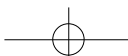
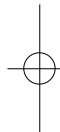
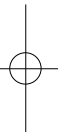




War Crimes and War Crime Trials: From Leipzig to the ICC and Beyond



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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.
UNIVERSITY OF ALABAMA

and

John Paul Weber
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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....

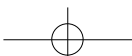
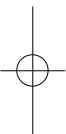
Thomas Paine
(1737–1809)
Common Sense
February 14, 1776

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

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

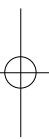
International law should be realistic, creative, and axiologically oriented; it should take account of social psychology, sociology, economics, and politics, and it should furnish a functional critique in terms of social ends rather in terms of the norms themselves.

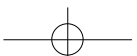
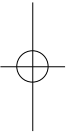
Hardy Cross Dillard
(1902–1982)
Judge, International
Court of Justice
(1970–1979)





*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*





Contents

Table of Cases	xvii
Foreword by <i>M. Cherif Bassiouni</i>	xix
Preface	xxi
Acknowledgments and Permissions	xxv
Editorial Note	xxvii
Part One Hague Peace Conferences; World War I; Treaty of Versailles; League of Nations; Leipzig Trials (1899–1921)	3
Editorial Commentary	3
1. Hague Conferences of 1899 and 1907	8
(a) 1899 Hague Convention (No. II) Respecting the Laws and Customs of War on Land	8
(b) 1907 Hague Convention (No. IV) Respecting the Laws and Customs of War on Land	13
2. The Armenian Genocide (1915)	14
(a) Vahakn N. Dadrian, “Genocide as a Problem of National and International Law: The World War I Armenian Case and Its Contemporary Legal Ramifications”	14
(b) Peter Maguire, <i>Law and War: An American Story</i>	17
3. Woodrow Wilson’s “Fourteen Points”	17
4. Conditions of an Armistice with Germany	19
5. Covenant of the League of Nations Adopted by the Peace Conference at Plenary Session	22
6. Excerpts from Address of President Wilson on Presenting the Draft Covenant of the League of Nations to the Third Plenary Session of the Peace Conference at Paris	25
7. Excerpts from the Report of the Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties to the Preliminary Peace Conference	28
Memorandum of Reservations Presented by the Representatives of the United States to the Report of the Commission on Responsibilities	35
8. Annex III Reservations by the Japanese Delegation	37
9. The Status of William Hohenzollern, Kaiser of Germany, Under International Law	37
10. Treaty of Peace with Germany	43
Protocol Supplementary to the Treaty of Peace between the Allied and Associated Powers and Germany	47

11. Richard Overy, “The Versailles Settlement” in <i>The Penguin Historical Atlas of the Third Reich</i>	48
12. Treaty of St. Germain-en-Lave with Austria	50
13. The Leipzig War Crime Trials	51
(a) Peter Maguire, <i>Law and War: An American Story</i>	51
(b) <i>Current Notes: German War Trials</i>	52
(c) U.S. Department of the Army Pamphlet No. 27-161-2 II International Law 221–22 (1962)	52
(d) Judgment in the <i>Case of Karl Heynen</i>	54
(e) Judgment in the <i>Case of Emil Müller</i>	56
(f) Judgment in the <i>Case of Commander Karl Neumann</i>	60
(g) Judgment in the <i>Case of Lieutenants Dithmar and Boldt</i>	63
Suggestions for Further Reading	67
 Part Two Weimar Republic:	
The Nazi Party and German Fascism; World War II and German War Crimes; IMT-Nuremberg; Nuremberg “Subsequent Proceedings”; Other Selected War Crime Cases— Great Britain and Norway (1921–1951)	71
Editorial Commentary	71
1. Excerpts from the Weimar Constitution	85
2. Richard Overy, “Weimar Germany” in <i>The Penguin Historical Atlas of the Third Reich</i>	89
3. Richard Overy, “The German Slump” in <i>The Penguin Historical Atlas of the Third Reich</i>	90
4. Kellogg-Briand Peace Pact (Pact of Paris)	91
5. Paul Brooker, “Hitler’s Regime in Germany” in <i>Twentieth Century Dictatorships</i>	96
6. Charter of the International Military Tribunal	98
7. Ann Tusa and John Tusa, <i>The Nuremberg Trial</i>	103
8. Control Council Law No. 10 Punishment of Persons Guilty of War Crimes, Crimes against Peace and against Humanity	109
9. Gerry L. Simpson, “War Crimes Trials: Some Problems” in <i>The Law of War Crimes: National and International Approaches</i>	113
10. Robert L. Birmingham, <i>Note</i> , “The War Crimes Trial: A Second Look”	117
11. IMT-Nuremberg Defendants and Their Position(s) in the Third Reich	120
12. <i>The United States of America, et al. against Herrmann Wilhelm Göring, et al.</i>	127
13. The International Military Tribunal in Session at Nuremberg, Germany	143
(a) Opening Statement	145
(b) Closing Statement	151
(c) Judgment of the Tribunal	159
14. Summary of the Counts of the Indictment and Results of War Crimes Trial against Accused Individuals	161
15. Organization Criminality	162
16. Hans Ehard, “The Nuremberg Trial against the Major War Criminals and International Law”	162
17. Georg Schwarzenberger, “The Judgment of Nuremberg”	174

CONTENTS

xi

18. Steven Fogelson, <i>Note</i> , “The Nuremberg Legacy: An Unfulfilled Promise”	181
19. Maximilian Koessler, “American War Crimes Trials in Europe”	186
20. German Occupation: “Subsequent Proceedings” under Allied Control Council Law No. 10	191
21. Selected “Subsequent Proceedings” Decisions	196
(a) Tribunal II-A <i>United States of America v. Otto Ohlendorf, et al.</i>	196
(b) Tribunal I <i>United States of America v. Ulrich Greifelt, et al.</i>	203
(c) Tribunal V <i>United States of America v. Wilhelm von Leeb, et al.</i>	217
(d) The Malmédy Trial	248
(e) <i>United States of America v. Valentin Bersin et al.</i> (1946) The “Malmédy Massacre” Case	250
(f) <i>Trial of Heinrich Gerike and Seven Others</i> (The Velpke Children’s Home Case)	254
(g) <i>Trial of Werner Rohde and Eight Others</i> (The SS Obergruppenführer Case)	259
(h) <i>Trial of Gerhard Friedrich Ernst Flesch, SS Ober-sturmbannführer, Oberregierungsrat</i>	263
22. The Nuremberg Principles	272
Suggestions for Further Reading	274
Part Three Japanese Imperialism in the 1930s; China and Manchuria; Nanking Massacre; Tripartite Pact; World War II and Japanese War Crimes; IMTFE Tokyo; Japanese Atomic Bomb Litigation (1927–1948; 1963)	277
Editorial Commentary	277
1. Emperor Hirohito’s Imperial Rescript	288
2. <i>In re Yamashita</i>	289
3. George F. Guy, “The Defense of Yamashita”	307
4. Ann M. Prevost, “Race and War Crimes: The 1945 Trial of General Tomoyuki Yamashita”	311
5. The Japanese Instrument of Surrender	315
6. The Imperial Rescript of 2 September 1945	316
7. Proclamation by the Supreme Commander for the Allied Powers	316
8. Charter of the International Military Tribunal for the Far East	317
9. IMTFE-Tokyo Defendants and Their Position(s) in Imperial Japan	323
10. Judgment <i>The United States of America, et al. against Sadeo Araki, et al.</i>	325
11. Dissent of Justice R. M. Pal	337
12. <i>Hirota v. MacArthur, General of the Army, et al.</i>	343
13. Elizabeth S. Kopelman, “Ideology and International Law: The Dissent of the Indian Justice at the Tokyo War Crimes Trial”	346
14. The Imperial Rescript of 14 August 1945	352
15. “Unit 731: The Hidden Atrocities”	353
16. <i>Shimoda et al. v. State</i>	356

17. Richard A. Falk, "The Shimoda Case: A Legal Appraisal of the Atomic Attacks on Hiroshima and Nagasaki"	362
18. Yves Beigbeder, "The Legality of Atomic Bombing"	365
Suggestions for Further Reading	366
Part Four Israel and the Eichmann Case; Selected War Crime Cases Involving Former Nazis in Ghana (extradition); United States (civil damages); France (war crimes) and Canada (war crimes) (1960–62; 1966; 1980; 1985; 1994)	369
Editorial Commentary	369
1. The Indictment	374
Peter Papadatos, <i>The Eichmann Trial</i>	374
The Attorney-General v. Adolf, the son of Adolf Karl Eichmann aged 54, at present under arrest—the accused	374
2. <i>The Attorney-General of the Government of Israel v. Eichmann</i>	383
3. <i>Eichmann v. The Attorney-General of the Government of Israel</i>	396
4. Nicholas N. Kittrie, "A Post Mortem of the Eichmann Case—The Lessons for International Law"	399
5. <i>The State v. Schumann</i>	404
6. <i>Rudolf Hess v. Federal Republic of Germany</i>	409
7. <i>Handel v. Artukovic</i>	412
8. <i>Federation Nationale des Deportes et Internes Resistants et Patriotes and Others v. Barbie</i>	420
9. The Case of Paul Touvier	428
Leila Sadat Wexler, "Reflections on the Trial of Vichy Collaborator Paul Touvier for Crimes against Humanity in France"	428
10. <i>Regina v. Finta</i>	433
Suggestions for Further Reading	440
Part Five SEATO Treaty; Vietnam War; Gulf of Tonkin Resolution; Peers Commission Report; Medina and Calley Cases; Commentary on My Lai; U.S. District Court Cases on Legality of Vietnam Conflict (1964–1975)	443
Editorial Commentary	443
1. Michal R. Belknap, <i>The Vietnam War on Trial</i>	445
2. Southeast Asia Collective Defense Treaty	448
3. The Legality of United States Participation in the Defense of Viet-Nam	451
4. The Gulf of Tonkin Resolution	460
5. Headquarters: United States Military Assistance Command, Vietnam	461
6. Jeffrey P. Addicott & William A. Hudson, Jr., "The Twenty-Fifth Anniversary of My Lai: A Time to Inculcate the Lessons"	463
7. Michael Bilton & Kevin Sim, <i>Four Hours in My Lai</i>	465
8. The Peers Commission Report	467
9. <i>Medina v. Resor</i>	473
10. Norman G. Cooper, "My Lai and Military Justice—To What Effect?"	475
11. <i>United States v. Calley</i>	475
12. <i>Calley v. Callaway</i>	483
13. Kenneth A. Howard, "Command Responsibility for War Crimes"	487
14. The Constitution, International Law and Vietnam	489

CONTENTS

xiii

(a) Jonathan M. Fredman, "American Courts, International Law and the War in Vietnam"	489
(b) <i>United States v. Berrigan</i>	492
(c) <i>Berk v. Laird</i>	495
Suggestions for Further Reading	498
Part Six A Postscript on Twentieth Century Impunity; Selected ICTY and ICTR cases; International Criminal Court and the Rome Statute; Military Commission Controversy: History, Cases and Commentary; the <i>Hamdi</i> and <i>Padilla</i> Cases and the U.S. Supreme Court; Citizen Terrorists and the Constitution; Political Ethics and Terrorism (1990–2004)	501
Editorial Commentary	501
1. Twentieth Century Impunity	503
(a) Yves Beigbeder, <i>Judging War Criminals: The Politics of International Justice</i>	503
(i) The Unpunished Soviet Massacres	503
(b) M. Cherif Bassiouni, <i>Crimes against Humanity in International Criminal Law</i>	506
(i) Selective Enforcement	506
(c) Yves Beigbeder, <i>Judging War Criminals, The Politics of International Justice</i>	507
(i) Indonesia: The 1965 Massacre	507
(ii) China	508
(iii) The Khmer Rouge Genocide	508
(d) M. Cherif Bassiouni, <i>Crimes against Humanity in International Criminal Law</i>	509
2. <i>Statute of the International Tribunal for the Former Yugoslavia</i>	511
3. The <i>Tadic</i> Judgment of the ICTY	518
(a) Karl A. Hockhammer, Note, "The Yugoslav War Crimes Tribunal: The Compatibility of Peace, Politics, and International Law"	519
(b) <i>Prosecutor v. Tadic</i>	521
(c) <i>Prosecutor v. Dusko Tadic</i>	525
4. <i>Prosecutor v. Erdemovic</i>	527
5. The Concept of Ethnic Cleansing	531
(a) L.C. Green, <i>Notes and Comments: "The Rule of Law and Human Rights in the Balkans"</i>	532
(b) John Quigley, "State Responsibility for Ethnic Cleansing"	533
6. <i>Prosecutor v. Blaskic</i>	535
7. The International Criminal Tribunal for Rwanda	541
(a) Christina M. Carroll, "An Assessment of the Role and Effectiveness of the International Criminal Tribunal for Rwanda and the Rwandan National Justice System in Dealing with Mass Atrocities of 1994"	542
(b) <i>Statute of the International Criminal Tribunal for Rwanda</i>	544
(c) <i>Prosecutor v. Jean-Paul Akayesu</i> (Indictment)	549
(d) <i>Prosecutor v. Jean-Paul Akayesu</i>	552
(e) Diane Marie Amann, "Prosecutor v. Akayesu, Case ICTR-96-4T, 'International Decisions'"	558

(f) <i>Prosecutor v. Georges Anderson Nderubumwe Rutaganda</i> (Indictment)	561
(g) <i>Prosecutor v. Rutaganda</i>	564
(h) Gabrielle Kirk McDonald, “The International Criminal Tribunals: Crime and Punishment in the International Arena”	570
(i) Michael P. Scharf, “The International Trial of Slobodan Milosevic: Real Justice or Realpolitik?”	572
8. The International Criminal Court, The Rome Statute and Commentary	576
(a) <i>The Statute of the International Criminal Court</i> as quoted in ch. 7, “International Prosecutorial Efforts and Tribunals,” in <i>International Criminal Law: Cases & Materials</i>	576
(b) The Rome Conference and the ICC Statute “The Rome Conference—15 June–7 July 1998,” as quoted in Yves Beigbeder, <i>Judging War Criminals: The Politics of International Justice</i>	578
(c) Ceremony for the Opening for Signature of the Convention on the Establishment of an International Criminal Court, Rome, “Il Campidoglio” Statement of Professor M. Cherif Bassiouni Chairman, Drafting Committee	581
(d) <i>Statute of the International Criminal Court</i>	582
(e) Michael P. Scharf, “The United States and the International Criminal Court: A Recommendation for the Bush Administration”	588
(f) “U.S. Policy and the International Criminal Court,” Comments by Ambassador David J. Scheffer, U.S. Ambassador-at-Large for War Crimes Issues	591
(g) Alison M. McIntire, <i>Comment</i> , “Be Careful What You Wish for Because You Just Might Get It: The United States and the International Criminal Court”	595
(h) <i>American Servicemembers’ Protection Act</i>	600
9. International Criminal Justice, Asymmetrical Warfare and the Military Commission Controversy	604
(a) <i>Public Law 107-39</i> , 107th Congress	604
(b) <i>Public Law 107-40</i> , 107th Congress	605
(c) W. Michael Reisman, <i>Editorial Comment</i> , “In Defense of World Public Order”	606
(d) Detlev F. Vagts, <i>Editorial Comments</i> , “Hegemonic International Law”	608
(e) United States Department of the Army, FM 27-10 (1956)	611
(f) (1) United States Code, 18 USC §2441 (2001)	611
(g) (2) United States Code, 10 USC §836 (2003)	612
(h) <i>Ex parte Milligan</i>	612
(i) <i>Ex parte Quirin</i>	618
(j) <i>Duncan v. Kahanamoku</i>	624
(k) <i>Johnson v. Eisentrager</i>	629
(l) <i>Reid v. Covert</i>	633
(m) Proclamation 7463 of September 14, 2001	638
(n) Military Order of November 13, 2001	640
(o) <i>Coalition of Clergy v. Bush</i>	643

CONTENTS

xv

(p) <i>Rasul v. Bush</i>	649
(q) <i>Al Odah v. United States</i>	650
(r) Kenneth Anderson, “What to Do With Bin Laden and Al Qaeda Terrorists? A Qualified Defense of Military Commissions and United States Policy on Detainees at Guantanamo Bay Naval Base”	653
(s) The <i>Hamdi</i> and <i>Padilla</i> Appeals: Citizen Terrorists and the Constitution	665
(i) <i>Hamdi et al. v. Rumsfeld</i>	665
(ii) <i>Rumsfeld v. Padilla</i>	677
(t) <i>Rasul v. Bush</i>	680
10. Epilogue: Michael Ignatieff, <i>The Lesser Evil: Political Ethics in an Age of Terror</i>	684
Suggestions for Further Reading	689
Appendices	
Appendix A General Orders No. 100	693
Appendix B The Nuremberg Laws	697
Appendix C Regulation on Military Government Courts, Issued by Letter of Headquarters, U.S. Forces, European Theater	700
Appendix D Regulation on Military Commissions, Issued by Letter of Headquarters, U.S. Forces, European Theater	702
Appendix E Regulations Governing the Trials of Accused War Criminals, GHQ, Supreme Commander for the Allied Powers [Tokyo]	704
Appendix F Military Government—United States Zone Ordinance No. 7	708
Appendix G Convention on the Prevention and Punishment of the Crime of Genocide	712
Appendix H Convention for the Protection of Cultural Property in the Event of Armed Conflict	713
Appendix I Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity	714
Appendix J International Covenant on Civil and Political Rights	715
Appendix K Protocol I Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts	716
Appendix L [United Nations] Security Council Resolution Condemning Hostage Taking	724
Appendix M United States Code: 18 U.S.C. §2401, <i>The War Crimes Act of 1996</i>	724
Appendix N Tables of International Legal Regimes and War Incident Values	725
Glossary	729
References	747
About the Editors	805
Name Index	807
Subject Index	815

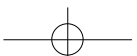
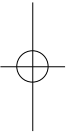
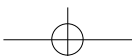
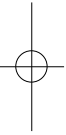
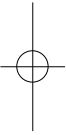


Table of Cases

- Ahrens v. Clark*, 335 U.S. 188 (1948), 633
- Al Odah v. United States*, 321 F.3d 1134 (2003), 650
- Alstoetter et al., United States v.*, 3CCL No. 10 Trials 954, 229
- Araki et al., United States et al. v.*, MSS 78-3, Box Nos. 216–219, Spec. Coll., University of Virginia Law Library, 325
- Attorney-General of Israel v. Eichmann*, 56 *Am. J. Int'l L.* 805 (1962), 383
- Augenblick, United States v.*, 393 U.S. 348 (1969), 486
- Baker v. Carr*, 369 U.S. 186 (1962), 494, 496–497
- Baxley v. United States*, 134 F.2d 937 (4th Cir. 1943), 492
- Berk v. Laird*, 317 F.Supp. 715 (E.D.N.Y. 1970), 495
- Berrigan, United States v.*, 283 F.Supp. 336 (D. Md. 1968), 492
- Bersin, Valentin et al., United States v.*, Rec. Gp. No. 153, Rolls 1–6, Nat'l Archives & Rec. Adm. (1946), 250
- Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971), 415
- Brady v. Maryland*, 373 U.S. 83 (1963), 485
- Brandenburg v. Ohio*, 395 U.S. 444 (1969), 560
- Brandt et al., United States v.*, I CCL No. 10 Trials 1, 192
- Brown v. Allen*, 344 U.S. 443 (1953), 682
- Calley, United States v.*, 22 USCMA 534, 48 CMR 19 (1973), 475
- Calley v. Callaway*, 519 F.2d 184 (5th Cir. 1975), 483
- Cantwell v. Connecticut*, 310 U.S. 296 (1940), 493
- Carbo v. United States*, 364 U.S. 611 (1961), 679
- Coalition of Clergy v. Bush*, 189 F.Supp.2d 1036 (C.D. Cal. 2002), 652
- Cox v. Louisiana*, 379 U.S. 559 (1965), 493
- Cuban-American Bar Assn. v. Christopher*, 43 F.3d 1412 (11th Cir. 1995), *cert. denied*, 515 U.S. 1142 (1995), 648
- DeBartolo Corp. v. Florida Gulf Coast Bldg & Const. Trades Council*, 485 U.S. 568 (1988), 676
- Dennis v. United States*, 341 U.S. 497 (1951), 493
- Dithmar & Boalt, In re*, 16 *Am. J. Int'l L.* 708 (1922), 63
- Dow v. Johnson*, 100 U.S. 158 (1879), 628
- Duncan v. Kahanamoku*, 327 U.S. 304 (1946), 624, 676
- Eichmann v. Attorney-General of Israel*, 136 *ILR* 277 (1962), 396
- Eisentrager v. Forrestal*, 174 F.2d 96; (1949), 344
- Endo, Ex parte*, 323 U.S. 283 (1944), 344, 633, 676
- Federation Nationale des Deportes et Internes Re-sistants et Patriots et al v. Barbie*, 78 *ILR* 25 (1985), 420
- Filartiga v. Pena-Irala*, 630 F.2d 876 (2nd Cir. 1980), 413
- Finta, Regina v.*, 104 *ILR* 285 (1994), 433
- Flesch, Gerhard Friedrich Ernst, Trial of*, 6 *L.R.T.W.C.* 111 (1948), 263
- Flick et al., United States v.*, 6 CCL No. 10 Trials 1, 193
- Gerike, Heinrich & Seven Others, Trial of*, 7 *L.R.T.W.C.* 80 (1946), 254
- Greifelt, Ulrich et al., United States v.*, 5 CCL No. 10 Trials 1, 196, 203
- Hamdi et al. v. Rumsfeld*, 542 U.S. ____ (2004), 665
- Hamilton v. Regents of the University of California*, 293 U.S. 245 (1934), 494
- Handel v. Artukovic*, 601 F.Supp. 1421 (C.D. Cal. 1985), 412
- Hess, Rudolf, v. Federal Republic of Germany*, 90 *ILR* 387 (1980), 409
- Heynen, Karl, In re*, 16 *Am. J. Int'l L.* 674 (1922), 54
- Hirabayashi v. United States*, 320 U.S. 81 (1943), 314
- Hirota v. MacArthur*, 338 U.S. 197 (1948), 343

- INS v. St. Cyr*, 533 U.S. 289 (2001), 682
Irvin v. Dowd, 366 U.S. 717 (1961), 476
Johnson v. Eisentrager, 339 U.S. 763 (1950), 629, 646, 650, 652, 681–682
Jones v. Cunningham, 371 U.S. 236 (1963), 645
Kalanianaʻole, In re, 10 Hawaii 29 (1895), 627
King v. Cowle, 2 Burr. 834, 97 Eng. Rep. 587 (K.B.), 683
Korematsu v. United States, 323 U.S. 214 (1944), 314
Kraunch et al., United States v., 8 CCL No. 10 Trials 1081, 194
Krupp, Alfried United States v., 9 CCL No. 10 Trials 1327, 194
Lambert v. California, 355 U.S. 225 (1957), 482
Lindh, United States v., 212 F.Supp.2d 541 (E.D. Va. 2002), 674
List et al., United States v., 11 CCL No. 10 Trials 757, 195, 281
Lotus Case, P.C.I.J., Ser. A; No. 10 (1927), 394
Luftig v. McNamara, 126 U.S. App. D.C. 4, 373 F.2d 664 (1967), *cert. denied*, 387 U.S. 945 (1967), 497
Marshall v. United States, 360 U.S. 310 (1959), 476
Mathews v. Eldridge, 424 U.S. 319 (1976), 672, 677
Medina v. Resor, 20 USCMA 403, 43 CMR 243 (1971), 473
Milch, United States v., 2 CCL No. 10 Trials 353, 192
Milligan, Ex parte, 71 U.S. (4 Wall.) 2 (1867), 612, 682
Mitchell v. Harmony, 54 U.S. (13 How.) 115 (1851), 183
Muller, In re, 16 Am. J. Int'l L. 684 (1922), 56
Murdock, United States v., 290 U.S. 389 (1933), 493
Neumann, In re, 16 Am. J. Int'l L. 704 (1922), 60
Ohlendorff, et al., United States v., 4 N.M.T. 411, 196
Ozawa v. United States, 260 U.S. 178 (1922), 312
Paguetta Habana, The, 175 U.S. 677 (1900), 413, 490
Pohl et al., United States v., 5CCL No. 10 Trials 958, 196
Preiser v. Rodriguez, 411 U.S. 475 (1973), 682
Prosecutor v. Akayesu, ICTR-96-4-T (1998), 552
Prosecutor v. Blaskic, 122 ILR 2 (2000), 502–535
Prosecutor v. Erdemovic, IT-96-22-T (1996), 527
Prosecutor v. Rutaganda, ICTR-96-3-T (1999), 564
Prosecutor v. Tadic, IT-94-1-T (1997), 502
Quinn, Ex parte, 317 U.S. 1 (1942), 490, 618, 669, 682
Rasul v. Bush, 215 F.Supp.2d 55 (D.D.C. 2002), 649, 652
Rasul v. Bush, 542 U.S. ____ (2004), 680
Reid v. Covert, 354 U.S. 1 (1957), 633
Rohde, Werner & Eight Others, Trial of, 5 L.R.T.W.C. 54 (1948), 259
Rumsfeld v. Padilla, 542 U.S. ____ (2004), 677
Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206 (1953), 682
Sheppard v. Maxwell, 384 U.S. 333 (1966), 476
Shimoda et al. v. State, 355 Hanrei Jiho 17 (1963), 356
Sisson, United States v., 294 F.Supp. 511 (D.Mass. 1968), 497
Spelar, United States v., 338 U.S. 217 (1949), 647
Swain v. Pressley, 430 U.S. 372 (1977), 682
Tel-Oren v. Libyan Arab Republic, 726 F.2d 774 (1984), 415
The State v. Schumann, 39 ILR 433 (1966), 404
United States ex rel. Toth v. Quarles, 350 U.S. 11 (1955), 636
United States of America et al. v. Hermann Wilhelm Göering, et al., 20 Temple L.Q. 168 (1946–47), 127
Vallandigham, Ex parte, 68 U.S. (1 Wall.) 243 (1863), 624
von Leeb, Wilhelm et al., United States of America v., 10 CCL No. 10 Trials 1, 217
Warth v. Seldin, 422 U.S. 490 (1975), 645
Watkins, Ex parte, 28 U.S. (3 Pet.) 193 (1830), 675
Weizsaecker, et al., United States v., 12 CCL No. 10 Trials 13, 193
West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943), 493
Whitmore v. Arkansas, 495 U.S. 149 (1990), 645
Williams v. Kaiser, 323 U.S. 471 (1945), 681
Yamashita, In re, 327 U.S. 1 (1946), 289, 682
Yasui, United States v., 320 U.S. 115 (1943), 314
Yick Wo v. Hopkins, 118 U.S. 356 (1885), 630
Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952), 675
Zadvydas v. Davis, 533 U.S. 678 (2001), 647

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 indeterminacy, 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 at work on all levels of decision-making.

Despite the twenty-first century’s new spectre 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, anomalous 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 tressed 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 II Sung of North Korea, Idi 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.

1. William C. Bradford, “International Legal Regimes and the Incidence of Interstate War in the Twentieth Century: A Cursory Quantitative Assessment of the Associative Relationship,” 16 *Am. U. Int'l L. Rev.* 647 (2001).

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.

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Tuscaloosa, Alabama
July 1, 2005

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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*.

