War Crimes and
War Crime Trials:
From Leipzig to the ICC
and Beyond
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War Crimes and War Crime Trials: From Leipzig to the ICC and Beyond

Cases, Materials and Comments

John C. Watkins, Jr.
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and

John Paul Weber
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Carolina Academic Press
Durham, North Carolina
The laying a Country desolate, with Fire and Sword, declaring War against the natural rights of all mankind, and extirpating the Defenders thereof from the Face of the Earth, is the concern of every man….

Thomas Paine
(1737–1809)
*Common Sense*
February 14, 1776

Defeat cries out for explanation; whereas success, like charity, covers a multitude of sins

Alfred Thayer Mahan
(1840–1914)
U.S. Naval Historian

International law should be realistic, creative, and axiologically oriented; it should take account of social psychology, sociology, economics, and politics, and it should furnish a functional critique in terms of social ends rather in terms of the norms themselves.

Hardy Cross Dillard
(1902–1982)
Judge, International Court of Justice
(1970–1979)
Dedicated to the men and women in international and national tribunals who have labored over the years to bring justice and peace to the community of nations and to make the rule of law a living testament in international relations
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Foreword
Preface

This is a book about war crimes and war crime trials occurring for the most part in the twentieth century, with a concluding group of subsections in Part Six devoted to emerging twenty-first century geopolitical and military developments in response to transnational terrorism. All of us in the academic enterprise, in one degree or another, incorporate by reference the intellectual capital accrued by other scholars, both past and present. In this work we confess our collective debt to a number of gifted minds whose commentary make up a significant portion of the non-case law material included within these pages.

We have found that traditional casebooks that approach the subject of international criminal justice have often, in our view, neglected some of the historical dynamics that have driven war crimes jurisprudence. Our preference here is to provide the student of international criminal justice—primarily in the liberal arts field—with a short précis of certain events that have animated the trials of various individuals or groups who have flagrantly violated international legal norms. Nonetheless, because neither editor is a professional historian, we take full responsibility for any errors of historical omission or commission.

As lawyers, however, both of us appreciate the utility in placing these cases in a historical frame of reference, contingent as that may be. Traditional historical commentary, unlike the law, is almost always contingent and incomplete, awaiting yet again a new “slant,” a new “analysis,” a new prism as it were for the discovery of new evidence that may provide additional insight into a hodge-podge of conflicting narratives. On the other hand, law must generally eschew contingency and lack of finality. Its purpose, both in the international and domestic context, is to promote a reasonable degree of certitude, predictability and finality. Yet many jurists and lawyers who labor in the field of international criminal justice are also aware of the fact that this body of law is correspondingly affected by Jerome Frank’s twin hobgoblins of jurisprudence—“fact skepticism” and “rule skepticism.” Facts are subject to the human shortcomings of perception and narrative incommensurability, while the rules are subject to a multitude of interpretations by judges from widely different cultural backgrounds and trained in diverse systems of law. The cases reported in the following pages reflect this duality that work on all levels of decision-making.

Despite the twenty-first century’s new specter of radical, religious-based, transnational terrorism, there is a positive side to the dilemma we face as a community of nations bound together ever closer by cutting-edge technology and economic interdependence. From the first Hague Peace Conference in 1899 to the present, there has been an ever-increasing recognition in international criminal justice of the primacy of human rights as a legitimate object of legal protection. Notwithstanding twentieth century impunity, the various international conventions, conferences and protocols, reinforced by both the Nuremberg and Tokyo judgments after World War II, have laid the groundwork for such developments as the Genocide Convention and the Universal Declaration of
Human Rights, among others. The principles, rules and regulations emerging from these various assemblies have added to the corpus of human rights recognized in international law that, in previous eras, had been left to the discretion of ad hoc tribunals or unilateral State action. The 1998 Rome Statute establishing the first permanent International Criminal Court is a positive step in the quest for global criminal accountability. At present, that Court’s role in this quest is still a work in progress. The ICC does represent, however, the culmination of work first begun at the Hague Convention of 1899. Gross violations of human rights and war crimes may have at last been made amenable to a forum whose very existence may give pause to tyrants, great and small. It will be interesting to see whether or not the concerns raised by the United States to certain provisions of the ICC Statute will be a significant factor in determining that Court’s future success. In the twentieth century, international criminal justice has moved from a State-centered to a more individual-oriented body of jurisprudence. Despite the asymmetrical, anomic and nihilistic nature of contemporary terrorism, the international accords and agreements put in place during the twentieth century provide a framework for dealing with a threat unenvisaged by those who drafted most of those instruments. Like the common law itself, international criminal law must adapt and change to meet this new accretion of atrocity, but pressed by the accumulated wisdom, experience and guidance afforded by a jurisprudence forged in the maelstrom of the world’s bloodiest century.

In a seminal law review article published in 20011 Bradford remarked that “[I]n the past century, 203 million combatants and civilians have perished and vast fortunes have been squandered in war—a dysfunctional, yet ubiquitous, human social behavior that has threatened the very existence of mankind.”2 This book will illustrate in some small fashion the dysfunctionality of armed conflict and the attempts by international organizations and international and national tribunals to dampen violence in pursuit of political, economic, social and ideological objectives.

A work of this sort cannot cover an entire rogues gallery of all war criminals and other international outlaws of the past century, much less those of the nascent twenty-first. We have omitted, except for a few occasional references, coverage of the crimes perpetrated by Russian dictator Josef Stalin and Chinese Communist founder Mao Tse-Tung. Likewise, there is no coverage of crimes perpetrated in the name of Nicaraguan strongman Anastasia Garcia Somoza, Haiti’s infamous Francois “Papa Doc” Duvalier, Cambodia’s genocidal Pol Pot, Chili’s Augusto Ugarte Pinochet, Kim Il Sung of North Korea, Iki Amin of Uganda or Saddam Hussein of Iraq, to mention only the more notorious. Time and space constraints dictate such exclusion.

We’ve designed this work to be a teaching tool for a standard three-hour credit course that can be taught in departments of criminal justice, legal studies, political science, international relations and either as a stand-alone or supplementary casebook in schools of law. The book is divided into six Parts arranged in chronological order covering a time-span from the first Hague Peace Conference in 1899 up to the United States Supreme Court’s decisions on terrorism and military tribunals in mid-2004. Part One covers the era from 1899 to 1921, including excerpts from the first and second Hague Conventions, World War I, the Treaty of Versailles of 1919, the Covenant of the League of Nations, Woodrow Wilson’s “Fourteen Points” and four of the Leipzig Trials of 1921.

2. Id. at 649–650.
Part Two includes the era from 1921 to 1951, including the inter-war years in Europe, the Weimar Constitution, the Kellogg-Briand Pact of 1928, the rise of Adolf Hitler and National Socialism in Germany, World War II and German war crimes, the London Charter of 1945, excerpts from the IMT-Nuremberg and selected “Subsequent Proceedings” cases in post-war Germany under Allied Control Council Law No. 10, two British war crime trial opinions as well as one post-World War II war crimes trial opinion by the Supreme Court of Norway and the United Nations’ adoption of the so-called “Nuremberg Principles.” Part Three is devoted to the years 1927–1948, and the year 1963, covering the rise of Japanese Imperialism in the Far East between the late 1920s and the beginning of World War II, the Nanking Massacre of 1937, the Tripartite Pact between Japan, Germany and Italy in 1940, World War II and Japanese war crimes, the IMTFE-Tokyo and the 1963 Japanese civil litigation involving the atomic bombing of Hiroshima and Nagasaki by the United States in August, 1945. Part Four covers selected events from 1960 to 1994, including the Israeli trial of Adolf Eichmann for his role in the Holocaust and selected war crime cases involving former Nazis in Ghana, the Federal Republic of Germany (West Germany), the United States, France and Canada. Part Five deals with the 1964–1975 time-period involving the SEATO Treaty, the Gulf of Tonkin Resolution, the Vietnam War, the Peers Commission Report on the My Lai atrocity, excerpts from both the Medina and Calley cases, commentary on My Lai and two United States district court opinions in the early 1970s addressing, among other things, the legality of the Vietnam conflict. Part Six covers the 1990–2004 period with an initial discussion of twentieth century impunity, selected decisions from the ad hoc United Nations’ ICTY and ICTR rulings, selected provisions from the statute of the International Criminal Court and the United States’ reservations and objections to the codification, selections regarding the military commission controversy from the post-Civil War United States Supreme Court decision of Ex parte Milligan of 1867 up to and including the June, 2004, Supreme Court opinions in the Hamdi and Padilla appeals involving American citizens in custody as suspected terrorists as well as Rasul v. Bush, dealing with Guantanamo Bay detainees. Trial by United States military commissions of suspected al Qaeda and other Islamic Jihadist from Afghanistan, Iraq and other Mid-East nations currently in custody at the United States Naval Base in Cuba, has aroused a robust public debate. How military commissions are organized and the procedures they employ to try accused persons is only dimly understood, if at all, by most of the American public. These forums, however, have a storied history going back in time as far as the American Revolution, but drawing more scrutiny after the Civil War. Military tribunals or commissions apply the laws and customs of war to their tasks, not the traditional and time-honored procedural protections taken for granted by Americans tried in regular state or federal criminal courts.

The Bush Administration characterizes the detainees it holds at Guantanamo Bay as unlawful “enemy combatants.” Under such a rubric, these prisoners do not enjoy POW status, nor are they protected by all of the rules and regulations granted to lawful “enemy combatants” by international accords and conventions. The eleven cases selected for the final portion of Part Six illustrate the varied legal issues and tensions surrounding the question of trial by military commission and raise substantial public policy queries on how the United States treats captured asymmetrical warriors. This is followed by an Epilogue containing excerpts from the first chapter of Ignatieff’s notable 2004 book, The Lesser Evil: Political Ethics in an Age of Terror, where that commentator lays out some final thoughts on how a liberal democracy should address issues of liberty, order and security when dealing with international terrorism. The book concludes
with an eleven-entry Appendices, a Glossary containing over 200 entries, a Reference section of over 1,400 citations and a detailed Name and Subject Index.

A separate Instructor's Manual keyed to the Six Parts of the book supply background information for the instructor on selected topics and questions for classroom use. We believe this material can be usefully employed in either a classroom lecture format or in a small-group seminar format. We would suggest that no particular prerequisite be required, except, perhaps, upper-division undergraduate or graduate status.

John C. Watkins, Jr.
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Tuscaloosa, Alabama
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Footnote citations in each of the six Parts conform to A Uniform System of Citation, Harvard Law Review Association (17th ed. 2000) The opinions of the German Supreme Court of the Empire in the Leipzig Trials are printed in the format appearing in the English translation of those decisions in volume 16 of the American Journal of International Law. Editorial comments, except those appearing at the beginning of each of the six Parts, are set off by brackets throughout the work. Citations in the References section are in a stylistic combination found in A Uniform System of Citation (17th ed. 2000) and in the Publication Manual of the American Psychological Association (5th ed. 2001). Footnotes in case law citations and in judicial opinions are selectively omitted, and, where used, are renumbered.

Minor omissions of words or parts of a sentence, paragraph subsection or section(s) in the text of judicial opinions, conventions, treaties, protocols and scholarly commentary are indicated by a series of ellipses. Major omissions of paragraphs, sections or pages are indicated by a series of asterisks. The majority of international agreements, judicial opinions and scholarly commentary have been edited due to space limitations. Foreign terms, words common to international law, phrases, acronyms and certain other terms of art are collected in the Glossary.