.1.3.3 Overall and contextual assessment	
			of gravity	620
			6.9.5.1.3.4 No additional element of inhumanity	
			required	625
	6.9.5.2	Categorie	s of underlying acts capable of amounting	
		to persecu	, , ,	625
		-	General and historical considerations	625
			Examples of underlying persecutory acts	628
			Destruction and unlawful appropriation of	
			property as persecution	640
			Single act or course of conduct amounting	
			to persecution	643
	6.9.5.3		nation 'in fact'	645
	0171010		Actual discrimination as element of the <i>actus reus</i>	645
			Interpreting the requirement	646
			Establishing discrimination in fact	648
696	Mens r		200000000000000000000000000000000000000	651
0.7.0			nent of mens rea—Underlying act and	-
	0121012		atory intent	651
	6.9.6.2		cialis to discriminate	651
	0.7.0.2		General considerations	651
			No required knowledge of a policy or plan	653
	6963		ed grounds of discrimination	653
	0.7.0.5		One of the prohibited grounds was intended	653
			Whose intent?	654
	6964		eness in relation to underlying act or conduct	655
	0.7.0.1		Deliberateness of underlying conduct	655
			Recklessness and knowledge insufficient	656
			Motives irrelevant	656
	6965		ne discriminatory intent	658
		_	ry mens rea vs genocidal intent	664
			natory intent aggravates the offence	665
697			e Statute of the ICC	666
0.7.7			of persecution at the ICC	666
			ne vs customary international law	666
		_	ies of the ICC regime	668
	0.7.7.5		Against any identifiable group or collectivity	668
			Range of discriminatory grounds	669
			6.9.7.3.2.1 New grounds of discrimination	669
			6.9.7.3.2.2 Subjective assessment of grounds of	007
		,	discrimination	670
		60723	'In connection with' another crime	670
			6.9.7.3.3.1 Origin of the requirement	670
			6.9.7.3.3.2 Meaning of the requirement	673
		6.9.7.3.4		675
698	Perseci		ssociated offences	676
0.7.0	TOTOCCE	and a	ood diameter of the little of	0,0

xx Contents

6.10	Other	r Inhuma	ane Acts		677
	6.10.1	General	considerat	ions	677
		6.10.1.1	Origin of	the offence	677
		6.10.1.2	Residual	character of the offence	678
		6.10.1.3	Elements	of the offence	680
			6.10.1.3.1	Customary international law	680
				ICC regime	681
	6.10.2	Actus re			687
		6.10.2.1	Elements	of actus reus	687
		6.10.2.2	Type and	form of the underlying conduct	687
		6.10.2.3	Gravity th	reshold	695
		6.10.2.4	Indirect v	ictims	697
	6.10.3	Mens red	7		698
	6.10.4	Other in	humane ac	ts and associated offences	699
6.11	Enfor	ced Disa	ppearance		700
	6.11.1	Enforced	d disappear	ance as a human rights violation	700
	6.11.2	Enforced	d disappear	ance as a crime against humanity	703
		6.11.2.1	Recogniti	on of enforced disappearance as a criminal offence	703
			6.11.2.1.1	Enforced disappearance as a recognized	
				criminalized practice	703
			6.11.2.1.2	The transformation of a human rights	
				prohibition into a crime against humanity	705
		6.11.2.2	Status und	ler customary international law?	706
			6.11.2.2.1	1975—Not <i>yet</i> part of customary law	706
			6.11.2.2.2	Developments since then—The recognition	
				of enforced disappearance under customary	
				international law	706
		6.11.2.3		and elements	710
			6.11.2.3.1	General elements of the offence	710
				A state or no state?	712
				Refusal to clarify fate of victim	715
		_		Categories of potential perpetrators	718
	6.11.3			ance in the Statute of the ICC	718
			The defini		718
			_	on of liberty	719
		6.11.3.3		suppression of information	720
			6.11.3.3.1	Refusal to provide information as an element	
				of the crime	720
			6.11.3.3.2	Refusal to inform need not be imputed to	
				the accused	721
				Does a refusal imply a request for information?	721
		(11.2.4		Possible forms of refusal	723
		6.11.3.4		ent of a state or political organization	724
				Statutory requirement	724
				Stage or stages of involvement	724
				Form and manner of involvement	725
		61125		State or political organization	726
		0.11.3.5		ent of intent	726
				Normative framework	726
		(11.27		Intended removal for a prolonged period of time	728
		0.11.3.6		ing crime (within jurisdictional limits)	729
				A continuing crime	729
	6114	Enforce		Limited competence <i>ratione temporis</i> of the Court ance and associated offences	730 730
	0.11.4	CHIOTCEC	uusabbeara	ance and associated offences	/ 5()

Contents	xxi

6.12	2 Apartheid	732
	6.12.1 A short history of the crime against humanity of apartheid	732
	6.12.2 Apartheid under customary international law	738
	6.12.3 Perpetratorship	739
	6.12.4 The crime of apartheid in the ICC Statute	739
	6.12.4.1 The importance of the statutory recognition of	
	apartheid as a crime against humanity	739
	6.12.4.2 Definition of the crime	740
	6.12.4.2.1 Normative framework	740
	6.12.4.2.2 Inhumane acts	740
	6.12.4.2.3 In the context of an institutionalized regime	
	of systematic oppression and domination	742
	6.12.4.2.4 On grounds of race	743
	6.12.4.2.5 Mens rea	744
	6.12.5 Apartheid and associated offences	744
6.13	Sexual and Gender Crimes	745
	6.13.1 General considerations	745
	6.13.1.1 From the First World War to the ICC and beyond	745
	6.13.1.2 Gender-specific and non-gendered crimes—	
	Overlap and differences	750
	6.13.2 Sexual slavery	751
	6.13.2.1 Origin of the offence	751
	6.13.2.2 Elements of the offence	754
	6.13.2.3 Sexual slavery and associated offences	763
	6.13.3 Enforced prostitution	767
	6.13.3.1 Origin of the offence	767
	6.13.3.2 Elements of the offence	770
	6.13.3.3 Enforced prostitution and associated offences	774 775
	6.13.4 Forced pregnancy	775 775
	<ul><li>6.13.4.1 Origin of the offence</li><li>6.13.4.2 Elements of the offence</li></ul>	775 776
		781
	6.13.4.3 Forced pregnancy and associated offences 6.13.5 Enforced sterilization	781
	6.13.5.1 Origin of the offence	782
	6.13.5.2 Elements of the offence	783
	6.13.5.3 Enforced sterilization and associated offences	785
	6.13.6 Sexual violence	785
	6.13.6.1 Origin of the offence	785
	6.13.6.2 Elements of the offence	787
	6.13.6.3 Sexual violence and associated offences	793
	6.13.7 Forced marriage	795
7 Cr	imes Against Humanity and Other International Crimes	799
		799
	Crimes Against Humanity in a Nutshell	
1.2	Crimes Against Humanity and War Crimes	801
	7.2.1 General considerations	801
	7.2.2 Different contextual elements	802
	7.2.2.1 Armed conflict and nexus therewith	802 804
	7.2.2.2 Widespread or systematic attack against a civilian population	804
	7.2.3 Different scope of criminalization 7.2.3.1 Protected individuals	805
	7.2.3.1 Protected individuals 7.2.3.2 Protected properties	808
	7.2.3.3 Underlying offences	809
	7.2.4 Relative gravity	810
	/ . Z. I INCIBITY CHAPTEY	OIU

xxii Contents

	7.3	Crin	nes Aga	inst Humanity and Genocide	813
		7.3.1	Comm	on features	813
		7.3.2	Differe	nces	814
			7.3.2.1	Different mens rea and relevance of groups	814
			7.3.2.2	Range of underlying crimes	815
			7.3.2.3	Widespread or systematic attack against a civilian population	816
			7.3.2.4	Protected individuals	816
			7.3.2.5	Specific inchoate offences for genocide	817
			7.3.2.6	Policy element	817
			7.3.2.7	Gravity	818
			7.3.2.8	Other normative differences	818
		7.3.3		ide and certain overlapping crimes against humanity	819
			7.3.3.1	Genocide and persecution	819
			7.3.3.2	Genocide and extermination	820
			7.3.3.3	Genocide and enforced sterilization	821
			7.3.3.4	Genocide, deportation, and forcible transfer	822
	7.4	Crim	es Aga	inst Humanity and Aggression	823
	7.5	Crim	nes Aga	inst Humanity and Terrorism	827
Bił	oliogr	aphy			831
	lox	. /			857