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A Concise History of International Criminal Law

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Introduction: The Genesis Story

The international criminal proceedings following World War II are credited with launching the modern regime of international criminal law (ICL). Antecedents, however, trace back for centuries and across the globe. In particular ICL draws on four main strands of international law history: nineteenth-century prohibitions against piracy, the subsequent regulations of slavery and the slave trade, the once theological and later secular theory of just war, and international humanitarian law (IHL) or the "law of war." On this foundation, the international community gradually built the norms, rules, instruments, and institutions that now make up the modern ICL machinery. This chapter interweaves the history of substantive norms with that of evolving principles of domestic and international jurisdiction, as these narratives are virtually inseparable in ICL.

Several features of this evolution are worth pointing out at the outset. First, with the exception of the post–World War II period, when the international community created tribunals

and the law they were to apply virtually simultaneously, many ICL norms developed well before there were judicial institutions available to enforce them. In the terminology of Dan-Cohn, ICL had conduct rules without corresponding enforcement rules (rules directing officials to enforce the conduct rules).[1] As is the case with much public international law, it took some time before the international community was willing to put principle into practice. Second, until very recently, the design of much of the system was ad hoc and reactive to world events rather than the result of any sort of coherent forward-looking process. A notable exception is the permanent International Criminal Court (ICC), which has only prospective jurisdiction. Third, the history of ICL is marked by greater and greater incursions into arenas that were historically the exclusive province of sovereign states. Thus, ICL norms increasingly govern the treatment a state can legally accord its citizens and others under its jurisdiction, and such acts are increasingly the subject of international scrutiny, condemnation, and criminal prosecutions.

Substantive Law Antecedents to Modern ICL

Just War: *Jus Ad Bellum*

Although early Christian theology manifested an "extreme pacifism" that prohibited participation in war, by the time of St. Augustine (C.E. 354-430) a theory of *just war* had developed, which stated that resort to war was permitted only if the ends were just. Other religious and national traditions also preserved the right to engage in war against "infidels" or to avenge a wrong. Efforts to identify the necessary conditions for war constitute the *jus* (or *ius*) *ad bellum* — the set of rules regulating the decision to use military or armed force in international relations.

In his *Summa Theologica*, for example, St. Thomas Aquinas (C.E. 1225-1274) set forth the following requirements for a war to be considered just: (1) it must be authorized by a legitimate sovereign; (2) it must be necessary for the achievement of a just cause; and (3) it must be for a "right intention," that is the restoration of a good and just order and not in furtherance of injustice.[2] Self-defense against an unjust act of aggression, punishment of an unjust act of aggression, or recovery of something wrongly taken all qualified as just causes for Aquinas.

By the sixteenth century, however, it became accepted that there may be a just war on both sides, and the laws of war gradually shifted attention away from identifying the acceptable reasons for going to war to regulating the effects of war — the *jus* (or *ius*) *in bello*. Eventually, the notion of just war dissipated almost entirely. By the time of World War I, war was viewed as the prerogative of the sovereign and a valid instrument of foreign policy. International law had thus dramatically shifted focus. It went from evaluating the morality and justice of going to war, but only weakly regulating the means and methods of warfare, to a resignation that the justness of war was too difficult to universalize combined with renewed efforts to humanize the means and methods of warfare. This shift in emphasis from *jus ad bellum* to *jus in bello* still largely describes the state of the law of armed conflict today, although the halting development of the crimes of terrorism and aggression harkens back to the *jus ad bellum* tradition.

Penal Antecedents: Piracy and Slavery

Piracy and the practices of slavery and the slave trade were two of the earliest international crimes outside of war that states coordinated among themselves to criminalize and prosecute. Up until this point ICL primarily focused on acts committed by one state against the nationals of another state — the traditional paradigm for war crimes. With the recognition of piracy and

slavery as international crimes, ICL turned its attention to private actors that operated within the interstitial space separating nation states. We thus see a shift from a focus solely on activity that is international, in the sense of activity between distinct nation states, to an acceptance of international jurisdiction over activity that affects the efficient operation of the international system (piracy) or that implicates universal moral values (slavery).

Piracy — widespread in the eighteenth and nineteenth centuries — was a crime that, in the absence of any international tribunal and because it was committed on the high seas, could long be prosecuted before the courts of any nation able to apprehend the perpetrators. The prohibition against piracy thus gave rise to the notion of universal jurisdiction, now a central feature of modern ICL.

Collective efforts to combat piracy in many respects began with the 1856 Paris Declaration Respecting Maritime Law, which abolished forms of piracy in armed conflict and was signed by nearly all the imperial powers. As the international community convened the League of Nations, there was talk of regulating piracy more generally through international agreement; however, this effort was abandoned as delegates thought it insufficiently pressing to merit international attention and got bogged down in distinctions between definitions of piracy under international and municipal law. It was not until the first Law of the Sea Convention was drafted in 1958 that an omnibus treaty-based definition emerged. Article 15 of the Geneva Convention of the High Seas defines piracy as

> (1) Any illegal acts of violence, detention or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed:
>
> (a) On the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;

(b) Against a ship, aircraft, persons or property in a place outside the jurisdiction of any State;

(2) Any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft;

(3) Any act of inciting or of intentionally facilitating an act described in sub-paragraph 1 or sub-paragraph 2 of this article.[3]

This definition appears, with stylistic changes, in Article 101 of the 1982 United Nations Law of the Sea Convention.[4] The once customary practice of universal jurisdiction over piracy finds expression in the 1982 Convention at Article 105: "On the high seas, or in any other place outside the jurisdiction of any State, every State may seize a pirate ship . . . and arrest the persons and seize the property on board . . . [and] may decide upon the penalties to be imposed."

The abolition of slavery and the slave trade is another important chapter in the story of ICL and international human rights. Abolitionists working across the globe were responsible for gaining the passage of domestic laws outlawing slavery and the slave trade and convincing nation states to enter into multilateral treaties doing the same. Great Britain led the charge, entering into a network of bilateral and multilateral treaties that both permitted the searching of ships suspected of transporting individuals to be sold into slavery and established mixed tribunals in ports around the world to condemn slave ships. As early as the 1815 Congress of Vienna, signatories called for the voluntary abolition of the slave trade, which it described as "repugnant to the principles of humanity and universal morality."

The 1890 General Act for the Repression of the African Slave Trade ("the Brussels Act") finally called on all signatories to criminalize slave trading and to prosecute offenders — an early example of the concept of treaty-based universal

jurisdiction.* States also established an international monitoring commission, the Temporary Slavery Commission (1924-1925), which expanded its own mandate to consider analogous practices of forced labor, debt slavery, and sexual slavery. This was followed a year later by the relatively anodyne Slavery Convention of 1926, which called for the "progressive" suppression of slavery, but contained no concrete enforcement regime. The subsequent Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery (1956) returned to the regime of the Brussels Act and required domestic criminalization and prosecution. In particular, Article 6(1) provided that:

> The act of enslaving another person or of inducing another person to give himself or a person dependent upon him into slavery, or of attempting these acts, or being accessory thereto, or being a party to a conspiracy to accomplish any such acts, shall be a criminal offence under the laws of the States Parties to this Convention and persons convicted thereof shall be liable to punishment.

This legal response to slavery and related acts finds expression in more modern international treaties prohibiting forced labor — such as the 1932 Convention Concerning Forced or Compulsory Labour — and the trafficking of persons, such as the Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children (2000), which supplements the United Nations Convention against Transnational Organized Crime (2000).

* The Act's effects were not all beneficial or beneficent; part of its enforcement regime involved establishing colonial administrations in the African interior, putting "an anti-slavery guise on the colonial occupation and exploitation of Africa." Suzanne Miers, *Slavery and the Slave Trade as International Issues 1890-1939*, 19(2) Slavery and Abolition 19 (1998).

International Humanitarian Law

Modern international criminal law also borrows heavily from IHL. IHL, also called "the law of war" or the "law of armed conflict," describes those international rules governing armed conflict. As long as groups of people, and later states, have waged war, there have been rules in place governing acceptable behavior in armed conflict. Although the history of the law of war is often told from the perspective of international conferences held in The Hague and Geneva, as described in more detail later, all human cultures manifest efforts to regulate this seemingly inherent aspect of our shared humanity. Recorded history confirms that the ancient Israelites, Greeks, and Romans, for example, distinguished between combatants and civilians and made only the former the lawful object of attack. There are African and Islamic traditions dictating that captured combatants and civilians should be humanely treated. Likewise, in ancient combat, certain weapons or tactics were prohibited if they caused excessive damage. The codes of chivalry developed in Medieval Europe set forth rules of combat that applied within the knighthood. In 1139, for example, the Second Lateran Council condemned the use of the crossbow, foreshadowing subsequent efforts to ban the use of weapons viewed as unnecessarily cruel or inhumane. Many of these ancient principles and rules are now contained in a web of bilateral and multilateral treaties, making IHL the most codified area of ICL. A rich body of customary international law supplements this extensive treaty regime to this day.

From the perspective of the development of positive law, IHL rules historically evolved along parallel tracks. The set of treaties emerging from international conferences in The Hague and elsewhere concerned the means and methods of warfare and sought to limit the tactics of war and prohibit the

use of certain weapons designed to cause excessive suffering ("Hague Law"). Treaties sponsored by the International Committee of the Red Cross (ICRC) in Geneva established protections for individuals uniquely impacted by war, especially those who do not — or who no longer — participate directly in hostilities, such as the shipwrecked, prisoners of war (POWs), and civilians and noncombatants ("Geneva Law"). In addition, whereas the laws of war originally and almost exclusively addressed international armed conflicts, with notable exceptions such as the 1863 Lieber Code governing the U.S. Civil War, IHL rules increasingly apply to noninternational armed conflicts. Over time, these various strands of IHL have converged to create a more complete corpus of law. Article 8 of the Statute of the International Criminal Court reflects this gradual merging of Hague and Geneva Law and of the law applicable in international and noninternational armed conflicts.

The first multilateral IHL treaty in the strict sense was the 1856 Paris Declaration Respecting Maritime Law, referenced earlier in connection with the history of piracy, which addressed privateering and the neutrality of commercial ships in times of war, among other topics. It was followed by the First Geneva Convention of 1864. This treaty was the brainchild of Henry Dunant, an inadvertent witness to the Battle of Solferino between Austria and the kingdom of Sardinia prior to the Italian unification. After seeing thousands of soldiers lying wounded and dying on the battlefield, Dunant organized Italian citizens to provide care. He later wrote a highly influential book, *Un Souvenir de Solferino* ("A Memory of Solferino"), in which he advocated the creation of a neutral organization to care for the wounded in war. He also convinced the Swiss government to convene a diplomatic conference of states to draft rules to prevent the suffering he had witnessed. The conference led to the signing of the first Geneva Convention by several European and American states.

Aside from creating the ICRC,* the treaty established rules governing the duty to provide relief to the wounded without distinction of nationality, confirmed the neutrality of medical units, and designated the red cross symbol as a protected insignia.

By the turn of the century, the international community increasingly turned its attention to codifying the laws of war. Peace conferences were held in The Hague in 1899 and 1907 that led to the conclusion of multiple conventions addressing land and maritime war. (Ironically, preparations for a third conference were interrupted by World War I.) The 1899 Hague Conventions, signed but never ratified, addressed themselves to the Pacific Settlement of International Disputes (Hague I), the Laws and Customs of War on Land (Hague II), Maritime Warfare (Hague III), the Launching of Projectiles and Explosives from Balloons (Hague IV, 1), Asphyxiating Gases (Hague IV, 2), and Expanding Bullets (Hague IV, 3). Delegates reconvened in The Hague in 1906 to draft additional treaties, which have superseded their predecessors and expanded consideration to the Opening of Hostilities (Hague III), the Rights and Duties of Neutral Powers and Persons in Case of War on Land (Hague V), the Status of Enemy Merchant Ships at the Outbreak of Hostilities (Hague VI), the Laying of Submarine Automatic Contact Mines (Hague VIII), Bombardment by Naval Forces in Time of War (Hague IX), and the Discharge of Projectiles and Explosives from Balloons (Hague XIV).

The most important treaty to emerge from this latter Conference was undoubtedly the fourth, Respecting the Laws and

* The ICRC is a nongovernmental organization based in Geneva, Switzerland, that operates as a neutral, impartial, and independent organization to protect victims of armed conflict. In this capacity, the ICRC monitors compliance with the Geneva Conventions by warring parties, organizes care for those wounded on the battlefield, supervises the treatment of POWs, traces those missing in armed conflict, and mediates between warring parties.

Customs of War on Land,[5] which contained a detailed set of regulations in its annex. The fundamental principle of *jus in bello* is found in Article 22, which states that "[t]he right of belligerents to adopt means of injuring the enemy is not unlimited." The regulations go on to forbid poisoned weapons; the killing or wounding of those belligerents who are *hors de combat* (i.e., those who have laid down their weapons and no longer present a threat); means of warfare "calculated to cause unnecessary suffering"; the destruction or seizure of enemy property unless "imperatively demanded by the necessities of war"; and the attack of undefended towns, villages, dwellings, or buildings.

The Hague Conventions also introduced the so-called Martens Clause, named after the Russian delegate to the first Hague Conferences. The Clause appears in the preamble of the Hague Conventions of 1899 and 1907, in a modified form in the 1949 Geneva Conventions and Protocol II, and in the main text of Protocol I of 1977 of the Geneva Conventions. In its inaugural formulation, it provided that:

> Until a more complete code of the laws of war is issued, the High Contracting Parties think it right to declare that in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity and the requirements of the public conscience.

Martens introduced the declaration after delegates at the Peace Conference failed to agree on the status of civilians who took up arms against an occupying force. Large military powers argued that they should be treated as *francs-tireurs* — a term first used to describe irregular military formations that had taken up arms against the Germans during the Franco-Prussian War (1870-1871) and from then on used to refer more generally to guerrilla fighters. Conversely, smaller states

contended that these irregular fighters should be treated as privileged combatants. Although the clause was originally formulated to resolve this particular dispute, it has subsequently reappeared in various but similar forms in later treaties regulating armed conflicts.

The clause, although somewhat abstruse, contains several important ideas. First, it highlights the legal and moral bases of humanitarian obligations by making reference to natural law ideas, such as the sentiments of humanity. Second, by making reference to the practices of "civilized states," the clause directly incorporates customary law principles as a source of rules to fill in gaps in codified law. Third, although framed from the perspective of potential victims of violations ("populations and belligerents"), it also suggests a role for courts acting in an enforcement capacity to refer to principles of international law and morality in assigning responsibility for abuses.

Although the Fourth Hague Convention retains modern currency, today's rules of IHL are largely founded on the four Geneva Conventions of 1949, drafted on the heels of World War II and supplemented by their two 1977 Protocols.* The 1949 Conventions were developed to provide specific protections to four classes of individuals not actively involved in combat: the wounded and the sick in the field (Geneva Convention I), wounded and sick at sea (Geneva Convention II), prisoners of war (Geneva Convention III), and civilians or noncombatants (Geneva Convention IV). The four Geneva Conventions primarily apply to international armed conflicts, although common Article 3 as a "convention in miniature" applies to conflicts "not of an international character." The four Conventions criminalize so-called "grave breaches," which in Geneva Convention III include willful killing, torture

* In 2005, a third Protocol recognized the red crystal as a fourth protected symbol alongside the red cross, the red crescent, and the lion and sun, and put to rest a long-standing dispute between the ICRC and the State of Israel, which had long advocated a nonsectarian symbol.

or inhuman treatment, including biological experiments, willfully causing great suffering or serious injury to body or health, depriving a POW of the rights of fair and regular trial, and the taking of hostages and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly. It is notable that these provisions protect core due process rights alongside the physical and mental integrity of persons affected by armed conflict.

The international community adopted two Protocols to the Geneva Conventions in 1977 in response to the changing nature of armed conflict. Protocol I provides a detailed set of rules concerning the obligation to discriminate between military and civilian targets, defines international conflicts as including "armed conflicts in which people are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination," expands the category of privileged combatants to include some members of guerrilla movements, and further defines and clarifies the rules with respect to mercenaries. Protocol II elaborates on the minimum rules in common Article 3 governing noninternational armed conflicts.

Efforts to Enforce International Criminal Law

Pre-World War I: Antecedents

The original customary and conventional law of war implicated only state responsibility. In the event of a breach, responsible states were liable to pay reparations or provide other civil remedies to aggrieved nations. Only later did states begin to impose individual criminal liability on breaches of the law of war. Although many point to the trial of Peter von Hagenbach in 1474 in Austria for war crimes as the first prosecution of an

individual for war crimes, the earliest recorded trial of an individual for war crimes appears to be the prosecution by an English court in 1305 of Scottish national hero and warrior Sir William Wallace. Sir Wallace was charged with, convicted of, and executed gruesomely for waging a war against the English "sparing neither age nor sex, monk nor nun."[6] The first treaty mention of individual criminal liability for breaches of IHL is found in the work of the Brussels Conference of 1874, which produced a final protocol that was signed by 15 European states but never ratified. Paragraph III stated:

> The laws and customs of war not only forbid unnecessary cruelty and acts of barbarism committed against the enemy; they demand also, on the part of the appropriate authorities, the immediate punishment of these persons who are guilty of these acts, if they are not caused by an absolute necessity.[7]

Jurisdictionally, most early prosecutions for violations of the laws and customs of war were based on the territorial or nationality principles of jurisdiction. A prominent example of an early war crimes prosecution is the 1865 military commission trial of Henry Wirz, a Confederate Captain accused of mistreating and murdering Union soldiers detained in Andersonville prison in violation of the laws and customs of war. Wirz argued that he was unable to ensure proper conditions in the prison and was otherwise just following orders. In pleading his case, he wrote:

> I do not think that I ought to be held responsible for the shortness of rations, for the overcrowded state of the prison (which was in itself a prolific cause of the fearful mortality), for the inadequate supplies of clothing, and of shelters &c. Still I now bear the odium, and men who were prisoners here seemed disposed to wreak their vengeance upon me for what they have suffered, who was only the medium, or I may better say, the tool in the hands of my superiors.[8]

The military commission rejected Wirz's defense and sentenced him to death by hanging. Notwithstanding that many wrote to President Andrew Johnson pleading Wirz's pardon or at least the commutation of the death sentence, Wirz was hanged on November 10, 1865. On the gallows, he reputedly stated: "I know what orders are. And I am being hanged for obeying them."

At the turn of the twentieth century, during an insurrection in the Philippines launched in opposition to U.S. annexation of the territory following the Spanish-American War (1898), the United States convened a number of military commissions to prosecute Filipino insurgents and courts martial to prosecute U.S. service members. These institutions adjudicated both war crimes and common crimes that were prosecuted as a function of the U.S. obligations as occupier to maintain public order. Most of the 800 military commission cases involved abuses against Filipino victims (so-called *Americanistas*) who had been accused of collaborating with the American occupiers or opposing the guerillas. These institutions confronted a number of key issues that continue to vex the modern tribunals, such as the definition of crimes triable under the laws of war; forms of liability for lesser participants, accomplices, superiors, and co-conspirators; and legal defenses. The Filipino insurrection marks one of the few times that the U.S. Congress suspended the writ of *habeas corpus*.*

World War I: A False Start

The first modern world war launched the first genuine global effort to address international crimes through the exercise of international and domestic criminal jurisdiction. World War I (1914-1918) — which pitted the Central Powers (composed of

* Additional suspensions occurred in the South to combat the Ku Klux Klan and in Hawaii during World War II.

the German, Austro-Hungarian, Bulgarian, and Ottoman Empires) against the Allied and Associated Powers (Great Britain, France, Imperial Russia, later the United States, and others) — precipitated the commission of abuses against combatants, POWs, and civilians on an unprecedented scale. German atrocities included unrestricted submarine warfare, brutal occupations, the targeting of civilians and undefended towns, breaches of neutrality, and — from the perspective of the rest of Europe — the initiation of the war in the first place. The Ottoman Empire, with the Young Turks at the helm, is accused of staging one of the first genocides of the twentieth century in its effort to eradicate the Christian Armenian population of what is now Turkey. Under the pretext of averting an Armenian revolutionary uprising or a "treasonous" alliance with Russia during the war, the Ottoman Empire launched wholesale deportations and massacres that amounted to a virtual extermination of the Armenian population. In all, more than a million people were reportedly killed.

In the face of these offenses, the Allies convened a Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties to inquire into culpable conduct by the Central Powers during the "Great War." The Commission was also to consider the propriety and feasibility of asserting penal jurisdiction over particular individuals — "however highly placed" — accused of committing such breaches. During the ensuing debates over the notion of ascribing individual criminal responsibility for crimes of war, a confluence of ideological and pragmatic objections emerged. On the merits, naysayers — led primarily by the Americans — took issue with the very premise that the principle of state sovereignty could be pierced so dramatically as to hold heads of state and other state actors liable for the collective actions of their sovereigns. Objectors also noted the lack of precedent for such a project and pointed to gaping lacunae in available substantive law. Others argued that trials could lengthen the war if the

threat of prosecution was hanging over the parties. As the war ended, realists argued that trials would exacerbate instability in the fledgling Weimar Republic and in Turkey, where new governments were struggling to consolidate their authority in the wake of the war. Others warned that trials could create a dangerous precedent that might come back to bite the Allies in subsequent conflicts. Even where there was support for holding trials in theory, there was little agreement on secondary issues of venue, rules of procedure and evidence, standards of proof, and so on.

In 1919, the Commission presented its final report to the Paris Peace Conference that was at the time negotiating peace agreements with the Central Powers. This report documented "outrages of every description committed on land, at sea, and in the air, against the laws and customs of war and of the laws of humanity."* The report concluded that such crimes should be prosecuted before an international "high tribunal" composed of representatives of the Allied and Associated Powers or before national tribunals. Foreshadowing the notion of crimes against the peace later developed at Nuremberg and Tokyo, the Commission also considered "not strictly war crimes, but acts which provoked the war," such as deliberate violations of the neutrality of Belgium and Luxembourg. Notwithstanding early support for prosecuting German officials for initiating the war, the Commission concluded that acts of aggression should not be the subject of prosecution in light of the lack of legal authority for such a charge and the complexity of undertaking an investigation into the politically charged question of the causes of the war. It reasoned:

> The premeditation of a war of aggression, dissimulated under a peaceful pretence, then suddenly declared under false

* This latter reference to the "laws of humanity" planted one of the first seeds of the idea that there were crimes against humanity that were punishable separate and apart from conventional war crimes.

> pretexts, is conduct which the public conscience reproves and which history will condemn but by reason of the purely optional character of the institutions at The Hague for the maintenance of peace . . . a war of aggression may not be considered as an act directly contrary to positive law, or one which can be successfully brought before a tribunal.[9]

The Commission, however, recommended that in the future "penal sanctions should be provided for such grave outrages against the elementary principles of international law."[10]

The United States at Annex II advanced four fundamental reservations to the report's recommendations. First, it objected to the proposal of creating an international criminal tribunal — for which, it argued, there was "no precedent, precept, practice, or procedure" — instead of coordinating existing national military tribunals. Second, it invoked the limitations of jurisdiction when it argued that nations could not legally take part in the prosecution of crimes committed against the subjects of other nations. Third, it rejected the notion that any court of law could prosecute violations of the "laws or principles of humanity," on the ground that such violations were moral rather than legal breaches and were, as such, nonjusticiable. Fourth, it argued that to prosecute a head of state outside of his national jurisdiction would violate basic precepts and privileges of sovereignty. The Americans indicated their intention not to participate in any international trial and instead focused their energies on President Wilson's project for the League of Nations.

From this point, the potential liability of German and Ottoman defendants proceeded along separate tracks. The 1919 Treaty of Versailles ending the war with Germany required Germany to accept full responsibility for causing the war (the so-called war guilt clause), make substantial territorial concessions, and pay reparations. Most important for our purposes, Article 227 envisioned the establishment

of an international tribunal composed of representatives of the United States, Great Britain, France, Italy, and Japan to try the former German Emperor, Kaiser Wilhelm II, who was thus singled out for his central role in orchestrating German crimes during the war. In agreeing to this provision, the United States capitulated on its prior position in favor of domestic trials. The envisioned tribunal was to prosecute the Kaiser for "a supreme offense against international morality and the sanctity of treaties" and was to be "guided by the highest motives of international policy, with a view to vindicating the solemn obligations of international undertakings and the validity of international morality."[11] According to Article 228 of the Treaty of Versailles, lesser German defendants were to be tried before the domestic military tribunals of the Allied and Associated Powers. This same provision obligated Germany to hand over "all persons accused of having committed an act in violation of the laws and customs of war, who are specified either by name or by the rank, office or employment which they held under the German authorities." Mixed military tribunals were to prosecute individuals "guilty of criminal acts against the nationals of more than one of the Allied and Associated Powers" pursuant to Article 229. By these terms, the Treaty of Versailles became the first peace treaty to contemplate war crimes trials.

By the time the Versailles Treaty entered into force, six months after the signing of the 1918 general armistice, the Kaiser had fled to the Netherlands, which had remained neutral during the war. The Netherlands refused to extradite him for trial, invoking a long history of providing asylum to political refugees and the double criminality rule, which prevented the Kaiser's extradition to face justice for acts that were not crimes under Dutch law. An American attempt to kidnap the Kaiser was thwarted, and he died in 1941. Article 227 thus remained a dead letter. The Allies never enforced the other penal provisions of the Treaty either. In the face of continued

Allied equivocation over war crimes trials and fierce objections among the German public to the possible extradition of German nationals, Germany artfully proposed hosting domestic trials before the German Supreme Court in Leipzig. The Allies, desperate to salvage some vestige of the project, agreed. To the extent that cases were brought (out of more than 800 individuals accused of war crimes, including high-level German officials, only 12 proceedings were held), trials proceeded sluggishly against low-level defendants and resulted in acquittals or disproportionately low sentences. Although the Allies protested and then quit the proceedings, they never made good on their threats to further sanction Germany, and no additional cases were pursued.

With respect to the Ottoman Empire, the new Turkish regime — under pressure from the British and perhaps in an effort to head off international trials of its own former leaders — court-martialed in Constantinople an impressive array of once prominent officials for "crimes against humanity and civilization" and other wartime offenses. Some defendants were tried in absentia because Germany refused to extradite them. The trials provoked a surge of Nationalist backlash, prompting the Turkish government to release a number of important defendants, ostensibly on the ground that there was no case against them. The British took many of these individuals into custody on Malta and elsewhere to prevent their release. As the Turkish civil war heated up, however, the British eventually swapped or released its prisoners, who had been languishing in pretrial detention.

The first treaty of peace with Turkey, the 1920 Treaty of Sèvres, contained accountability provisions mirroring those in the Treaty of Versailles with respect to the right of the Allies to convene military tribunals to prosecute persons guilty of having committed acts in violation of the laws and customs of war. Article 230 also contemplated a tribunal created by the League of Nations to address "the massacres committed during the

continuance of the state of war on territory which formed part of the Turkish Empire on August 1, 1914." After the Turkish War of Independence, Mustafa Kemal (a.k.a. Atatürk), who led the Nationalists to victory in the civil war, denounced and refused to ratify the Treaty of Sèvres. Renegotiations produced a successor treaty, the 1923 Treaty of Lausanne, which was silent on the question of international justice or legal accountability for abuses. To this day, Turkey has never acknowledged responsibility for the campaign against the Armenians and protests diplomatically whenever it is mentioned.

The World War I experiment with international criminal justice thus proved short-lived, a "fiasco" even, according to Henry Morgenthau, Sr., ambassador to the Ottoman Empire from 1913 to 1916. The fragile unity and resolve among the Allies dissipated in the immediate postwar period. Evolving events overtook idealism. In the end, only a handful of individuals were tried, and those who were prosecuted were essentially exonerated. This failed history was ever present a mere two decades later as a world war once again ravaged the globe.

The Interwar Period: Efforts to Avert Another World War

"The end of a great war frequently brings a revision of the laws of war in its wake."[12] World War I was no different. In the tenuous peace during the short interwar period, the international community came together to build institutions to diffuse and settle international disputes and to fill some of the legal lacunae that had become so apparent in the post–World War I period. Institutionally, the League of Nations — which featured as its "judicial branch" the precursor to the International Court of Justice, the Permanent Court of International Justice (PCIJ) — announced its goal of providing a global forum for "safeguard[ing] the peace of nations" by resolving international disputes without recourse to war. In

1920, an advisory commission convened in connection with the League of Nations recommended the creation of a permanent international criminal court to have jurisdiction over "crimes constituting a breach of international public order or against the universal law of nations." The proposal, however, was rejected as "premature," and only the PCIJ was created with civil jurisdiction over states.

In response to the new weapons systems deployed during World War I, treaties were drafted regulating or prohibiting the use of various means and methods of war, such as bacteriological agents, poison gas, and submarines, and protecting vulnerable classes of persons, such as POWs and the wounded and sick. The catastrophic war also revived aspects of the just war theory as reflected in the optimistic, if not naive, Kellogg-Briand Pact (or Pact of Paris). The Pact, originally a bilateral treaty between the United States and France that was later opened to global ratification, pledged its members to

> condemn recourse to war for the solution of international controversies, and renounce it as an instrument of national policy in their relations with one another . . . [and] agree that the settlement or solution of all disputes or conflicts of whatever nature or of whatever origin they may be, which may arise among them, shall never be sought except by pacific means.[13]

Almost immediately after it entered into force, however, the Pact became a nullity, as Japan invaded Manchuria (1931), Italy invaded Ethiopia (1935), and Germany invaded Poland (1939), effectively launching World War II.

World War II: A Return to First Principles

The post–World War II period is nothing less than a watershed moment in the development of ICL. This period heralded the development of two international tribunals for adjudicating

international crimes — the International Military Tribunal for the Trial of German Major War Criminals (the IMT or Nuremberg Tribunal) and the International Military Tribunal for the Far East (the IMTFE or Tokyo Tribunal). The Allies established these tribunals to prosecute, respectively, high-level German and Japanese military and civilian authorities whose crimes "had no particular geographic localisation."[14] The Nuremberg Tribunal was established by agreement (the London Agreement of August 8, 1945) among the four victorious Allied Powers: France, the Soviet Union, the United Kingdom, and the United States. By contrast, the Tokyo Tribunal was technically established by a special proclamation issued by the Supreme Allied Commander of the Far East, U.S. General Douglas MacArthur, although with the acquiescence of the other Allied Powers. International judicial proceedings before these institutions were followed by hundreds of trials before military and civilian tribunals in the various zones of occupation throughout Europe and the Pacific theatre. As these enforcement efforts were underway, the codification of ICL also began in earnest, with the promulgation of treaties addressing genocide (the 1948 Convention on the Prevention and Punishment of the Crime of Genocide) and war crimes (the four Geneva Conventions of 1949).

That the Allies would adopt a strategy of international criminal justice in the post–World War II period was not a foregone conclusion. For one, the memory of the abject failure of the last effort at international justice following World War I remained fresh. The British and Soviets were more inclined to purge, punish, and in some cases simply execute defeated principals without elaborate legal processes. (The devastated French played little role in the initial decision making.) Even Prime Minister Churchill argued in favor of executions for Nazi leaders and summary legal proceedings for the rank and file. In the end, it was pressure from the United States — and in particular from the Secretary of War, Henry Stimson —

that resulted in the adoption of strictly legal processes to adjudge German and Japanese officials accused of violations of international law.

This dramatic change in the U.S. position toward international justice provides one of the most fascinating chapters of the history of ICL. As you will recall, after World War I, the United States was the staunchest opponent of the creation of an international tribunal, considering such an institution to be unprecedented and potentially dangerous. The United States also rejected both the justiciability of crimes against humanity as separate and apart from more traditional war crimes and the notion of a crime of initiating and waging an aggressive war. By the end of World War II, however, the United States had become the champion of trials, domestic and international (even single-handedly establishing the Tokyo Tribunal by executive fiat). The United States also directed the prosecution of crimes against the peace and conspiracy charges.

How can we explain the *volte-face* of the United States? Much may have turned on a key protagonist in this story—Stimson, a lawyer by training. Stimson never wavered in his advocacy that the Nazi defendants should face trials rather than firing squads, a countermajoritarian position when U.S. public opinion at the time strongly favored summary execution or immediate imprisonment. Stimson remained staunchly opposed to alternative proposals that hundreds if not thousands of Nazis be summarily shot, insisting that even the Nazi defendants deserved due process of law in keeping with the best of the American legalistic tradition. Stimson was able to pass the baton to Justice Robert H. Jackson, a Supreme Court Justice (the last one without a law degree) who represented the United States at the Paris Peace Conference and eventually was chief U.S. prosecutor at Nuremberg. Once the Allies arrived at the Paris Peace Conference, the American delegation imposed its postwar strategy on the rest of the Allies, and the Nuremberg Tribunal was established.

The Tribunal convened November 20, 1945 to October 1, 1946. The Tokyo Tribunal (sitting from May 3, 1946 to November 12, 1948) followed closely on its heels.

The subject matter jurisdiction of the two tribunals reflects the ideas being cast about in the post–World War I period. Notwithstanding the original Allies' reticence about criminalizing the resort to war, the Nuremberg and Tokyo Charters at Articles 6(a) and 5(a), respectively, enabled the prosecution for "crimes against the peace," defined as the "planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances." Prosecutable war crimes, uncontroversially defined in subsection (b), included "murder, ill-treatment or deportation to slave labor or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity." The Charter heralded the revival of the concept of crimes against humanity, although little reference was made in the judgment to the crime's World War I ancestry. The crime was defined as "murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated."

Twenty-four Nazi leaders were indicted before the IMT, which was composed of judges from the four Allies. One defendant was too ill to go to trial (Krupp);* one committed

* IMT prosecutors attempted to substitute his son Alfried (who ran his family's armaments company during the war) as a defendant, but the judges ruled the substitution came too close to trial. Alfried was later tried in subsequent proceedings for his use of slave labor. As a result of U.S. intervention during the

suicide (Ley); and one was tried and convicted to death in absentia (Bormann). The Tribunal tried the other 21 defendants.[15] Three of those were acquitted (Schacht, von Papen, and Fritzsche); seven were sentenced to prison terms ranging from ten years to life (Hess, Funk, Doenitz, Raeder, von Schirach, Speer, and von Neurath). The other 11 were sentenced to death (Goering, von Rivventrop, Keitel, Kaltenbrunner, Rosenberg, Frank, Frick, Streicher, Saukel, Jodl, and Seyss-Inquart). These defendants were all hung except Goering, who committed suicide hours before he was scheduled to be executed. It has been suggested that he accomplished this with the help of a young American guard who, perhaps unwittingly, smuggled a cyanide pill into Goering's cell.

At the time of Japan's surrender, the Japanese Cabinet launched war crimes trials of Japanese defendants, perhaps thinking that the principle of double jeopardy would prevent subsequent trials by the Allies. Eight accused were tried according to this plan, but all were subsequently retried by the Tokyo Tribunal. The defendants at Tokyo were four former premiers (Hiranuma, Hirota, Koiso, and Tojo), three former foreign ministers (Matsuoka, Shigemitsu, and Togo), four former war ministers (Araki, Hata, Itagaki, and Minami), two former navy ministers (Nagano and Shimada), six former generals (Doihara, Kimura, Matsui, Muto, Sato, and Umezu), two former ambassadors (Oshima and Shiratori), three former economic and financial leaders (Hoshino, Kaya, and Suzuki), one imperial adviser (Kido), one theorist (Okawa), one admiral (Oka), and one colonel (Hashimoto).

The United States, through General MacArthur, exercised far more control and influence over the Tokyo trials than at Nuremberg. Whereas the prosecutions at Nuremberg were led by a multinational team that shared relatively equal power and

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Cold War, Krupp was eventually released from prison and his property was restored to him.

responsibility, the Tokyo prosecution was led by a single Chief of Counsel from the United States chosen by MacArthur with Associate Counsel from the Allies. The Tribunal itself was composed of judges from newly independent states in addition to representatives of the Allies. All of the decisions of the Tokyo Tribunal were subject to review by MacArthur, although he never exercised this power; there was no provision for review of any of the Nuremberg decisions. In addition, each of the accused at Tokyo had an American defense counsel in addition to one or more Japanese defense counsel. The majority opinion, authored by Judge Webb of Australia, resulted in the sentencing of seven defendants to death by hanging, 16 to life imprisonment, one to 20 years imprisonment, and one to seven years imprisonment.[16] Interestingly, Emperor Hirohito was not indicted or called as a witness by the Tokyo Tribunal, notwithstanding that he was viewed by many as the architect of Japanese imperialism. There is speculation that members of the U.S. government thought the occupation would proceed more smoothly with the emperor in place, albeit with a renunciation of any claims to divinity. By the 1950s, most of the Tokyo defendants sentenced to terms of imprisonment had been paroled. Two defendants returned to high government positions in Japan.

Notwithstanding the importance of the work of the Nuremberg and Tokyo Tribunals, the vast majority of post–World War II prosecutions did not occur before these two international tribunals, but were conducted by the victorious powers in their respective zones of occupation. For example, Allied Control Council Law No. 10, which largely mirrored the terms of the Nuremberg Charter, authorized trials in Germany. The United States hosted 12 key trials, each with a theme and appropriate nickname. The Hostages Trial, for example, involved allegations against German generals leading troops during the Balkans Campaign who were charged with civilian hostage-taking and murder. The RuSHA Trial targeted

14 officials of various SS organizations responsible for the implementation of the Nazi "pure race" program through racial cleansing and resettlement. Defendants included principals from the Rasse- und Siedlungshauptamt (RuSHA) bureau, the office of the Reich Commissioner for the Strengthening of Germanism, the Repatriation Office for Ethnic Germans, and the Lebensborn society. The Einsatzgruppen Trial involved mobile death squads operating primarily behind the frontline in Eastern Europe that indiscriminately targeted Jews, partisans, Roma, disabled persons, and otherwise uncooperative civilians. The Doctors Trial involved medical doctors accused of engaging in human experimentation, and the Justice Case involved German jurists and lawyers held responsible for implementing the Nazi "racial purity" program envisioned by the eugenic laws. The Ministries Trial involved officials of various Reich ministries, who faced charges for atrocities committed both in Germany and in occupied countries during the war. The High Command Trial focused on high-ranking generals and former members of the High Command of Nazi Germany's military forces charged with having participated in, planning, or facilitating the execution of the war.

Trials proceeded against civilian industrialists as well. For example, the Flick Trial centered on Friedrich Flick and five other high-ranking directors of Flick's group of companies and involved charges of the use of slave labor and plundering. (Flick himself was sentenced to seven years imprisonment. After serving three years, he was released and went on to rebuild his industrial empire. His son was later named one of the richest men in Austria.) The IG Farben Trial concerned the manufacture of Zyklon B, the poison gas used in extermination camps (the other supplier of the gas was the firm Tesch/Stabenow). IG Farben was also charged with participating in crimes against the peace, because it had developed processes for synthesizing gasoline and rubber from coal and thereby contributed to Germany's ability to wage war without access

to petroleum resources. Twelve former directors of the Krupp Group were accused of having enabled the armament of the German military forces and for having used slave laborers. In total, more than 5,000 trials were held of German and Japanese POWs accused of committing war crimes and crimes against humanity.

It is difficult to overstate the significance of the post–World War II period to the field of ICL. Together, these legal proceedings established many core principles of the field, and modern tribunals continue to cite these proceedings as persuasive authority. We touch here on the most salient of the tribunals' contributions. First, the Nuremberg and Tokyo proceedings established that many violations of IHL that had theretofore given rise only to state responsibility also gave rise to individual criminal responsibility, even if the relevant treaty was silent as to criminal penalties. Therefore, when the Nuremberg defendants argued that they could not legally be prosecuted for certain acts because they were not technically crimes under international law at the time the acts were committed, the Tribunal responded that "[c]rimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced."[17] All of the post–World War II ICL treaties are premised on this notion of individual criminal responsibility for breaches. In particular, it is the cornerstone of the enforcement regime contained in the four Geneva Conventions of 1949, which with 194 parties recently became the first treaties to enjoy universal ratification. Each state in the world has now agreed to apprehend and prosecute, or extradite for prosecution, any individual found to have committed a "grave breach" of one of the four Conventions.

Second, the two tribunals established the primacy of international law over domestic law. In many cases, the conduct for which the accused had been charged was authorized by

domestic law. Indeed, the tribunals' Statutes made clear that crimes against humanity in particular were punishable "whether or not in violation of the domestic law of the country where perpetrated." That international law placed limits on the content of domestic law governing purely domestic affairs was groundbreaking under the prevailing view that international law primarily governed relations between states. The Nuremberg and Tokyo proceedings mark the first time that the international community pierced the veil of sovereignty to hold governmental actors responsible for the mistreatment of their compatriots.

Third, two new crimes officially came into existence with the promulgation of the Nuremberg and Tokyo Charters: crimes against the peace and crimes against humanity. The Allies' prosecutorial strategy focused primarily on the crimes against the peace charge, which the Allies considered the primary justification for punishing individual representatives of the Axis Powers. Jackson, in his opening statement, spoke of aggressive war — not genocide — as the "greatest menace of our times." Indeed, the crimes against humanity allegations appear in parts of the Nuremberg Judgment as mere afterthoughts. Nonetheless, the crimes against humanity charge was revolutionary in piercing the veil of sovereignty and establishing once and for all that international law applied to crimes committed by state actors against their compatriots. The inclusion of both crimes in the Charter was controversial in light of the principle of legality, defined in international law through the maxim *nullum crimen sine lege, nulla poena sine lege*, which dictates that an individual cannot be prosecuted for conduct that was not criminalized at the time the individual acted. This was a primary defense of all the defendants, yet it had no effect on the tribunals. The Nuremberg Tribunal in particular ruled that the defense was inapplicable in light of the obvious wrongfulness of the acts in question. Where the treaties were silent as to the criminality of the prohibited acts therein, the Tribunal

found precedent for their prosecution before national tribunals. Accordingly, it argued that the customary international law prohibition of the acts went beyond the conventional one. As discussed in a fuller chapter on the *nullum crimen* defense, these arguments are repeated in modern ICL jurisprudence when judges are faced with new atrocities that do not fit nicely into the framework of existing crimes.

Fourth, although their legacy remains plagued by charges of "victors' justice," the tribunals established clear precedent for the exercise of international penal jurisdiction as distinct from domestic jurisdiction. Indeed, in many respects, this precedent gave rise to a distinct preference for international and multilateral, as opposed to national and unilateral, efforts at international criminal justice. This preference remains compelling today in light of concerns about the potential for abuse and politicization inherent in the practice of universal jurisdiction. Depending on the political will of the international community, international courts can assert a more robust jurisdiction, freed from the limitations that international law and the principle of international comity might place on their domestic counterparts. International tribunals are also able to tap into the existing UN enforcement machinery, such as the Security Council. Notwithstanding this firm foundation for the exercise of international jurisdiction, the international community did not significantly build on this precedent until the post–Cold War period. The mending of entrenched Cold War rivalries created space for the United Nations to revive the promises of the post–World War II era in the face of civil wars in the former Yugoslavia and Sierra Leone, crimes against humanity and genocide in Rwanda and Cambodia, the destruction of East Timor by forces loyal to its former occupier Indonesia, and acts of terrorism in Lebanon. In particular, the Security Council, once paralyzed by East–West obstructionism, could act unanimously without the threat of an automatic veto of one of the permanent five

members. These modern international and hybrid tribunals have the blessing of the entire United Nations, either as organs of the Security Council (the Yugoslav and Rwandan tribunals), as the products of treaty negotiations between the state in question and the UN Secretary General (the Special Court for Sierra Leone, the Extraordinary Chambers in the Courts of Cambodia, and the Lebanon tribunal), or as a feature of a UN transitional authority (the East Timor Special Panels).

Fifth, the postwar tribunals confirmed that even high-ranking state officials could be held individually criminally liable for international crimes committed in war. In particular, the IMT proclaimed that "the very essence of the [Nuremberg] Charter is that individuals have international duties which transcend the national obligations of obedience imposed by the individual State."[18] High-ranking state agents thus cannot hide behind state sovereignty when international jurisdiction is at issue. In so holding, the tribunals rejected common law doctrines of head of state and sovereign immunity that might have shielded particular defendants from liability, a result that has been followed by the modern international tribunals in cases involving Yugoslav President Slobodan Milošević, Liberian President Charles Taylor, and Sudanese President Omar al-Bashir. On the flip side of head of state immunity, the post–World War II Tribunals also rejected the claim that individuals implementing superior orders should be exonerated: "That a soldier is ordered to kill or torture in violation of the international law of war has never been recognized as a defense to such acts of brutality, though . . . the order may be urged in mitigation of the punishment."[19]

Sixth, the tribunals convicted civilians and military men as well as private actors — financiers and industrialists — for war crimes and crimes against humanity. State action is not an element of these crimes, although in many situations of mass violence and repression the state is the source of or inspiration

for the abuses. Together, this collection of rulings became known as the "Nuremberg principles" and they have shaped the field of ICL ever since.

Post–World War II: The Cold War Freeze

The post–World War II period heralded a wave of optimism about the power of law and judicial institutions to restrain state violence and protect the vulnerable. Just as the ink was drying on the UN Charter and the tribunals' judgments against the major World War II defendants, the Cold War set in, paralyzing efforts to put permanent ICL institutions in place. As a result, for many years, the development of ICL was largely relegated to obscure UN drafting committees, a smattering of domestic proceedings in transitional societies, and the writings of a few dogged academics.

This stagnation did not set in immediately, however. Continuing the typical reactivity of international law, the close of World War II brought about a flurry of drafting endeavors. The international community constructed the United Nations from the ashes of the League of Nations. The lynchpin of its Charter is Article 2(4), which codified a default rule against the use of force subject to two express exceptions — actions undertaken with Security Council approval (Article 42) and measures taken in self-defense (Article 51). It remains an open question whether the historic doctrine of humanitarian intervention survived the passage of the Charter. The Charter forbids the use of force undertaken "against the territorial integrity or political independence of any state." The legality of the use of force to stop atrocities or to otherwise assist people in need is thus an open question, especially in light of the proliferation of human rights treaties.

The immediate postwar era also witnessed the promulgation of the 1948 Genocide Convention[20] and four new Geneva Conventions in 1949 protecting various classes of people in

times of war — the wounded, the shipwrecked, POWs, and civilians.[21] These treaties confirmed the new expectation of individual criminal responsibility for international law breaches. The Geneva Conventions, in particular, codified the war crimes recognized at Nuremberg and Tokyo and other proceedings — officially deeming them "grave breaches." The treaties also made such breaches subject to universal criminal jurisdiction, distinguishing them from those breaches that give rise only to state (civil) responsibility. These treaties were followed by other multilateral treaties prohibiting or criminalizing acts of torture, the policy of apartheid, various manifestations of terrorism, war crimes in noninternational armed conflicts, and the international sale and distribution of narcotics. Many of these subsequent treaties contain boilerplate language obliging signatories to either prosecute offenders or extradite them elsewhere for prosecution, regardless of the place of the act's commission or the nationality of the perpetrator or victim (the *aut dedere aut judicare* requirement). This drafting process remains seemingly without end, as international law struggles to keep pace with increasingly destructive and cruel methods of warfare and repression. One of the more recent additions to this pantheon is the 2005 Convention on Disappearances.[22]

In addition to this norm proliferation, members of the international community also tried to build a permanent judicial institution, untainted by the stain of victors' justice, to prosecute international crimes. It was assumed that this work would proceed in parallel with the drafting of substantive law. Indeed, the drafters of the Genocide Convention contemplated the establishment of a permanent international criminal court at Article VI, which provides that individuals charged with committing genocide shall be tried "by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction." Thus, in 1947, the General Assembly requested

the International Law Commission (ILC)* to study "the desirability and possibility of establishing an international judicial organ for the trial of persons charged with genocide or other crimes." The ILC was also asked to codify the Nuremberg and Tokyo principles in a Draft Code of Offenses Against the Peace and Security of Mankind that would provide the subject matter jurisdiction of the proposed tribunal.

On other fronts, the international community began the process of building a regime of international human rights that in many respects is the progeny of the crimes against humanity charge at Nuremberg. The groundbreaking Universal Declaration of Human Rights was followed by twin Covenants in 1966 that — reflecting the ideological schisms of the day — protect civil and political rights on one side[23] and economic, social, and cultural rights on the other.[24] Subsequent specialized treaties seek to protect and guarantee equal treatment for racial and ethnic groups, women, children, indigenous people, and the disabled. Over time, states increasingly consented to more robust enforcement regimes in these treaties, granting expert committees the powers to receive reports, monitor human rights practices, accept individual complaints and petitions, recommend reforms and reparations, conduct site visits, and so on. This proliferation of partially overlapping institutions — domestic, regional, and international bodies with varying degrees of adjudicative power — has generated a productive cross-fertilization of norms that is approaching a veritable common law of ICL and international human rights law.

* The General Assembly established the ILC that year to promote the progressive development and codification of (primarily) public international law. The ILC is composed of legal experts and played a key role in creating a draft code of international crimes and a draft statute for a permanent international criminal court that served as the starting point for creating the modern ICC.

With the advent of the Cold War, however, work on many of these fronts slowed or stalled. In particular, the project to create a permanent international criminal court hit an impasse, in part because delegates could not agree on a definition of the crime of aggression against the backdrop of United States and Soviet "proxy wars" throughout the developing world. As a result, prior to the establishment in the mid-1990s of the ad hoc criminal tribunals, ICL was characterized by a panoply of articulated rights without judicial institutions in which to launch prosecutions — a rights–remedy gap that characterizes much of public international law.

Notwithstanding the lack of international prosecutions, there was some domestic activity in the form of paradigmatic cases. The most high profile of these is probably the trial of Adolf Eichmann, whose job under the Third Reich was to manage mass deportations from Eastern Europe to brutal ghettos and extermination camps. Following Germany's surrender after World War II, U.S. troops detained Eichmann briefly in an internment camp, although he escaped because he was not recognized. On a false Red Cross passport obtained through the Nazi underground, Eichmann traveled to Argentina where he lived under an assumed name until 1960. That year, Israeli Mossad agents abducted him, causing a major diplomatic rift between Israel and Argentina that went before the UN Security Council. The Council condemned the kidnapping, and ordered Israel to make "appropriate restitution." In Israel, Eichmann was charged with crimes against humanity, war crimes, and "crimes against the Jewish people" under Israel's 1950 Nazi and Nazi Collaborators (Punishment) Law. His primary defense was jurisdictional, arguing that the Israeli courts could not prosecute him under ex post facto legislation for acts that he allegedly committed before the State of Israel existed. The Israeli court ruled that it had both universal and passive personality jurisdiction over him.[25] Eichmann did not contest the factual charges against him, but

claimed he was just following orders. He was convicted and hanged in 1962.

In 1987, France prosecuted Klaus Barbie — the former head of the Gestapo in Lyon, dubbed the "Butcher of Lyon" — for crimes against humanity committed in connection with his involvement in the deportation of French Jews and partisans during World War II.[26] He had already been prosecuted in absentia for war crimes, but these verdicts lapsed while he was in exile in Bolivia. The crimes against humanity case went forward on the basis of a ruling that the crime carried no statute of limitation. During this trial, he was represented by Jacques Verges, who has subsequently made a name for himself ("the Devil's Advocate") representing high-profile accused war criminals and Holocaust deniers. Verges — an avid anticolonialist — invoked a modified *tu quoque* ("you also") defense by analogizing Barbie's actions to those of France in Algeria during that country's quest for independence. Barbie ultimately died in prison after serving four years of a life sentence.

In the United States, civil suits involving ICL and human rights norms have proceeded under the Alien Tort Statute and related statutes. For example, civil plaintiffs have obtained personal jurisdiction over defendants hailing from the former Yugoslavia, Rwanda, East Timor, the states of the Southern Cone and Central America, the Philippines, and elsewhere. In addition, corporations can also be sued for violating these norms in places where they do business. Although serving important purposes, these tort cases — which occasionally proceed in default — often seem to be a poor substitute for more robust criminal processes and penalties that better reflect the severity of the offenses involved.

Post–Cold War Period: A Renaissance

In the late 1980s, a consortium of Latin American and Caribbean states reinvigorated the project of international

criminal justice, primarily because they sought an international mechanism to combat the transnational illicit drug trade. With prompting from the General Assembly, the ILC again turned its attention to drafting a statute for a permanent international criminal court. The ILC completed a draft statute in 1994 that formed the basis for intensified consideration by an Ad Hoc Committee on the Establishment of an International Criminal Court and then a Preparatory Committee on the Establishment of an International Criminal Court.

In the meantime, it appeared that genocide had returned to Europe in the form of deportations, concentration camps, "ethnic cleansing," and mass killings of Bosnian Muslim civilians during the war on the territory of the former Yugoslavia. (To be fair, violations were committed by all three of the immediate parties to the conflict — Bosnian Muslims, Croats, and Serbs — as well as by the former Yugoslavia and recently independent Croatia, which had territorial designs in Bosnia). In the midst of the war, the UN Security Council addressed the conflict in seriatim resolutions. In Resolution 780 adopted on October 6, 1992, the Security Council directed the Secretary General, at the time the Egyptian diplomat Boutros Boutros-Ghali, to establish a Commission of Experts to document violations of international law. As this investigation was ongoing, governments (prominently the United States), and intergovernmental and nongovernmental organizations called for the creation of an ad hoc international tribunal in the Nuremberg tradition to assign individual responsibility for the documented abuses. The interim report of the Commission of Experts echoed these recommendations. In Resolution 808 adopted February 22, 1993, the Security Council unanimously decided "that an international tribunal shall be established for the prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991." It directed the Secretary General to prepare specific proposals for such a tribunal. In his

subsequent report, Boutros-Ghali presented a tribunal blueprint and appended a draft statute setting forth existing international humanitarian and criminal law. Invoking its Chapter VII powers, the Security Council unanimously adopted the draft statute in Resolution 827 on May 25, 1993. The International Criminal Tribunal for Yugoslavia (ICTY) was thus established.

The next year, Rwanda became engulfed in a genocide of colossal proportions. All told, upward of 800,000 Tutsi and moderate Hutu individuals perished within the span of a mere four months — a rate of killing that far exceeded that in the Nazi Holocaust. Having convened a tribunal for the former Yugoslavia, the Security Council could not readily ignore almost a million dead in Rwanda, especially given that the international community had largely stood silent and immobile as the death toll mounted. The Security Council through Resolution 955 thus established the International Criminal Tribunal for Rwanda (ICTR), finding that widespread violations of international law largely within the confines of a single state, although with regional ramifications, constituted a threat to international peace and security within the meaning of Chapter VII of the UN Charter. As first constructed by the Security Council, the ad hoc tribunals shared an Appeals Chamber and a Chief Prosecutor. South African jurist Richard Goldstone originally held the latter post. Canadian jurist Louise Arbour, who was later chosen to be the UN High Commissioner for Human Rights, next occupied the position. The Security Council then appointed Swiss Prosecutor Carla Del Ponte. From the tribunals' beginning, observers expressed concern that the Rwandan prosecutions were not getting the Chief Prosecutor's full attention. As the Security Council began to contemplate the completion of the tribunals' missions, it split the Office of the Prosecutor into two positions over the objections of Del Ponte. The chief Prosecutor of the ICTR is now Hassan Bubacar Jallow, a former

Solicitor General, Attorney General, Minister of Justice, and Supreme Court Justice of Gambia. In 2007, Del Ponte retired and was replaced by Belgian jurist Serge Brammertz, who was also the chief UN investigator into the death of former Lebanese Prime Minister Rafik Hariri. Later, additional ad hoc tribunals were established by efforts from outside the Security Council to respond to massive crimes committed in Sierra Leone, Cambodia, and East Timor.

The relative success and startup costs of the two ad hoc tribunals served as further inspiration for the drafting of a standing international criminal court. After convening six separate sessions, the Preparatory Committee produced a consolidated draft Statute that served as the basis for comprehensive negotiations at a Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court held from June 15 to July 17, 1998 in Rome, Italy. A final statute — called the Rome Statute of the International Criminal Court (ICC Statute or Rome Statute) — was completed and adopted at the Diplomatic Conference, which was attended by delegations from 120 states, multiple observers and intergovernmental organizations, and hundreds of nongovernmental organizations. Only seven states voted against the statute: the United States, China, Israel, Qatar, Libya, Iraq, and Yemen. The ICC entered into force in 2002 with the deposit of the 60th instrument of ratification.

The ICC has jurisdiction over war crimes, crimes against humanity, and genocide as defined by its Statute. Although the crimes against the peace charge was the lynchpin of the Nuremberg Indictment and Trial, the crime of aggression has eluded modern definition. Drafters of the ICC Statute were unable to come up with a consensus definition of aggression in time for the treaty to be opened for signature, so they punted. Article 5(2) promises that "[t]he Court shall exercise jurisdiction over the crime of aggression once a provision is adopted defining the crime and setting out the conditions

under which the Court shall exercise jurisdiction with respect to this crime. Such a provision shall be consistent with the relevant provisions of the Charter of the United Nations." A Working Group continues to seek resolution on issues such as (1) the proper role of the Security Council, the General Assembly, and the International Court of Justice in adjudications of the crime of aggression; and (2) whether the definition should make reference to specific acts that constitute aggression, or be left open for future interpretation by the Court. As of this writing, a Review Conference is to be held by the ICC in 2009-2010 to consider adopting a definition of aggression.

Events from 1994 onward attest that the Nuremberg and Tokyo Tribunals are not mere historical footnotes. Indeed, the modern era promises more than a revival of the Nuremberg legacy. In fact, the international community has built on the promises of that era in significant ways. Key events are the 1998 establishment of a permanent International Criminal Court in The Hague; the 1998 arrest of General Augusto Pinochet of Chile in the United Kingdom in response to an arrest warrant from Spain for him to stand trial for torture, genocide, and other international crimes over which Spain asserts universal jurisdiction; and the 1999 indictment of President Slobodan Milošević, the first against a sitting head of state. Progress toward a more comprehensive system of international justice has not been linear or continuous. Rather, it has featured a number of oversteps and backslides that include the failure of international troops and domestic officials to arrest key indicted war criminals from the Yugoslav war; the in absentia indictment in Belgium of high-level political figures from powerful states, which resulted in an international backlash and a contrite amendment of Belgium's universal jurisdiction law; the failure of the East Timor Special Panels to gain jurisdiction over any defendants of real consequence as a result of Indonesian obstructionism and international neglect; the summary execution of Saddam Hussein after a

controversial trial and while important charges remained pending against him; and all the delays, wasted resources, and corrupt functionaries that seem to plague international bureaucracies, no matter how noble their mandate. Most important, perhaps, the tragic events of September 11, 2001, led to the creation of "legal black holes" at Guantánamo and elsewhere where pure power for a time had all but eclipsed law. Yet, the field's movement is inexorably forward, and international criminal law and justice are undoubtedly here to stay.