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

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

Cases, Materials and Comments

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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

Foreword

A disparity exists between human aspirations and their achievement. This is evident in the long history reflecting the evolution of fundamental human and humanitarian values applicable to the initiation and the conduct of war, and in later times, all types of armed conflicts. This historic evolution over the last 5,000 years witnesses the articulation of human and humanitarian values in the form of prohibitions in time of war against the killing of civilians and in general, the humane treatment of civilians, the non-destruction of religious establishments, and more recently, the protection of POWs and the sick, wounded, and injured in the field and at sea. A parallel track is evident in the evolution of doctrine and normative developments at the international and national levels, with doctrine being the driving engine for governments to adopt binding legal obligations.

All of this is evident in the writings of scholars from Sun Tzu in the Fifth Century BCE in China, Manu in the Fourth Century BCE in India, inscriptions on Mayan monuments in the Fourth Century BCE in South America, the practices of the Prophet Mohammed in the early Islamic battles in southern Arabia, followed by the specific prescriptions enunciated by the First Khalifa, Abu Bakr, to the Muslim troops going to the southern Mediterranean in the Seventh Century CE, the Christian European medieval code of chivalry in the Twelfth Century CE, and the writings of scholars, experts, and laypersons from the Seventeenth Century on.

This intellectual development, reflecting commonly-shared human values reflected in several civilizations, embodied in the values of the three Abrahamic faiths, led to specific international prescriptions and proscriptions applicable both to what was historically referred to as the *jus ad bellum* and the *jus in bello*. The result was a series of international instruments which developed along parallel tracks, namely, conventional and customary law applicable to conflicts of an international and non-international character. They are commonly referred to as the "Law of Geneva" and "Law of The Hague". The former in reference to the Conventions sponsored by the International Committee of the Red Cross in Geneva, starting with the First Geneva Convention of 1864, and ending, at this point in time, with the 1977 Additional Protocols to the Four Geneva Conventions of 1949. As to the "Law of The Hague," it originated with the First Hague Convention of 1899 soon amended in 1907, and which is still applicable as a restatement of customary international law, but which surprisingly has not been updated since then. The "Law of The Hague" also includes a number of conventions prohibiting the use of certain weapons which are deemed to be indiscriminate or to cause unnecessary pain and suffering.

As is evident in the history of what for lack of a better word we now call international humanitarian law, doctrine has always been far ahead of the willingness of governments to accept binding international obligations. Nevertheless, in recent times, particularly since the end of WWII, there has been a significant increase in international instruments with varying degrees of binding legal obligations evidencing prescriptive

norms for combatants, as well as proscriptive norms for the enforcement of these prohibitions. The adoption of these international norms has not, however, been paralleled in the establishment of enforcement institutions. The post-WWI efforts of international prosecution for violations of the *jus ad bellum* and *jus in bello* have been a step in the right direction, but not one which has achieved its purposes, as no international prosecutions took place. Post-WWII efforts yielded a significant result in the Nuremberg and Tokyo war crimes trials followed by national prosecutions brought by the Allies in their respective zones of occupation in both theaters of the war. Other national prosecutions in formerly occupied countries also occurred. The record of these proceedings is mixed. For sure it evidences that international and national criminal justice for international crimes is only for the defeated. However, substantial developments occurred in the elimination of heads of state immunity for certain international crimes, and for the expansion of the law of command responsibility and the elimination of the automatic defense of obedience to superior orders.

The cold war brought this historic evolution to a temporary halt. However, during the same period of time, another set of international legal norms developed, namely, international human rights law, which in many respects, overlaps with international humanitarian law. Thus, we have today two major sources of normative prescriptions and proscriptions which reflect certain commonly-shared values by the international community, namely international humanitarian law and international human rights law. In the course of their development, the former applied to the context of wars between states or what is now called conflicts of an international character and to conflicts of a non-international character, with some applications into what are also called conflicts of an internal character (which is particularly true with respect to genocide and crimes against humanity). As to international human rights law, while it has originally been assumed to apply to times of peace, it nevertheless evolved to apply to times of war as well. This was affirmed in the 2004 International Court of Justice Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, which recognized the joint applicability of international human rights law and international humanitarian law in the context of conflicts, as well non-conflict situations. In other words, international human rights law is the general law applicable to all contexts and international humanitarian law the more specific law applicable to conflict contexts. These two sources of applicable law have, however, overlaps and gaps which have yet to be resolved, the two internal sources of international humanitarian law, namely conventional and customary international law, have overlaps and gaps which have not been resolved.

Notwithstanding the existence of multiple sources of law and their overlaps and gaps, there has been a significant evolution in the enforcement of international criminal law since 1992 with respect to what has now emerged as the three international core crimes, namely, genocide, crimes against humanity and war crimes (with the politically conspicuous disappearance from that list of "crimes against peace," which were prosecuted at Nuremberg and Tokyo, and which subsequently became aggression). As mentioned above, after a hiatus due to the cold war, a new political international resolve developed with the advent of the conflict in the former Yugoslavia, reflected in the security council's decision in establishing a Commission of Experts to Investigate Violations of International Humanitarian Law in that conflict, which then led the Security Council to establish the International Criminal Tribunal for the former Yugoslavia (ICTY), followed by the International Criminal Tribunal for Rwanda (ICTR).

The Security Council's thrust in the arena of international criminal justice was soon drained of its momentum, and the international community, particularly concerned

with the costs of the ICTY and ICTR, resolved to explore alternative mechanisms such as the mixed tribunals in Sierra Leone and East Timor. Both of these experiences, for lack of international commitment to them, as well as limited resources, cannot be held out as useful models without these missing ingredients. Lack of international political will has also prevented post-conflict justice in Cambodia. There are so many examples of situations where impunity has prevailed over accountability.

Since WWII, it is reported that over 250 conflicts have occurred throughout the world, resulting in 70 million casualties at the low range of estimates to 170 million casualties at the high range of estimates. Over the last half-century during which these atrocities have unfolded before the international community, with scant accountability befalling the leaders and senior perpetrators of these crimes, international civil society, as well as a number of governments have reaffirmed their beliefs in international criminal justice and worked towards the establishment of a permanent international criminal court—an idea that made its way to reality from the end of WWI to 1998 with the adoption of the Rome Treaty establishing the International Criminal Court.

The current thrust for the elimination of impunity and the establishment of accountability for international crimes is hopefully irreversible, though we have regrettably witnessed in recent times something else the international community thought to be irreversible, namely, the prohibition against torture, which some governments continue to practice, and which this Administration has institutionalized. How deep and how far the international community's commitment to international human rights law and international humanitarian law goes is something only time will tell. What is evident is the struggle between on the one hand human and humanitarian values and on the other *realpolitik*, or political realism. In a sense, this conflict may be simply viewed as a reflection of the struggle of good and evil in every individual which manifests itself in the behavior of societies from the beginning of time. With the advent of the nation-state, institutionalized rationalizations have been developed under the guise of "state interests," "strategic interests," and ultimately, under the overall umbrella of "political realism." What has changed, however, is the growing strength of international civil society which supports international criminal justice and opposes impunity.

The increase in the literature on these subjects evidences significant interest all over the world. This abundant literature includes contributions to the history and evolution of norms, what the author of this book refers to as "war crimes" and their enforcement, to which he refers as "war crimes trials." The material he offers in the six parts of this book is offered in a chronological order, covering a period of time ranging from 1899 to 2004. Most significantly, the material contained in these parts combine legal and political events, showing the interrelationship between norms, enforcement modalities, and the socio-political climate surrounding it.

While the first five parts offer the reader a thorough, conventional description of the course of events with appropriate excerpts from documents and other writings, it adds documents and comments seldom found in other similar writings. Among them for example, are those contained in part three, describing the rise of Japanese imperialism in the late '20s, and the Nanking massacre of 1937, which many similar writings have regrettably failed to adequately reflect. It also includes the 1963 Japanese civil litigation involving the atomic bombing by the United States in 1945 of Hiroshima and Nagasaki. Part 4 adds national prosecutions to the mix of international prosecutions, and includes the Vietnam war era and the Calley and Medina cases arising out of the My Lai massacre, which are somewhat forgotten in more contemporary writings on the enforce-

ment of international criminal law. Part 6, which includes the ICTY and ICTR, as well as appropriate material on the ICC, also includes the U.S.'s position on the so-called "war against terrorism" and its aftermath. The book does not, however, cover mixed models and lesser known efforts such as in the case of Ethiopia. Probably because of timing, the book does not address Iraq's Higher Criminal Tribunal, established in December, 2003.

It would be appropriate to describe the contents of the book as a significant compilation of materials whose methodology and approach makes it readily usable in connection with teachings on international criminal law and on international humanitarian law. The author's didactic approach and the choice of materials, as well as the way they were excerpted, makes such a book not only appropriate in legal education, but also in the fields of political science and history.

It will not be difficult for anyone glancing at the table of contents to realize how comprehensive the material assembled by the author is, and how careful a surgeon he has been in cutting out the appropriate parts to make it all fit into a cohesive whole. Unlike similar works, this one is easy to read. The student and researcher will also find very useful the fourteen appendices containing significant documents directly applicable to the subject of the book.

Necessarily a book of this size will exclude cases and materials which are relevant to the subject. However, as a teaching tool, basically, everything needed is included in the book, and it may be that other scholars may be critical of a historic evolutionary approach, as opposed to a subject-matter oriented one. In my judgment, however, the historical and political contexts are indispensable to the understanding of how certain institutions developed, and how in turn these institutions developed jurisprudence, which in turn became foundational for further normative developments. Indeed, international criminal justice is not the product of an orderly intellectual or legislative development, instead, it is a haphazard product deriving from events, circumstances, and sometimes even the force of personality of certain individuals. The student of international criminal law must be mindful of how the history of war crimes and war crimes trials has developed, though admittedly I would have preferred a wider scope to show that the evolution of war crimes trials is part and parcel of the evolution of international criminal justice.

Professor John Watkins is to be congratulated on his effort, which I am sure will prove to be a significant contribution to the legal literature and that of other fields with respect to the subject of international criminal law.

Carolina Academic Press is also to be congratulated for publishing this book, and also for publishing other books on international criminal law.

M. Cherif Bassiouni
Distinguished Research Professor of Law, President
International Human Rights Law Institute, DePaul University College of Law
President, International Institute of Higher Studies in Criminal Sciences (Siracusa, Italy)
Honorary President, International Association of Penal Law (Paris, France)

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, 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, buttressed 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 2001[1] 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.

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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.

John C. Watkins, Jr.
John Paul Weber
Tuscaloosa, Alabama
July 1, 2005

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Editorial Note

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.*