

Contents

<i>Preface</i>	v
<i>Table of Cases</i>	xv
<i>Table of Treaties</i>	xxxix
<i>Table of National Legislation</i>	lv
PART I FUNDAMENTAL PRINCIPLES OF INTERNATIONAL CRIMES AND CRIMINAL JUSTICE	1
Chapter 1 Fundamentals of International Criminal Law	3
1.1 Introduction	3
1.2 Sources of International Law and Individual Legal Personality	4
1.3 The International Criminalisation Process	8
1.4 Enforcement of International Criminal Law	12
1.5 State Criminality	16
1.6 International Criminal Law and Human Rights	19
1.7 The Principle of Legality	21
1.7.1 Specificity	21
1.7.2 Non-Retroactivity	23
1.7.3 Prohibition of Analogy	26
1.7.4 The <i>Favor Rei</i> Rule	27
1.8 Statutes of Limitation for International Crimes	28
1.9 Justificatory Bases for International Trials and the Quest for Legitimacy	29
1.10 Lawfare: International Law as a Weapon for the 'Weak'	32
Chapter 2 The Subjective and Objective Elements of International Crimes	35
2.1 General Principles of the Objective Element	35
2.2 General Principles of the Subjective Element	38
2.3 Intent or <i>Dolus</i>	40
2.4 Recklessness and <i>Dolus Eventualis</i>	43
2.5 Negligence	45
2.6 Special Intent	47
2.7 The Principle of Transferred Fault and of Mistaken Object	49
Chapter 3 Modes of Liability and Criminal Participation	51
3.1 The Legal Nature of Perpetration and Participation	51
3.2 Joint Criminal Enterprise	53
3.3 Commission through Another Person or Indirect Perpetration	59
3.4 Co-Perpetration	60
3.5 Conspiracy	63
3.6 Attempts	66
3.7 Aiding and Abetting	67
3.8 Ordering	70
3.9 Planning and Preparation	73

3.10	Instigation	74
3.11	International Corporate Criminal Liability	76
Chapter 4 The Law of Command Responsibility		79
4.1	The Legal Nature of Command Responsibility	79
4.2	The Superior-Subordinate Relationship	82
4.3	The Position of Civilian Commanders	86
4.4	The Mental Element	88
4.5	The Duty to Prevent or Punish	93
4.6	The Question of Successor Superior Responsibility	95
PART II DEFENCES AND EXCUSES FROM CRIMINAL LIABILITY		97
Chapter 5 Defences in International Criminal Law		99
5.1	Theoretical Underpinnings of Criminal Defences	99
5.2	Is there a Place for Domestic Defences in the ICC Statute?	102
5.3	Superior Orders	104
5.4	Duress and Necessity	108
5.5	Self-Defence	112
5.6	Intoxication	114
5.7	Mistake of Fact or Mistake of Law	115
5.8	Ignorance of Law	116
5.9	Mental Incapacity	119
5.10	<i>Tu Quoque</i>	121
Chapter 6 Immunities from Criminal Jurisdiction		122
6.1	General Conception of Immunity in International Law	122
6.2	Act of State Doctrine	125
6.3	Immunity from Criminal Jurisdiction	127
6.3.1	The Application of Functional and Personal Immunity in Practice	128
6.4	Diplomatic and Consular Immunities	131
6.5	Immunity from International Criminal Jurisdiction	133
PART III SUBSTANTIVE CRIMES		135
Chapter 7 War Crimes and Grave Breaches		137
7.1	Grave Breaches of the 1949 Geneva Conventions	137
7.1.1	Classification of Armed Conflicts	140
7.1.2	Types of War Crimes in International Armed Conflicts	141
7.2	War Crimes against Protected Persons and of Property in the Hands of the Adversary	143
7.2.1	Wilful Killing	143
7.2.2	Torture as a War Crime	144
7.2.3	Inhuman and Cruel Treatment	145
7.2.4	Biological Experiments	146
7.2.5	Wilfully Causing Great Suffering or Serious Injury	147
7.2.6	Extensive Destruction and Appropriation of Property	148
7.2.7	Pillage	149

7.2.8	Compelling Prisoners of War or Protected Persons to Serve with the Hostile Power	150
7.2.9	Wilfully Depriving Protected Persons of Rights to Fair and Regular Trial	151
7.2.10	Unlawful Deportation or Transfer of Protected Persons	152
7.2.11	Transferring Own Population into Occupied Territory	153
7.2.12	Unlawful Confinement	154
7.2.13	Taking of Hostages	155
7.2.14	War Crime of Depriving the Nationals of the Hostile Party of Rights or Actions	156
7.2.15	Using, Conscripting or Enlisting Children	156
7.3	Sexual Crimes	159
7.3.1	Outrages upon Personal Dignity	159
7.3.2	Rape and Sexual Violence	160
7.3.3	Sexual Slavery	163
7.3.4	Enforced Prostitution	164
7.3.5	Forced Pregnancy	165
7.3.6	Enforced Sterilisation	165
7.4	Prohibited Targeting Crimes	166
7.5	War Crimes against Combatants and <i>Hors de Combat</i>	173
7.6	War Crimes related to the Use of Illegal or Prohibited Weapons	175
7.7	Violations of the Laws or Customs of War in Internal Armed Conflicts	178
7.7.1	Specific Internal Armed Conflict War Crimes	181
7.7.2	The War Crime of Inflicting Collective Punishments	183
Chapter 8	Crimes Against Humanity	185
8.1	Origins of the Concept	185
8.2	The Fundamental Elements of the Offence and the Meaning of 'Attack'	188
8.2.1	The Underlying Offences	190
8.3	The Widespread or Systematic Element	196
8.4	The Nature of the Targeted 'Civilian Population'	198
8.5	The Subjective Element	200
8.6	Crimes Against Humanity in the ICC Statute	201
Chapter 9	The Crime of Genocide	203
9.1	Early Perceptions and the Duties of States to Prevent and Punish Genocide	203
9.2	Destruction of the Group 'in Whole or in Part'	206
9.3	The Specific Intent (<i>Dolus Specialis</i>) Required for Genocide	208
9.4	Membership of the Targeted Group	212
9.5	Acts Constituting Genocide	215
9.6	The Problematic Nature of Aiding and Abetting Genocide	217
9.7	Incitement to Commit Genocide	219
Chapter 10	Offences Against the Person	222
10.1	Introduction	222
10.2	Slavery and Related Practices	222
10.2.1	The Slave Trade and Similar Institutions	224

10.3	Torture as a Crime under International Law	230
10.3.1	Defining Torture	231
10.3.2	The 'Public Official' Requirement of Torture	234
10.4	Apartheid	235
10.5	Enforced or Involuntary Disappearances	237
Chapter 11	Transnational Crimes	240
11.1	Introduction	240
11.2	Transnational Organised Crime	241
11.2.1	Additional CATOC Protocols: Migrant Smuggling and Illicit Traffic in Firearms	244
11.3	Money Laundering	246
11.4	Drug-Trafficking as a Crime under International Law	249
11.5	Bribery of Foreign Public Officials	252
11.6	International Postal Offences	257
Chapter 12	Terrorism	260
12.1	Introduction	260
12.2	The Thematic Evolution of Terrorism in International Law	263
12.3	The Specialised Anti-Terrorist Conventions	264
12.3.1	Offences Against Civil Aviation	264
12.3.2	Hostage Taking and Attacks Against Internationally Protected Persons	270
12.3.3	Terrorist Bombings and Nuclear Terrorism	272
12.3.4	Terrorist Financing and Security Council Resolution 1373 (2001)	275
12.4	State-Sponsored Terrorism	279
12.5	Terrorism and National Liberation Movements	281
12.6	Organised Crime and its Relation to Terrorism	284
Chapter 13	The Crime of Aggression	287
13.1	Introduction	287
13.2	Aggression under Customary Law	288
13.3	Aggression in the ICC Statute	291
Chapter 14	International Criminal Law of the Sea	295
14.1	Brief Introduction to the Law of the Sea	295
14.2	Piracy <i>Jure Gentium</i>	297
14.2.1	Definition of Piracy under International Law and its Difference from Armed Robbery at Sea	298
14.2.2	Mutiny and other Violence against Ships not amounting to Piracy	302
14.2.3	Mechanisms for the Prevention and Eradication of Piracy	303
14.3	Maritime Terrorism	305
14.4	Offences Against Submarine Cables and Pipelines	307
14.5	Unauthorised Broadcasting from the High Seas	310
14.6	Ship-Source Pollution	312
14.7	Criminal Liability for Fisheries-related Violations on the High Seas	314
14.8	Enforcement on the High Seas	316
14.9	The Right of Hot Pursuit	321

14.9.1 Commencement and Continuous Nature of Hot Pursuit	323
14.9.2 The Doctrine of Constructive Presence	324
PART IV ENFORCEMENT OF INTERNATIONAL CRIMINAL LAW	327
Chapter 15 The Exercise of Criminal Jurisdiction	329
15.1 International Law Principles on Criminal Jurisdiction	329
15.2 Territorial Jurisdiction	332
15.2.1 Subjective Territoriality	333
15.2.2 Objective Territoriality	335
15.2.3 The Ambit of National Territory	336
15.3 The Active Personality Principle	338
15.4 The Passive Personality Principle	340
15.5 The Protective Principle	342
15.6 Universal Jurisdiction	344
15.7 Jurisdiction with Respect to Crimes Against Civil Aviation	349
15.8 Foreign and Multinational Armed Forces Abroad	350
15.9 International Criminal Jurisdiction	352
Chapter 16 International Cooperation in Criminal Matters	355
16.1 Introduction	355
16.2 Mutual Legal Assistance <i>Stricto Sensu</i>	355
16.3 Informal Assistance Arrangements	361
16.4 Recognition of Foreign Penal Judgments: The Principle of Mutual Recognition	362
16.5 International Prisoner Transfers	363
16.6 Horizontal and Vertical Cooperation between States and International Organisations	366
16.6.1 Cooperation under the ICTY/ICTR Regime	367
16.6.2 The Vertical Regime of the ICC	370
16.6.3 Cooperation under the Statutes of Hybrid Tribunals	372
16.7 International Tribunal Requests to International Organisations and Preservation of Confidentiality	372
16.8 Extradition	373
16.8.1 Human Rights and Diplomatic Assurances	376
16.8.2 The Principle of 'Either Prosecute or Extradite'	378
16.8.3 The European Arrest Warrant	379
16.9 The Effects of Extraterritorial Abduction and Illegal Rendition on Criminal Proceedings	380
Chapter 17 The Nuremberg and Tokyo Tribunals and the Origins of International Criminal Justice	384
17.1 The Historical Origins of International Criminality	384
17.2 The Background to the Establishment of the International Military Tribunals	388
17.2.1 The Law and Jurisdiction of the International Military Tribunal (IMT) at Nuremberg	389

17.3	The International Military Tribunal for the Far East (IMTFE)	397
17.4	The International Law Commission's Role in the Post-Nuremberg Era	400
Chapter 18	The International Criminal Tribunals for Yugoslavia and Rwanda	403
18.1	Introduction	403
18.2	Formative Years of the Ad Hoc Tribunals	406
18.3	Jurisdiction of the ICTY and ICTR	412
18.4	Enforcement Capacity of the Tribunals	414
18.5	Rights of the Accused and Abuse of Process	417
18.6	Dissolution of the Tribunals and their Completion Strategy	421
Chapter 19	The Permanent International Criminal Court	423
19.1	Introduction	423
19.2	Jurisdiction and the ICC Triggering Mechanism	426
19.3	The Principle of Complementarity and Security Council Referrals	429
19.4	Deferrals by the Security Council and Deferrals in 'the Interests of Justice'	432
19.5	Subject Matter Jurisdiction	435
19.6	International Cooperation and Judicial Assistance	436
19.7	Impunity Agreements in Contravention of Article 98 ICC Statute	439
19.8	Reservations and Amendments to the Statute	440
19.9	Reparation of Victims and the ICC Trust Fund	441
Chapter 20	Internationalised Domestic Criminal Tribunals, Truth Commissions and Amnesties	444
20.1	Introduction	444
20.2	The Sierra Leone Special Court	445
20.2.1	The Fate of Amnesties and Immunities	448
20.3	The East Timor Special Panels	450
20.4	UNMIK and the Kosovar Judicial System	453
20.5	The Cambodian Extraordinary Chambers	455
20.6	The Iraqi Special Tribunal for Crimes Against Humanity	458
20.7	Terrorist-related Tribunals	461
20.7.1	The Lockerbie Tribunal	461
20.7.2	The Special Tribunal for Lebanon	464
20.8	National Truth Commissions and Amnesties	467
PART V	EVIDENCE AND INTERNATIONAL CRIMINAL PROCEDURE	471
Chapter 21	Evidence before International Criminal Courts and Tribunals	473
	<i>By Caroline Buisman</i>	
21.1	Introduction	473
21.2	General Evidentiary Principles	477
21.3	Admissibility	480
21.3.1	Rules and Principles of Admissibility	480
21.3.2	Relevant Definitions of Rule 89(C) Terminology	483
21.3.2.1	Relevance	483
21.3.2.2	Probative Value	484

21.3.2.3 Probative Value Versus Prejudice	485
21.3.2.4 Reliability	486
21.4 Principle of Orality	487
21.4.1 Admissibility of Written Statements in lieu of Oral Testimony	491
21.4.2 Further Steps to Admit Written Statements in lieu of Oral Testimony	494
21.4.3 Prior Inconsistent Statements	498
21.4.4 Admissibility of Suspect Interviews	500
21.4.5 Admissibility of Suspect Interviews Against a Co-Accused	500
21.5 Documentary Evidence	503
21.6 Hearsay Evidence	508
21.7 The Investigator's Report	512
21.8 Expert Evidence	514
21.9 Character Evidence	522
21.10 Exclusion of Improperly Obtained Evidence	524
21.11 Determination of Weight of Evidence	531
21.11.1 General Principles	531
21.11.2 Corroboration	534
21.11.3 Documentary Evidence	536
21.11.4 Hearsay Evidence	538
21.11.5 <i>Viva Voce</i> Testimony	540
21.11.6 Prior Statements	543
21.11.7 Expert Evidence	544
21.12 Free System of Proof	545
Chapter 22 The Status of Victims in International Criminal Law and Criminal Proceedings	548
22.1 The Legal Protection of Victims in International Law	548
22.2 The Physical Protection of Victims of International Crimes	550
22.2.1 'Victims' of No Crimes at All!	553
22.3 Forms of Reparation	556
22.4 Victim Participation in International Criminal Proceedings	557
22.4.1 The ICC	558
22.4.2 The Extraordinary Chambers in the Courts of Cambodia (ECCC)	561
<i>Index</i>	565