

CONTENTS

<i>Preface</i>	xv
<i>Abbreviations</i>	xvii
<i>Table of Cases Cited</i>	xxiii

PART I: INTRODUCTION

1 THE REACTION OF THE INTERNATIONAL COMMUNITY TO ATROCITIES	3
1.1 The failure of international sanctions by States	3
1.2 Other responses to atrocities	5
2 FUNDAMENTALS OF INTERNATIONAL CRIMINAL LAW	15
2.1 The notion of international criminal law	15
2.2 General features of international criminal law	16
2.3 The notion of international crimes	23
2.4 Sources of international criminal law	25
2.5 The historical evolution of international crimes	37

PART II: SUBSTANTIVE CRIMINAL LAW

SECTION I: INTERNATIONAL CRIMES

3 WAR CRIMES	47
3.1 The notion	47
3.2 The need for a link between the offence and an (international or internal) armed conflict	49
3.3 Establishing whether a serious violation of international humanitarian law has been criminalized	50
3.4 The objective elements of the crime	54
3.5 The subjective element of the crime	57
3.6 The definition of war crimes in the Statute of the ICC	59

4	CRIMES AGAINST HUMANITY	64
4.1	The notion	64
4.2	The origin of the notion	67
4.3	The objective element of the crime	74
4.4	The subjective element of the crime	81
4.5	The possible authors of the crime	83
4.6	The possible victims of the crime	85
4.7	Customary international law and Article 7 of the ICC Statute	91
5	GENOCIDE	96
5.1	The notion	96
5.2	The objective element of the crime	98
5.3	The subjective element of the crime	103
5.4	Genocide and crimes against humanity	106
5.5	Article 6 of the ICC Statute	107
6	OTHER INTERNATIONAL CRIMES (AGGRESSION, TORTURE, AND TERRORISM)	110
6.1	Introduction	110
6.2	Aggression: the notion	111
6.3	Objective and subjective elements of aggression	114
6.4	The possible impact on judicial findings of the appraisal of aggression by international political bodies	117
6.5	Torture: general	117
6.6	The emergence of a customary rule on torture	119
6.7	Objective and subjective elements of torture	119
6.8	Trans-national, State-supported, or State-sponsored terrorism	120
6.9	The diverse forms of terrorism	125
 SECTION II: FUNDAMENTALS OF INTERNATIONAL CRIMINAL RESPONSIBILITY 		
7	GENERAL PRINCIPLES	135
7.1	Preliminary remarks	135
7.2	The principle of individual criminal responsibility	136
7.3	The principle of legality of crimes (<i>nullum crimen sine lege</i>)	139

7.4	Articulations of the principle of legality	145
7.5	The principle of legality of penalties (<i>nulla poena sine lege</i>)	157
8	MENS REA	159
8.1	The methodological problem	159
8.2	General categories of <i>mens rea</i> : intent	162
8.3	Recklessness	168
8.4	Culpable negligence	171
8.5	The ICC Statute	176
8.6	Judicial determination of the subjective element	177
9	PERPETRATION AND OTHER MODALITIES OF CRIMINAL CONDUCT	179
9.1	General	179
9.2	Perpetration	180
9.3	Co-perpetration	181
9.4	Participation in a common purpose or design	181
9.5	Incitement or instigation as a form of participation in international crimes	189
9.6	Inchoate crimes: general	190
9.7	Planning	192
9.8	Ordering	193
9.9	Attempt	194
9.10	Conspiracy to commit genocide	196
9.11	Incitement to genocide	198
10	CRIMINAL LIABILITY FOR OMISSIONS	200
10.1	General	200
10.2	Rules imposing the positive obligation to act	201
10.3	<i>Mens rea</i>	203
10.4	The responsibility of superiors	203
11	MULTIPLICITY OF OFFENCES	212
11.1	General	212
11.2	Differentiating classes of multiple offences	212
11.3	The test based on protected values	217
11.4	The impact of multiplicity of crimes on sentencing	217

12	CIRCUMSTANCES EXCLUDING CRIMINAL LIABILITY: JUSTIFICATIONS AND EXCUSES	219
12.1	The distinction between justifications and excuses	219
12.2	Customary international law: general	221
12.3	Self-defence	222
12.4	Excuses: two main categories	224
12.5	Excuses based on lack of individual autonomy	224
12.6	The ICC Statute	229
13	OTHER EXCUSES: SUPERIOR ORDER, NECESSITY, DURESS, AND MISTAKE	231
13.1	Superior orders: may they be pleaded as a defence?	231
13.2	Necessity and duress	242
13.3	Mistake of fact	251
13.4	Mistake of law	256
14	IMMUNITIES	264
14.1	General: various classes of immunities	264
14.2	Functional and personal immunities provided for in international customary law	265
14.3	The customary rule lifting functional immunities in the case of international crimes	267
14.4	International personal immunities	271
14.5	National personal immunities	273

**PART III: PROSECUTION AND PUNISHMENT BY
NATIONAL COURTS**

15	LEGAL GROUNDS OF JURISDICTION	277
15.1	Introduction	277
15.2	The principle of territoriality	277
15.3	The principle of active nationality	281
15.4	The principle of passive nationality	282
15.5	The universality principle	284
15.6	Objections to universality	292

15.7	Is the exercise of universal jurisdiction allowed by customary international law?	293
15.8	Trends in the exercise of national criminal jurisdiction	295
16	THE IMPACT OF INTERNATIONAL LAW ON NATIONAL LEGISLATION	301
16.1	Are there international customary rules obliging States to prosecute international crimes?	301
16.2	Are there customary rules authorizing States to prosecute international crimes?	303
16.3	The limited impact of international law on national courts	303
16.4	International rules imposing respect for fundamental safeguards in national trials	309
17	LEGAL IMPEDIMENTS TO THE EXERCISE OF NATIONAL JURISDICTION	312
17.1	Amnesty	312
17.2	Statutes of limitation	316
17.3	The prohibition of double jeopardy (<i>ne bis in idem</i>)	319
17.4	Immunities	321

**PART IV: PROSECUTION AND PUNISHMENT BY
INTERNATIONAL COURTS**

SECTION I: GENERAL

18	THE ESTABLISHMENT OF INTERNATIONAL CRIMINAL TRIBUNALS	327
18.1	Abortive early attempts (1919–1945)	327
18.2	Criminal prosecution in the aftermath of the Second World War: the Nuremberg and Tokyo Tribunals (1945–1947)	329
18.3	The work of the ILC (1950–1954) for the elaboration of the statute of an international criminal court	333
18.4	The post-Cold War ‘new world order’ and the development of ad hoc Tribunals (1993–1994)	334
18.5	The drafting and adoption of the Statute of the ICC (1994–1998)	340
18.6	The establishment of so-called internationalized or mixed criminal courts or tribunals	343

19	INTERNATIONAL VERSUS NATIONAL JURISDICTION	348
19.1	Primacy and complementarity	348
19.2	The primacy of the ICTY and the ICTR	349
19.3	The complementarity of the ICC	351
19.4	The Nuremberg scheme versus the ICC scheme	353
19.5	The need for international criminal courts and tribunals to rely upon State co-operation	355
19.6	Models of co-operation	355
19.7	Co-operation of States under the ICTY and ICTR scheme	357
19.8	Co-operation of States under the ICC scheme	358
19.9	The question of surrender of nationals	360

SECTION II: INTERNATIONAL CRIMINAL TRIALS

20	THE ADOPTION OF THE FUNDAMENTAL FEATURES OF THE ADVERSARIAL SYSTEM AT THE INTERNATIONAL LEVEL	365
20.1	The adversarial versus the inquisitorial system: general	365
20.2	How the two models work: a comparison	367
20.3	The transposition of the adversarial model on to the international legal level	376
20.4	The principal elements of the inquisitorial model incorporated into international procedure	386
20.5	Towards a 'mixed' procedural model	387
21	THE GENERAL PRINCIPLES GOVERNING INTERNATIONAL CRIMINAL TRIALS	389
21.1	The nature and role of the principles	389
21.2	The presumption of innocence	390
21.3	The principle that judges must be independent and impartial	393
21.4	The principle of fair and expeditious trial	395
21.5	The principle that the accused must be present at his trial	400
22	STAGES OF INTERNATIONAL PROCEEDINGS IN OUTLINE	406
	(A) PROSECUTOR'S INVESTIGATIONS AND PRE-TRIAL PROCEEDINGS	
22.1	General	406
22.2	The setting in motion of international criminal investigations	406

22.3	Conditions the prosecutor must fulfil before initiating an investigation	408
22.4	Conduct of investigations by the prosecutor	409
22.5	Pre-trial proceedings	416
(B) TRIAL PROCEEDINGS		
22.6	Case presentation	418
22.7	Rules of evidence	421
22.8	Control of proceedings	425
22.9	Deliberations	425
22.10	Sentencing	427
22.11	Reparation or compensation to victims	429
(C) APPELLATE AND REVIEW PROCEEDINGS		
22.12	General	430
22.13	Appeals against interlocutory decisions	432
22.14	Appeals against judgment or sentence	433
22.15	Review of judgment or sentence	434
22.16	Review of other final decisions	435
(D) ENFORCEMENT OF SENTENCES		
22.17	Place of imprisonment	436
22.18	Conditions of detention	436
22.19	Reduction or commutation of sentence and pardon	437
22.20	Supervision of imprisonment	438
(E) THE SPECIFICITY OF INTERNATIONAL TRIALS		
22.21	The unique traits of international criminal trials	439
22.22	The merits of international criminal justice	441
22.23	The main problems of international criminal proceedings	442
23	THE OUTLOOK FOR INTERNATIONAL CRIMINAL JUSTICE	445
23.1	The importance of reacting to widespread atrocities	445
23.2	Current trends in the reaction to widespread atrocities	446
23.3	Resorting to improved Truth and Reconciliation Commissions	450
23.4	Enhancing the role of national courts	452
23.5	National criminal judges and international courts	455
23.6	Using mixed criminal courts and tribunals for international crimes	456

23.7	Some tentative conclusions: the need to work for criminal justice on various fronts	457
	<i>Index</i>	459