CHAPTER 1

WHAT IS INTERNATIONAL CRIMINAL LAW?

I. INTRODUCTION

Throughout history, criminal law has been almost exclusively a matter of national (or domestic) law. In the traditional view, each independent State in the international community has exclusive sovereign authority to define, prosecute, and punish crimes under its own law and procedures, especially when those crimes take place within its territorial boundaries.

Of course, some exceptions have long existed. For centuries, international law has authorized States to punish the perpetrators of certain crimes that cross national boundaries or which occur outside the sovereign territory of any one State. The classic examples are piracy on the high seas and slave trading. Since ancient times, States have made bilateral agreements to return (or extradite) fugitives who have escaped from one country to another date. International law has long prohibited certain conduct during armed conflict which could be punished by any State who had custody of the offender.

Yet for the most part, criminal law has been a matter of the exclusive competence of individual States and their domestic laws and courts. Since World War II, however, three broad and related developments have fundamentally changed this situation.

First, crime itself has become increasingly transnational. In activities as diverse as money laundering, credit card fraud, terrorism, and trafficking in drugs, weapons and people, criminals today operate with little regard for national boundaries or political borders. In fact, criminal organizations often use these boundaries to great advantage. In short, as the economy has become "globalized," so has crime.

In response, States have entered into a growing network of treaties and other agreements aimed at combating these new forms of transnational crime and facilitating cross-border cooperation between law enforcement authorities. These have included agreements defining new types of transnational crime (such as corruption, sex trafficking, and acts of terrorism) and implementing new forms of information sharing and cooperation between law enforcement authorities (such as through mutual legal assistance treaties).

Second, beginning with the massive atrocities committed during the Second World War, the international community has worked to criminalize the most atrocious kinds of violent conduct and abuse and to establish international courts to prosecute and punish those who commit the most serious offenses.[1] The Nuremberg and Tokyo War Crimes Tribunals created at the end of World War II marked the beginning of this effort. The crime of genocide was codified by treaty in 1948. In the 1990s, the United Nations created two special tribunals to deal with the widespread atrocities which occurred in the former Yugoslavia and in Rwanda. In 1998, the Rome Statute created the International Criminal Court to prosecute those individuals who commit genocide, crimes against humanity, war crimes and aggression. Since then, a number of hybrid or specialized courts have also been established (dealing, for example, with Lebanon, East Timor, and Sierra Leone).

Third, the international human rights revolution has required all governments to respect and promote fundamental rights and freedoms, in particular to protect individuals in every country from the most serious kinds of abuse and exploitation (including by prosecuting those who commit

[1] Although some international sources use the spelling "offences," for consistency this Nutshell will use the American spelling "offenses" unless quoting an original source.

such abuses whether they are foreign nationals or domestic criminals).

Taken together, these developments have brought about significant changes in the way the international community deals with crime. They have come to constitute the substance of the relatively new (and continually evolving) field known broadly as international criminal law.

II. DEFINITION OF INTERNATIONAL CRIMINAL LAW

There is no single agreed definition of the term "international criminal law." The scope of the topic—which particular subjects are included within the term—depends on the perspective of the persons providing the definition. One definition describes "a body of international rules designed both to proscribe certain categories of conduct (war crimes, crimes against humanity, genocide, torture, aggression, International terrorism) and to make those persons who engage in such conduct criminally liable." *See* Antonio Cassese, *International Criminal Law 3* (3rd ed. 2013).

Generally, one can identify three different approaches. They can be illustrated by reference to the following hypothetical situations: (i) individual A is a soldier who intentionally kills a wounded prisoner of war during an armed conflict between two independent States, (ii) individual B is part of a criminal gang engaged in smuggling in drugs and people across international borders, and (iii) individual C has committed a gruesome murder in his home country but managed to escape to (and find refuge in) a neighboring country, that has been asked to arrest and return him to his home country.

§ 1–1 THE NARROWEST VIEW

In its most technical sense, the term "international criminal law" is used to refer only to those few crimes established directly by international law and subject to the jurisdiction and practice of international courts created for the specific purpose of prosecuting individuals for those crimes.

From this perspective, the subject matter of international criminal law properly focuses on the International Criminal Court and its predecessors (the post-WWII war crimes tribunals and the *ad hoc* tribunals for the former Yugoslavia and Rwanda) and on the so-called "core crimes" of genocide, war crimes, and crimes against humanity, as well as the crime of aggression (the definition of which has only recently been agreed). In other words, it focues on situations where individual perpetrators are prosecuted before international tribunals for violations of crimes established by international law. Their criminal responsibility is determined under, and their punishment imposed by, international law both substantively and procedurally.

Thus conceived, the term would only apply to person A, since killing prisoners of war is a "war crime" prohibited by international law and can result in a prosecution before an international tribunal. Such crimes can also be prosecuted beforedomestic courts having jurisdiction.)

§ 1–2 A BROADER VIEW

A more expansive definition includes *transnational crimes*—crimes which have been agreed to by the international community and defined in multilateral treaties but which are prosecuted by domestic authorities under domestic laws giving effect to those treaties, rather than before international courts or tribunals. Because prosecutions carried out in domestic courts are based on domestic implementation of international norms, they are sometimes said to represent

the *indirect* enforcement of international criminal law. Some scholars describe them as *hybrid* crimes because, strictly speaking, they are neither entirely international nor entirely domestic.

Transnational crimes concern the international community because they involve significant cross-border activities and require a common and coordinated response by all States. For various reasons, however, they have not been included within the jurisdiction of the International Criminal Court or other supranational tribunals. The list of these transnational crimes is long and growing rapidly. It includes trafficking in people or drugs, acts of terrorism, cyber-crime, organized crime, money laundering and corruption, among others.

Of course, there is some overlap between this category and the narrower group of "core crimes," since both are defined by international law and the "core crimes" can be prosecuted in national courts as well as before the international tribunals. Domestic courts can prosecute a much larger range of international crimes than the international tribunals can. In practice, most international criminal law prosecutions fall within this broader "transnational" definition.

In our illustrations, individuals A & B have both committed acts condemned by international law; they are subject to domestic prosecution but B's crimes would not fall within the jurisdiction of an international tribunal.

§ 1–3 THE INCLUSIVE VIEW

A third approach recognizes the term "international criminal law" as encompassing not only (i) the "core crimes" within the jurisdiction of the international criminal tribunals, as well as (ii) the "transnational crimes" of within the jurisdiction of domestic courts, but also (iii) the many other substantive and procedural issues that arise when domestic criminal law is applied to transnational activities.

This view acknowledges that States use their own criminal laws and procedures to regulate actions that take place outside their national boundaries, including with respect to people, entities, activities, or evidence in other countries. Doing so can create problems at the international level, for example on issues of jurisdiction, apprehension of suspects, taking of testimony and collecting evidence abroad, assisting foreign and international law enforcement authorities, and enforcing criminal judgments. In this sense, the term "international criminal law" includes both the international aspects of domestic law and the domestic effects of international law, in their procedural as well as substantive criminal applications.

The issues which arise at this intersection of international and domestic law (sometimes referred to as the *law of international judicial assistance and cooperation in criminal matters*) are increasingly important in a world of ever-more rapid movement of people, goods, money and information. Most practicing lawyers are likely to encounter issues of international criminal law in this third dimension.

In our illustrations, issues raised by the request for the return of individual C would also fall within this definition.

Because it is important for students to understand the overall context in which these issues arise, this book adopts the third and most comprehensive approach to defining international criminal law. The following chapters accordingly address questions involving the transnational application of domestic criminal law (for example, the extraterritorial reach of substantive crimes), international cooperation in criminal matters (including extradition and mutual legal assistance), international treaties and conventions addressing transnational crimes (such as torture, corruption, trafficking), and the jurisdiction and practice of international tribunals in cases of genocide, crimes

against humanity and war crimes.

III. CREATION OF INTERNATIONAL CRIMINAL LAW

A basic understanding of the nature and sources of international law is important for any student of the field of international criminal law.

In its classic (some scholars might say increasingly outmoded) formulation, international law governs only the relations among sovereign States at the international level. It deals with issues such as the definition of national boundaries, the "recognition" of States and the establishment of diplomatic relations between them, the formation and interpretation of treaties, the law of the sea, the use of force, the laws of war, and issues of war and peace.

These classic issues of "public international law" have traditionally had only limited application in domestic courts. Until recently, only a few international tribunals have existed with competence to issue binding decisions with which States must comply. With just a few exceptions, international law in this sense did not address questions involving how a State treated its own citizens and it had very little to say about the domestic prosecution of crimes. Crime remained almost entirely a matter of domestic law, and the international tribunals that did exist (such as the International Court of Justice) lacked jurisdiction over individuals.

Today the situation is quite different, mostly as a result of the emergence of international criminal law as well as international human rights and humanitarian law over the last sixty years. All of the questions of public international law mentioned above continue to be important to lawyers in foreign ministries and international organizations. What has changed is that international law is increasingly relevant to the treatment of individuals by their own governments as well as those of foreign States. In limited situations, it can even be the basis on which criminal prosecutions can be initiated in international tribunals against individuals for their own conduct. The number of tribunals charged with interpreting and applying international law has grown significantly, in part due to the creation of specialized international criminal tribunals.

The following sections highlight only a few issues directly relevant to the subject matter of this book. Students desiring a more complete introduction to international law should refer to Thomas Buergenthal and Sean D. Murphy, *Public International Law in a Nutshell* (6th ed. 2018).

§ 1–4 THE ROLE OF CONSENT

In traditional theory, which still provides the basis for most applications of international law today, sovereign States play the central role in creating the international legal principles to which they must adhere. In other words, they are both the "creators" and the "subjects" of international law. This dual role reflects the fact that the international system lacks a real legislature authorized to adopt binding rules. Thus, the fundamental norm is the consent of the individual community "members" meaning that, with only a few arguable exceptions discussed below, a sovereign State cannot be bound to a rule which it has not accepted.

§ 1–5 SOURCES OF INTERNATIONAL LAW

The specific rules of international law are not codified in any single legislative code or enactment. Under article 38 of the Statute of the International Court of Justice (ICJ), which is appended to the Charter of the United Nations, international law derives from three main sources:

(1) international treaties or conventions "establishing rules expressly recognized by the contesting states;"
(2) international custom "as evidence of a general practice accepted as law;" and
(3) the general principles of law "recognized by civilized nations."

In addition, under article 38, the Court may look to "judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law."

§ 1–6 TREATIES

Treaties are the primary source of rules and obligations in contemporary international criminal law. (As used here, the term "treaty" means the same thing as an international convention, agreement or protocol, and includes both bilateral and multilateral agreements.) They are almost always written agreements, negotiated by States with the intention of imposing legally binding commitments as a matter of international law.

Generally speaking, however, treaties do not become binding and enforceable until they have been formally accepted by individual States (by ratification or accession), and each State has its own domestic processes for doing so. In the United States, for example, once a treaty has been negotiated and completed, and once it has been signed by someone authorized to do so, the President may transmit it to the U.S. Senate for advice and consent to ratification. After the Senate has given its advice and consent, and subject in most cases to the adoption of any necessary implementing legislation by the U.S. Congress, the President may ratify the treaty. Only at that stage does the treaty become formally binding on the United States.

Perhaps the most important international treaty in the field of international criminal law today is the one that created the International Criminal Court. Known as the Rome Statute, it was negotiated at and adopted by a diplomatic conference convened under the auspices of the United Nations. While the Rome Statute is legally binding only on those States that have ratified or acceded to it, many of its provisions contain definitions, statements of principle and procedural norms reflecting the views of a majority of the international community. For that reason, this book will frequently refer to those provisions for purposes of illustration.

As of the end of 2018, 123 States had ratified the Rome Statute -- well over half of the 194 Member States of the United Nations. Another 15 States (including the United States) have signed but not ratified or acceded. Three States (South Africa, Gambia and Burundi) have withdrawn from the Statute; two others announced their intent to do so (Russia in 2016 and the Philippines in 2018). For the authoritative list of parties and signatories to the Rome Statute and other criminal law treaties, visit the UN Treaty Collection Database at *https://treaties.un.org/Pages/ParticipationStatus.aspx?clang=_en* (search under Chapter 18 "penal matters").

§ 1–7 CUSTOMARY INTERNATIONAL LAW

Binding legal obligations may also arise from customary international law. As opposed to the formal, written provisions of an international treaty or agreement, customary international law obligations derive from the general and consistent practice of States over a substantial period of

time based on a sense of legal obligation. It is important to consider the two main elements of this definition: (i) an "objective" component involving the *actual conduct or practice* of States and (ii) a "subjective" component reflecting a *sense of legal obligation* by those States (referred to *opinio juris sive necessitates* or simply *opinio juris*).

Both requirements must be satisfied. Thus, a rule of customary international law may be said to exist where it can be demonstrated that a substantial number of States in the international community have in fact behaved in a certain way, generally and consistently for a substantial period, out of a belief that they are legally obligated to do so. Conduct alone, without the "subjective" sense of legal obligation, is not sufficient to establish a rule of customary international law. It is equally insufficient (from this classic perspective) to rely only on statements (such as UN General Assembly speeches or resolutions) as demonstrating the existence of an established rule of customary international law without also undertaking actual conduct which reflects that rule.

Although customary international law is still accepted as one of the primary sources of substantive international law, it can be difficult to establish a factual record of consistent State practice coupled with the necessary *opinio juris*. In relatively new fields such as international criminal law, the practice of States tends to be dynamic and changing, creating difficulties of clarity and precision. There is some question about whether the practice of non-State entities (such as international tribunals) can itself give rise to norms of customary international law. It can also be argued that statements by government representatives about international law (for example, in speeches to the UN General Assembly or even resolutions adopted by that body) may reflect authoritative views about international legal obligations but cannot by themselves create rules of customary international law. Unless supported by evidence of actual State practice, such statements may only reflect political expectations or normative aspirations.

In theory, an established rule of customary international law binds all States except those that have consistently and openly objected to the formation of the rule from its inception (the so-called "persistent objectors"). But it is not possible to be a "persistent objector" to a rule which reflects a "peremptory norm." Such a norm is said to constitute *jus cogens*, binding on all States regardless of their consent. Thus, States may not, by treaty, agree to something which contravenes a *jus cogens* norm. Although the term *jus cogens* is frequently employed, there is no general agreement on whether it exists or which specific norms it covers. However, few would disagree that the prohibition against genocide is or should be such a norm.

§ 1–8 GENERAL PRINCIPLES OF LAW

Common principles of law recognized and applied by the world's major legal systems supply the third main source of international law. Here, the element of State consent derives from the fact that, by adopting and enforcing a given rule, national legislatures and courts reflect the State's acceptance of the rule in question. When that rule has been adopted and enforced in a similar way by a substantial number of States among the world's various legal systems and traditions, it can be said to have achieved an international character. This is, in effect, a third way by which States, through their actions, can create binding law—by taking action in their domestic legal systems (as opposed to negotiating and ratifying treaties or through consistent practice at the international level from a sense of legal obligation).

In practice, courts and tribunals resort to consideration of general principles only when the norm in question cannot be clearly identified in an applicable treaty or as part of customary international law. In other words, general principles tend to be invoked as a supplementary source

to buttress or complement descriptions of the normative content of international law.

§ 1–9 SUBSIDIARY SOURCES

Article 38 of the ICJ Statute also provides that "judicial decisions and the teachings of the most highly qualified publicists of the various nations" may be considered as *subsidiary* means for the determination of relevant rules of law. In the international legal system, there is no clearly established rule of *stare decisis*, meaning that even in the International Court of Justice, prior decisions are typically accorded appropriate consideration but not binding effect. The same is true in many national legal systems, especially those based on the civil (as opposed to common) law. Until recently, principles of criminal law have mostly been articulated in national (rather than international) courts, so it has been difficult to consider the decisions of one State's courts as authoritative with respect to issues before the courts of another State. With the advent of international criminal courts, the importance of decisional law has clearly increased.

This "subsidiary" or secondary status is also given to the views of experts in the field (the "publicists"), reflecting the prominent role that academics and commentators have long played in the international legal system. Since international law is not codified, and considering the difficulties that can arise in uncovering actual State practice for purposes of customary international law and general principles, judges have often relied on the treatises and analyses of learned scholars who devote their careers to determining such things. In many civil law systems, academic commentaries or treatises have traditionally been given a far more persuasive role than they play in the U.S. system. The same has been true at the international level. However compelling their substantive contributions may be, the views and opinions of "the most highly qualified publicists" do not themselves constitute a source of law, under article 38 at least, but only provide a subsidiary means for ascertaining the content of the law.

§ 1–10 IN PRACTICE

The interplay between treaty law, customary international law, and general principles can be complicated and confusing. For example, new multilateral treaties are sometimes adopted on the basis that they merely codify pre-existing principles of customary international law or even general principles of law. At the same time, it is sometimes argued that a widely ratified multilateral treaty can give rise to a new norm of customary international law, or even *jus cogens*, which in turn binds even those States which have not ratified the treaty in question. The circularity of this approach is obvious.

Consider the crime of genocide. Following World War II and the Nuremberg Tribunal, the international community concluded a treaty defining the crime of genocide and requiring all States Parties to prosecute and punish those guilty of committing that offense. As of the end of 2018, 150 States were party to the Convention on the Prevention and Punishment of the Crime of Genocide, adopted by the UN General Assembly on December 9, 1948. The treaty crime of genocide has been incorporated into the Rome Statute (as well as the statutes of the *ad hoc* tribunals for the former Yugoslavia and Rwanda) without substantive change. Even though genocide continues to occur around the globe, most international lawyers and scholars would agree that genocide is now prohibited by customary international law and may in fact constitute a peremptory norm of international law (*jus cogens*). Moreover, because genocide is also a crime under the domestic law of many States with differing legal systems, its prosecution and punishment arguably

constitutes a general principle of law.

On the other hand, it is much more difficult to contend that international law clearly prohibits the application of the death penalty for the most serious crimes. Some widely-ratified regional treaties do contain restrictions or outright prohibitions on capital punishment, but those provisions do not bind non-parties. No explicit prohibition exists in any global treaty, although some argue that the practice is inherently precluded by provisions prohibiting torture or cruel, inhuman or degrading treatment or punishment (even where the relevant treaty expressly exempts "official sanctions"). The Second Optional Protocol to the International Covenant on Civil and Political Rights, adopted in 1989, calls for the abolition of the death penalty but permits States Parties to retain the death penalty in time of war, and many of its 86 States Parties have taken such a reservation.

It is true that a majority of States have abolished capital punishment domestically, either wholly or in part. Only about one-third of the States in the international community today continue to have the death penalty, and the trend certainly appears to be in the direction of abolishing capital punishment. Perhaps as a result, none of the international criminal tribunals is empowered to impose that sanction. But it can certainly be debated whether that fact establishes a general principle of law, a binding rule of customary international law, or a rule of *jus cogens* compelling all States to do what the majority have done. Some States (including the United States) expressly reject such a rule, in part to preserve their options to be "persistent objectors" and to reserve the decision to the duly-elected representatives of the people in their respective legislatures.

IV. THE PURPOSES OF INTERNATIONAL CRIMINAL LAW

The questions of genocide and capital punishment also raise an important issue about the nature and future development of international criminal law - namely what functions it serves, or should serve, in the global community. This issue can be approached from several perspectives.

§ 1–11 PEACE, ORDER, STABILITY, AND DETERRENCE

In the international system, as in most human communities, criminal law and the threat of prosecution and punishment for its violation serve primarily to deter future violations. From this perspective, it may make little difference to the individual perpetrator whether the prosecution and punishment take place in a domestic court under domestic law or at the international level. What matters is the likelihood that an illegal act will in fact entail serious consequences, thereby deterring potential violators from acting on their plans or impulses.

In a decentralized legal system consisting of independent States with differing jurisdictional approaches, the certainty of punishment is obviously diminished. One State may have differing rules than another about exactly what criminal behavior is prohibited, and jurisdictional hurdles may prevent prosecution of perpetrators for acts committed in the territory of other States. From this perspective, the creation of supranational courts for the prosecution of the most serious crimes makes it more likely that those who break the rules will in fact be called to account and thus strengthens the deterrence factor.

Another important goal of international criminal law is to help keep the peace. Maintaining good order is a function of law in general. International law serves to enhance peace and security in the world community, in part by constraining the use and abuse of power. By providing a forum for the prosecution of those who commit the most serious abuses—the "core crimes" of genocide,

crimes against humanity, war crimes and aggression—the International Criminal Court helps deter those who would commit such acts, not just for humanitarian reasons or because those crimes violate fundamentally shared values of the world community, but also because those acts tend to threaten the very fabric and structure of the international system. Demonstrating that there can be no impunity for these major crimes helps to create trust and respect for the developing system of international criminal justice. The prospect of prosecution and punishment thus serves a preventive and stabilizing purpose.

§ 1–12 RETRIBUTION

At the same time, some people justify punishing those responsible for the most horrific crimes simply on the basis of retribution—making the guilty pay for the terrible wrongs they have committed. International criminal law deals largely (but not exclusively) with various kinds of organized violence committed in situations of widespread abuse, where prosecutions under domestic law may not be viable. Prosecution before international tribunals may be the only alternative to allowing the guilty to go unpunished. In contrast to those interested in deterring future misconduct, the proponents of retributive justice tend to look backwards and to see punishment for past deeds as a fundamental requirement of an organized community.

One criticism often leveled at international criminal law is that historically, and especially in post-war contexts, it has represented "victors' justice." Some of the most important developments in the field of international criminal law have in fact taken place after horrendous conflicts and in response to widespread atrocities. For example, the landmark tribunals created at the end of World War II—the Nuremberg Tribunal in Germany and the Tokyo Tribunal in Japan—were created by the victorious Allied Powers to punish war crimes and other offenses committed by their enemies during the war. In a few instances, defendants were convicted and punished for conduct in which the victorious Allies also engaged (for example, conducting unrestricted submarine warfare).

In such situations, is the charge of "victor's justice" a legitimate criticism? Few would argue that those who committed genocide and crimes against humanity should escape prosecution and punishment simply because they were defeated. Does the problem lie in the fact that prosecutions have taken place before a court created only after the conflict has ended? Like the Nuremberg and Tokyo courts, the two *ad hoc* tribunals established by the UN Security Council in 1993 and 1994 represent *ex post* reactions to the abuses which took place during the conflicts in the former Yugoslavia and in Rwanda. By contrast, the International Criminal Court has only prospective jurisdiction.

Does a more serious concern arise when the specific crimes being prosecuted had not previously been clearly agreed upon or articulated by the international community? Or that the defendants were acting under the authority of their own governments? Defendants at Nuremberg made such contentions—that what they had done violated no clearly established pre-existing norm of international law but had been required by their domestic law. They also contended that the composition of the Tribunal did not reflect independence and impartiality (it included no German judges) and that the trial was a sham and based on vengeance rather than legal principles. Are *ex post facto* prosecutions ever justified?

§ 1–13 RESTORATIVE OR TRANSITIONAL JUSTICE

Some scholars discount punishment-as-retribution and *ex post facto* vengeance as legitimate aims of a modern criminal law system. Others argue that confronting and punishing the abusers is essential to overcoming the damage they have caused, particularly in situations of widespread atrocities. The purpose, they say, is not just "truth-telling" or public condemnation but to acknowledge and learn from the past in order to create a clear path to the future. This thought is sometimes captured by the phrase "no peace without justice." The emphasis here is on *restorative* justice, on rebuilding societies in the wake of conflict.

Another term that has gained currency is *transitional justice*. It reflects the concern that purely vengeful or retributive responses to past atrocities have the potential to do more harm than good, by hardening and perpetuating the same societal antagonisms that gave rise to the conflict in the first place. In some situations, justice for the victims and deterrence of future violations must take second seat to the more important goal of post-conflict reconciliation and rebuilding—even to the point of granting amnesties and pardons to those who committed atrocities.

In recent years, some States have established post-conflict "truth and reconciliation" commissions to help heal their wounds (for example, South Africa, Peru, Liberia, and Sierra Leone). These commissions may include highly qualified people (not limited to judges and lawyers) who take evidence, hear witnesses, and present a report describing what occurred and perhaps even assigning individual responsibility. Generally, they do not function as courts and do not sentence the guilty. In Rwanda, however, a system of communal courts (known as *gacaca*) served much the same purpose. Do these alternative approaches constitute acceptable ways of "doing justice," even if they allow perpetrators to escape trial and punishment? Some have expressed serious doubts about the viability or legitimacy of restorative justice schemes if they in fact fail to punish perpetrators or to compensate victims or allow perpetrators to live side-by-side with their intended victims.

§ 1–14 A DUTY TO PROSECUTE?

Some experts argue that impunity is unacceptable in any situation and that under international law there is (or should be) a clear duty to prosecute all those who have committed the most serious crimes. Arguably, there is growing textual support for this proposition. For example, the preamble to the Rome Statute affirms "that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation" and recalls "that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes."

Under the 1948 Genocide Convention, as interpreted by the International Court of Justice, States Parties to that treaty are obligated to prosecute perpetrators of genocide even when it was not committed within their territories. *See Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia-Herzegovina v. Yugoslavia), Preliminary Objections, 11 July 1996, para. 31 ("the obligation . . . to prevent and to punish the crime of genocide is not territorially limited by the Convention"). The same is true for grave breaches of the Geneva Conventions of 1949. Most of the multilateral criminal treaties require States Parties to "extradite or prosecute" the specific crimes defined in those treaties.

Under human rights law, States are said to have an affirmative duty to prevent, investigate and punish human rights violations. *See*, for example, the decision of the Inter–American Court of Human Rights in *Velasquez Rodriguez*, 29 July 1988, 95 I.L.R. 232, para. 166.

On the other hand, it is doubtful whether customary international law can truly be said today to impose a duty on States to prosecute all violations of international criminal law, or even just "core crimes" committed within their jurisdiction. While acknowledging the gravity of mass atrocities, the injustices and the suffering of victims, one can argue that mandatory prosecutions (regardless of circumstances) do not always serve broader societal interests and goals such as those pursued in a truth and reconciliation context.

§ 1–15 HARMONIZATION AND PROGRESSIVE DEVELOPMENT

The international community today is still premised on the principle of the sovereign equality and political independence of States. There is no global legislature, no universal law enforcement mechanism, and no single international court with compulsory jurisdiction. So the international system remains more diffuse (one can say "horizontal") than most domestic legal systems. In this context, international criminal law serves an important function in progressively articulating the standard, goals, and values of the world community as a whole.

The same is true both of how international crimes are defined and of the evidentiary and procedural rules by which prosecutions may be conducted. While national legal systems increasingly share some fundamental concepts (such as a presumption of innocence), they continue to differ widely on some basic principles (for example, the legitimacy of trials *in absentia* or representation by qualified legal counsel). It may still be too early to proclaim the existence of a universally-accepted body of procedural rules. Still, the decisions of the various supranational criminal courts (as well as the growing body of human rights norms) provide a growing source of principles and practices from which a universal code of criminal procedure may one day emerge.

§ 1–16 A NOTE ON HUMAN RIGHTS AND HUMANITARIAN LAW

As this discussion illustrates, international criminal law is closely connected to international human rights law. Most of the core crimes at the heart of international criminal law also constitute the most serious violations of human rights law. The "due process" principles of human rights (especially those set forth in Article 14 of the International Covenant on Civil and Political Rights) guide the conduct of prosecutions before international tribunals. Clearly, international human rights law exerts an increasingly powerful and pervasive force on domestic criminal procedure. Decisions by the European Court of Human Rights, the Inter-American Human Rights Commission and Court, and the UN Human Rights Committee (established to oversee implementation of the International Covenant on Civil and Political Rights) all push States in the direction of procedural fairness and recognition of defendants' rights, forcing modifications in domestic rules to conform to regional and universal norms.

There is of course a fundamental difference between the two fields. International human rights law imposes obligations on governments in the way they treat individuals (in particular, people who are within the territory and subject to the jurisdiction of the State concerned). International criminal law imposes criminal responsibility on individual perpetrators. Both are aimed at protecting the interests of people, but they do so in different ways. International criminal law aims to deter the commission of the gravest atrocities and to provide those charged with such offenses with a fair trial within a reasonable time before an impartial and independent tribunal. These aspects are discussed in greater detail in Chapter 4.

International criminal law is also closely related to another field, commonly referred to as

international humanitarian law. The latter term covers the body of international rules and principles intended to limit the effects of armed conflict, in particular by protecting persons who are not (or are no longer) participating in the fighting. It also seeks to regulate the means and methods by which warfare is conducted. For example, the Geneva Conventions of 1949 (and their two Additional Protocols of 1977) provide protections to specified categories of individuals (civilian non-combatants, the wounded, prisoners of war, and the shipwrecked). Other instruments and principles of customary international law impose obligations on the combatants not to cause superfluous injury or unnecessary suffering, to avoid severe or long-term damage to the environment, and not to use certain kinds of weapons (such as exploding bullets, chemical and biological weapons, blinding laser weapons, and anti-personnel mines). *See* Chapter 5.

The most serious violations of international humanitarian law may be prosecuted as war crimes and thus constitute one of the "core crimes" within the jurisdiction of the International Criminal Court (as well as the two *ad hoc* tribunals for the former Yugoslavia and Rwanda).

§ 1–17 FURTHER READING

Sara Kendall, "Restorative Justice at the International Criminal Court," 70 Revista Española de Derecho International 217 (2018); Patrick J. Keenan, "The Problem of Purpose in International Criminal Law," 37 Mich. J. Int'l L. 421 (2017); Yuval Shany, "Assessing the Effectiveness of International Courts: A Goal-Based Approach," 106 Am J. Int'l L. 225 (2012); Mirjan R. Damaska, "What is the Point of International Criminal Justice?," 83 CHI.-KENT L. REV. 329, 331 (2008).

CHAPTER 2

A BRIEF HISTORY OF INTERNATIONAL CRIMINAL LAW

To appreciate the significance of recent developments in the field, especially the creation of true international criminal tribunals, a basic understanding of the historical background and most significant antecedents of the contemporary system is useful.

I. ORIGINS AND EVOLUTION

The deepest historical roots of substantive international criminal law lie in the law of war, and more precisely in the once-prevalent distinction between "just" and "unjust" wars. Centuries ago, when the idea of sovereignty was personified in the Queen or Emperor, some uses of force by one monarch or ruler against another were considered entirely legitimate while others were prohibited. Violations of these rules might be punishable by the party that won the conflict in a kind of "victor's justice." The first "prosecution" for initiating an "unjust war" may have occurred as long ago as 1268, when, following his defeat by Charles I of Anjou at the Battle of Taggliacozzo (in what is now central Italy), Count Conradin von Hohenstaufen was beheaded for having started an unlawful war.

The distinction between just and unjust wars has long since been abandoned. Today, the prohibition against the use of force by States in international relations is clearly enshrined in the United Nations Charter, art. 2(4), which requires all UN Member States to "refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations." The UN Security Council can authorize the use of force under Chapter VII of the Charter, and article 51 recognizes that States have an inherent right of individual or collective self-defense against an armed attack.

With respect to individuals, evolving concepts of international humanitarian law have gradually endorsed the need to punish those who violate the most important rules governing the conduct of armed conflict. For example, individual criminal liability was established by the Brussels Conference of 1874, which prohibited unnecessary cruelty and acts of barbarism committed against the enemy.

International mechanisms for this purpose were slow to develop. After World War I ended in 1918, the victorious Allies attempted to establish an international tribunal, under article 227 of the Versailles Treaty, to prosecute the German Kaiser Wilhelm II for "a supreme offence against international morality and the sanctity of treaties." However, the Kaiser succeeded in evading arrest and was eventually granted asylum in the Netherlands. (The treaty provided for a petition to be made to Dutch authorities requesting the Kaiser's surrender, but the request for his extradition was repeatedly denied.) Articles 228 and 229 of the Versailles Treaty also provided for prosecution of German nationals before special Allied courts, but German authorities refused to surrender the individuals in question. Some were prosecuted before domestic German tribunals, but few were convicted. Two of these trials, held in Leipzig before the German *Reichsgericht* or Supreme Court during this period, involved the sinking of two Allied hospital ships (the *Dover Castle* and the *Llandovery Castle*) and established important precedents on the defense of superior orders.

In subsequent years, the League of Nations (predecessor to the United Nations) mounted an ultimately unsuccessful effort to gain agreement on the establishment of an international court

for these purposes. A treaty to create such a court was actually concluded in 1937 but never gained the necessary support. See Manley O. Hudson, *The Proposed International Criminal Court*, 32 Am. J. Int'l L. 549 (1938).

II. THE NUREMBERG TRIBUNAL

Atrocities committed by Hitler's Nazi Germany before and during World War II (including the Holocaust) resulted in the first successful effort to prosecute individuals before an international court for violations of international law.

In August 1945, several months after the war in Europe had effectively ended, the four principal Allied nations (the United States, France, the United Kingdom and the Soviet Union) reached an agreement to create a tribunal for "the just and prompt trial and punishment of the major war criminals of the European Axis countries." This so-called London (subsequently known as the Nuremberg) Charter established an International Military Tribunal (IMT) consisting of only four judges, one appointed by each of the four signatory countries (backed up by four alternates). The Tribunal, which subsequently took its seat in the German city of Nuremberg, had jurisdiction over three main categories of offenses: crimes against the peace, war crimes, and crimes against humanity.

More specifically, under article 6(a) of the London Charter, the term "crimes against the peace" included both (i) the planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, as well as (ii) participation in a common plan or conspiracy for the accomplishment of "any of the foregoing."

As defined by article 6(b), "war crimes" included violations of the laws or customs of war, such as the murder, ill-treatment, or deportation of civilians in occupied territories and prisoners of war, as well as the killing of hostages or "wanton destruction" of cities, towns and villages, and devastation "not justified by military necessity."

By contrast, article 6(c) defined "crimes against humanity" to include 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.

Importantly, article 6 also provided that "leaders, organizers, instigators, and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan." It was this provision that formed the basis for the most serious allegations against the individual defendants. Most were charged with participation in the formulation and execution of a "common plan" or "conspiracy" to commit crimes against the peace, war crimes, and crimes against humanity, centered on the National Socialist or "Nazi" Party. (The inclusion of conspiracy was controversial because, at the time, the domestic law in most European States did not recognize it as a crime.)

Among its other notable features, the London Charter stated, in article 7, that the official position of individual defendants, whether Heads of State or responsible government officials, neither relieved them from criminal responsibility nor mitigated punishment. Further, the defendants could not escape criminal responsibility on the grounds that they had acted pursuant to governmental or superior orders, although such facts could be considered in mitigation of punishment (article 8). The Charter also provided that the IMT was not bound by "technical rules

of evidence" but could "admit any evidence which it deems to be of probative value" (article 19).

Twenty-four Nazi leaders were indicted and tried before the IMT. The main charges were all based on article 6 of the Charter. The first count of the indictment described the overall conspiracy, the second concerned crimes against peace, the third charged war crimes, and the fourth focused on crimes against humanity. One defendant was too ill to go to trial; one committed suicide; and one was tried *in absentia*, convicted and sentenced to death (Martin Bormann). Of the other twenty-one defendants, three were acquitted and all others were convicted. Eleven were sentenced to death; all were executed except Hermann Göring, who committed suicide. The other seven defendants received prison sentences ranging from ten years to life. The last remaining prisoner (Rudolf Hess) committed suicide in 1987.

In addition, four groups were declared to be criminal organizations, including the Nazi Party's political leadership corps and their staffs, the Gestapo (or Secret Police), the Sicherheitsdienst (or Security Service), and the regular and "Waffen SS" (components of the Nazi Party).

§ 2–1 CONTROL COUNCIL LAW NO. 10

The Nuremberg Tribunal was not the only court to prosecute war crimes in Europe following World War II. Under an order promulgated in December 1945, known as Allied Control Council Law No. 10, each of the four Powers occupying Germany (the United States, United Kingdom, France and the Soviet Union) was authorized to establish military tribunals to prosecute suspects found in its respective zone of occupation.

CCL No. 10 generally followed the London Charter in focusing on crimes against the peace, war crimes and crimes against humanity. However, it expanded the tribunals' jurisdiction in several ways, *inter alia* by including torture, imprisonment and rape within the scope of crimes against humanity. It also eliminated the requirement that crimes against humanity could only be prosecuted if they had been committed "in execution of or in connection with" another crime within the jurisdiction of the Tribunal, meaning a war crime or crime against the peace. Thus, in these tribunals (unlike in the IMT), individuals could be prosecuted for crimes against humanity that did not occur during actual armed conflict, such as atrocities committed against civilians in Germany prior to the war. (For that reason, some argued that such crimes were not truly international and could only be prosecuted in domestic courts.)

Counting those prosecuted by the four Allied Powers, many more cases were brought before the CCL No. 10 tribunals (often called the "subsequent proceedings") than came before the IMT itself. Within the American zone alone, after the conclusion of the IMT proceedings, twelve major trials were held at Nuremberg involving some 185 defendants. The judgments in a number of these trials contained significant statements of legal principles (for example establishing the criminal liability of top officials of the Nazi Party and the High Command of the German Army, of civilian officials for directing Germany's pre-World War II rearmament program, for the administration of concentration camps, and of particular note for the atrocities committed by the so-called *Einsatzgruppen* or 'special action groups').

Many other cases (generally for less serious violations of the laws of war) were prosecuted before military commissions established by the occupying powers (for example, 489 cases involving 1672 defendants were pursued by the U.S. military at Dachau).

In an important sense, then, the IMT itself represented only the top level of an extensive system of post-war criminal prosecutions for atrocities and violations of the law of war in the

European Theater. Still, it marked the real beginnings of modern international criminal law and was the first tribunal to hold individuals personally responsible for their crimes under international law.

III. THE TOKYO TRIALS

The post-war trials in the Pacific Theater (commonly referred to as the Tokyo Trials) took place before the International Military Tribunal for the Far East (the IMTFE). It consisted of eleven judges, one from each of the victorious Allied powers in the war against Japan (United States, United Kingdom, Soviet Union, Republic of China, the Netherlands, Australia, New Zealand, Canada, France, British India, and the Philippines).

Unlike the Nuremberg Tribunal, the IMTFE was established unilaterally by the proclamation of the Supreme Allied Commander, U.S. General Douglas MacArthur, following the Japanese surrender. However, its Charter followed the London Charter closely and provided for jurisdiction over (a) crimes against the peace (including "the planning, preparation, initiation or waging of a declared or undeclared war of aggression, or a war in violation of international law, treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing"), (b) conventional war crimes (specifically, "violations of the laws or customs of war") and (c) crimes against humanity (namely, "murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political or racial 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").

The IMTFE's Charter also specified that "[l]eaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any person in execution of such plan."

Between 1946 and 1948, the Tribunal considered charges against some eighty of Japan's senior wartime leadership, including four former premiers, three foreign ministers, four war ministers, generals, ambassadors, and others who were variously accused variously of carrying out a "war of conquest" and of murdering, maiming and ill-treating civilians and prisoners of war, plunder, rape, and other atrocities and "barbaric cruelties."

Only twenty-eight defendants were actually tried, mostly military and political leaders. Two died of natural causes during the trial, and another suffered a nervous breakdown during the trial and was removed. All the others were convicted. Seven were hanged, sixteen were sentenced to life imprisonment (most were paroled in 1955), and two received lesser sentences.

Perhaps the best-known case decided by the IMTFE concerned General Yamashita, who was found guilty of war crimes committed by soldiers under his command on the basis of his responsibility as their superior officer. In its judgment in this case, the Tokyo IMT discussed the principle of "command responsibility" in considerable detail and applied it to civilian and military defendants alike.

Often overlooked is the fact that two judges dissented from the Tribunal's judgment. Judge Röling from the Netherlands argued that no individual liability could be imposed under international law for aggression. Judge Pal from India also challenged the conceptual basis for prosecutions of crimes against the peace, contending that the prohibition on aggressive war reflected a desire by colonial powers to preserve their interests in the status quo. He also criticized

the fairness of the trial proceedings themselves.

As in Europe, many hundreds of other war crimes trials were held at various locations in Asia and across the Pacific following the Japanese surrender, many before U.S. military tribunals. Some lasted into the 1950s. Perhaps the largest effort occurred on Guam, where 148 Japanese and Pacific Islanders were prosecuted; thirty received death sentences (some were commuted to life in prison) and ten were hanged. All told, over 5000 Japanese soldiers and officials were indicted for war crimes; most were convicted. Interestingly, Emperor Hirohito, in whose name Japan fought the war, was not even indicted. Additionally, the Soviet Union held a number of trials of Japanese war criminals, notably for the members of a special Japanese bacteriological and chemical warfare unit ("Unit 731") at Khabarovsk. China also conducted its own trials, resulting in over 500 convictions and many executions. The public sentiment surrounding the Tokyo Trial differed from that of the German trials, due in large part, to the wartime victimization of Japanese citizens by their own Government.

IV. SUBSEQUENT DEVELOPMENTS

The Nuremberg and Tokyo Trials were the first real international criminal tribunals and laid the groundwork for the development of a new field of international law. Largely because of Cold War tensions, however, no other international criminal tribunals were established until 1993, nearly a half century later.

Still, several significant developments did take place. These included (1) the adoption of the Genocide and Geneva Conventions, (2) efforts within the International Law Commission to write a "code of crimes" and a statute for a global criminal tribunal, and (3) domestic efforts to prosecute war criminals.

§ 2–2 THE GENOCIDE CONVENTION

One of the first accomplishments of the new United Nations (created in October 1945) was to affirm the Nuremberg Charter and the Judgment of the IMT. This was done by a unanimous vote of the very first UN General Assembly. *See* UN G.A. Res. 95(1) (Dec. 11, 1946).

Thereafter, work began on a new multilateral treaty to clarify and codify the prohibition in international law against the kind of widespread abuses which had been perpetrated by the Nazi regime against civilian populations. Neither the Nuremberg nor Tokyo Tribunals included the term "genocide" within their jurisdictional mandates, but a concerted effort by a Polish lawyer, Raphaél Lemkin, convinced the world community that a new formulation was necessary to focus global condemnation.

On December 9, 1948 (the day before it adopted the Universal Declaration of Human Rights), the UN General Assembly completed work on the Convention on the Prevention and Punishment of the Crime of Genocide. *See* UN G.A. Res. 260(III)(B) (Dec. 9, 1948). The treaty entered into force on January 12, 1951, 78 U.N.T.S. 277 (text available at *http://treaties.un.org/*) It remains one of the foundational treaties in the field of international criminal law. As of the end of 2018, 150 States were parties to the Convention.

The Convention proclaims that "genocide, whether committed in time of peace or in time of war, is a crime under international law." Art. 1. It defines the term "genocide" as including "any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) Killing members of the group; (b) Causing serious bodily or

mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group." Art. 2.

The definition thus contains three distinct elements: (1) commission of one or more of the specifically prohibited acts (2) against a "national, ethnical, racial or religious group" (3) with the intent to destroy that group "as such" and "in whole or in part."

In addition to genocide itself, the Convention prohibits conspiracy to commit genocide, direct and public incitement to commit genocide, attempt to commit genocide, and complicity in genocide. Art. 3. Persons committing genocide or any of the other acts enumerated in article III shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals. Art. 4.

Article 6 provides for two methods of enforcement. First, it contemplates domestic prosecutions before the national courts of the country where the genocide occurred ("[p]ersons charged with genocide or any of the other acts enumerated in article III shall be tried by a competent tribunal of the State in the territory of which the act was committed"). Second, it says that those persons could be tried before "such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction." The Convention itself did not, however, establish such a tribunal.

§ 2–3 THE 1949 GENEVA CONVENTIONS

A second major development took place in August 1949, when four new multilateral conventions concerning the protection of victims of war were adopted by a diplomatic conference. Like the Genocide Convention, these treaties were intended to clarify and strengthen international rules in response to the abuses and atrocities of World War II. They are universally accepted: as of December 2018, 196 States had ratified or acceded to them, including all UN member states, both UN observers (the Holy See and the State of Palestine) and the Cook Islands. They constitute the cornerstone of what is generally called "international humanitarian law."

The four treaties deal separately with different groups of persons not actively engaged in combat or who can no longer fight. Thus, Convention I protects the wounded and sick in land warfare; Convention II protects wounded, sick and ship-wrecked in sea warfare; Convention III protects prisoners of war; and Convention IV protects civilians. A basic premise of the Conventions is that parties engaged in an armed conflict must distinguish between legitimate combatants, on the one hand, and non-combatants on the other, since the latter are deserving of special protections.

The Conventions were drafted to apply primarily to conflicts between States ("international armed conflicts") although one increasingly important provision (known as "Common Article 3") applies to conflicts "not of an international character," which originally referred to conflicts taking place internally within a single State. This distinction was further elaborated in 1977 with the adoption of two Additional Protocols to the Geneva Conventions, one of which was designed specifically for "non-international" conflicts. Today, the terms are used somewhat differently to differentiate conflicts between the organized military forces of two States, on the one hand, from those between a State and non-State groups such as terrorist organizations, even when the conflict in question crosses international boundaries.

Violations of the Conventions constitute "war crimes," for which individual criminal

responsibility attaches. The most serious war crimes, called "grave breaches," must be punished. The term "grave breach" is defined slightly differently in each convention, but includes such acts as willful killing, torture or inhumane treatment.

§ 2–4 EFFORTS OF THE INTERNATIONAL LAW COMMISSION

Apart from the Genocide and Geneva Conventions, much of the post-war efforts to elaborate new principles and mechanisms of international criminal law took place within the International Law Commission (or "ILC"). Created in 1948, the ILC is a body of thirty-four experts elected by the UN General Assembly and charged with the codification and progressive development of international law. Over much of the following fifty years, the Commission worked on two related projects—drafting a "statute" for creation of a new international criminal court, and preparing a codification of the substantive rules of international criminal law. Both efforts encountered substantial difficulties.

§ 2–5 PROPOSALS FOR A NEW COURT

As part of the same resolution by which it adopted the Genocide Convention in 1948, the UN General Assembly invited the International Law Commission to study "the desirability and possibility of establishing an international judicial organ for the trial of persons charged with genocide or other crimes." As described above, such a body had been explicitly contemplated, but not created, by the Genocide Convention. Some early progress was made within the ILC and in a separate UN committee, and a draft "statute" was submitted to the General Assembly in 1954. But thereafter the General Assembly decided that this work should be deferred until after debate on a definition of "aggression" was completed. That did not occur until 1974. *See* Definition of Aggression, U.N. Doc. A/RES/29/3314 (Dec. 14, 1974) (text and background information available at *http://legal.un.org/avl/ha/da/da.html*).

After intermittent consideration of the topic, the ILC completed a revision of the draft statute in 1994. Spurred by the catastrophic situations in the former Yugoslavia and then Rwanda, the UN General Assembly appointed a special *Ad Hoc* Committee on the Establishment of International Criminal Court. Eventually, this effort formed the basis for the international convention establishing the International Criminal Court. *See* the Rome Statute of the International Criminal Court, art. 27, U.N. Doc. A/CONF.183/9* (July 17, 1998). For the text of the Convention and related information, *see* the website of the International Criminal Court at *https://www.icc-cpi.int*.

§ 2–6 CODIFYING SUBSTANTIVE PRINCIPLES

The second part of the ILC's efforts involved trying to codify the substantive law of the Nuremberg and Tokyo Tribunals. In 1950, the ILC adopted a statement of the Principles of International Law Recognized in the Charter and the Judgment. *See* Report of the International Law Commission, U.N. Doc. A/1316 (A/5/12) part III, paras. 95–127. It incorporated the IMT's definition of war crimes, crimes against humanity, and crimes against peace, and it enshrined the principle of individual criminal liability for their commission. It included provisions on complicity and precluded the defense of immunity as Head of State or Government. It also stated that the defense of superior orders could not relieve an individual from responsibility under international

law "provided a moral choice was in fact possible to him."

Four years later, in 1954, the Commission produced a broader "draft code of offences against the peace and security of mankind." That text proved controversial, however, and work was suspended for twenty years while attention focused instead on efforts to define the notion of "aggression." The question was again referred to the Commission in 1978, and a draft code was provisionally adopted on first reading in 1991. The text was completed in July 1996. It is available at *http://legal.un.org/ilc/texts/instruments/english/draft_articles/7_4_1996.pdf.*

§ 2–7 NATIONAL PROSECUTIONS

The third major aspect of post-war developments involved sporadic and only sometimes successful efforts by individual States to prosecute war criminals under their domestic laws. After the closure of the IMT, IMTFE and related courts, and prior to the establishment of the *ad hoc* tribunals for the former Yugoslavia and Rwanda in 1993 and 1994 respectively, no international tribunal existed with jurisdiction over international criminal defendants. Consequently, national courts offered the only place where persons charged with war crimes, genocide and crimes against humanity could be pursued. In fact, such prosecutions were specifically contemplated by the Genocide and Geneva Conventions. They often proved difficult and politically sensitive. Following the establishment of the International Criminal Court, several States (for example, Germany, the Netherlands, Canada and Australia) have adopted legislation providing for national prosecutions of international crimes.

By way of illustration, seven of the most well-known cases are briefly described here.

1. Klaus Barbie

Barbie headed the Nazi Gestapo in Lyon, France, from November 1942 to August 1944. Because of his involvement in torture and other atrocities, including the deportation of large numbers of French Jews and partisans to death camps, he was called the "Butcher of Lyon." After the war, he fled to Argentina. He was tried *in absentia* by French authorities for war crimes and crimes against humanity, and sentenced to death. Eventually he moved to Bolivia, where he lived under a false name. In 1983, he was extradited to France and prosecuted a second time, convicted again, and sentenced to life imprisonment. He died in 1991.

2. Paul Touvier

A colleague of Barbie and a senior officer of a paramilitary unit of the Vichy Government (the "Milice"), Touvier was prosecuted in absentia for treason by French authorities after the war and sentenced to death. In 1971, he was pardoned, but was subsequently charged with crimes against humanity arising out of a massacre of Jewish hostages in 1944. Finally arrested in 1989, he was tried in 1994, convicted, and sentenced to life imprisonment. He died in prison two years later.

3. Maurice Papon

Another a high-ranking official of the French Vichy Government, Maurice Papon was convicted in 1998 of complicity in Nazi crimes against humanity during the German occupation,

in particular for his role in deporting hundreds of Jews from southwestern France to their deaths in German concentration camps. His participation in those crimes was not revealed until 1981, after he had had a successful career in the French Government (including service as prefect of police in Paris and as France's budget minister). Tried, convicted and sentenced to ten years in prison, he served less than three years. According to his obituary, he always protested that he had done only what the Germans had made him do.

4. Adolf Eichmann

Sometimes called the "architect of the Holocaust," Eichmann was a senior officer in the *Schutzstaffel* (or "SS"), the elite force under Heinrich Himmler which was primarily responsible for the crimes against humanity perpetrated by the Nazis. Eichmann played a central role in organizing the mass deportation of Jews to extermination camps in Nazi-occupied Eastern Europe. He escaped at war's end and lived under an assumed name in Argentina. He was eventually captured by Israeli agents and returned to Israel, where he was convicted of crimes against humanity and war crimes. *See* Government of Israel v. Eichmann, 36 ILR 5 (1968) and Attorney-General of Israel v. Eichmann 36 1LR 277 (1968). *See also* Hannah Arendt, *Eichmann in Jerusalem* (1963). Eichmann was hanged in 1962. The Government of Argentina protested his apprehension as a "violation of the sovereign rights of the Argentine Republic" and the UN Security Council asked Israel to make appropriate reparations. This diplomatic dispute was settled by a joint communiqué.

5. Imre Finta

Finta, a senior Hungarian police officer during World War II, immigrated to Canada in 1948, settled in Toronto, and became a Canadian citizen in 1956. He was accused of war crimes and crimes against humanity for having assisting in the forced deportation of Jews from Budapest during the Holocaust. He was charged under Canadian war crimes legislation which allowed prosecution of any person who committed a war crime or crime against humanity outside Canada that, if it had been committed in Canada, would constitute an offense against Canadian law. His defense was that he had only been following orders. He was acquitted because the jury could not conclude that, in the violent anti-Semitic climate of the time, he was aware he had been assisting in an illegal policy of persecution; in other words, the jury felt he lacked the specific intent (*mens rea*) required by the statute. The acquittal was upheld by the Ontario Court of Appeal in 1992 and the Canadian Supreme Court two years later. The Supreme Court accepted his defense of superior orders, noting *inter alia* that "[e]ven where the orders are manifestly unlawful, the defense . . . will be available in those circumstances where the accused had no moral choice as to whether to follow the order." *R. v. Finta*, [1994] 1 S.C.R. 701. Finta died in Canada in December 2003.

6. John Demjanjuk

Beginning in 1977, U.S. authorities accused John Demjanjuk of having served as an SS guard at several German extermination camps during World War II. Following the war, he immigrated to the United States, became a naturalized citizen, and worked as a diesel engine mechanic in Ohio. The U.S. government acted to revoke his citizenship on the grounds that he had concealed his wartime activities on his immigration application. After a district court granted that

request, the Government of Israel successfully sought his extradition and prosecuted him under its Nazis and Nazi Collaborators (Punishment) Law, which gave jurisdiction over crimes committed against Jews in Germany during the war. The principal allegation was that Demjanjuk was in fact "Ivan the Terrible," the notorious guard who operated the diesel engines at the Gas Chambers at Treblinka extermination camp. He was convicted and sentenced to death, but five years later the Israeli Supreme Court overturned that judgment, finding reasonable doubt about his identification, and ordered his release.

Demjanjuk returned to the United States and in 1998, won a court ruling restoring his citizenship. However, the Justice Department filed a new complaint alleging that Demjanjuk had served at other death camps in Poland and Germany and was part of an SS-run unit involved in capturing nearly two million Jews in Poland. The government prevailed, and in 2004, that decision was upheld on the basis that the government had presented "clear, unequivocal, and convincing evidence" of Demjanjuk's service in Nazi death camps. The following year, an immigration judge ordered Demjanjuk deported and the decision was upheld on appeal. Deported to Germany in 2009, he was tried, convicted and sentenced to five years in prison on some 28,000 counts of acting as an accessory to murder, one count for each person who died at Sobibor during the time he was alleged to have served as a guard. He was later released and lived at a nursing home where he died in March 2012.

7. Gojko Jankovic

Jankovic was convicted of war crimes in the Court of Bosnia and Herzegovina as a leader of a para-military group in 1992-93. He was indicted for organized, large-scale attacks on the non-Serb population, including imprisonment, murder and rape in the Foča municipality region, alongside the Foča-based brigade of the 'Republika Srpska Army.'

After his surrender in March 2005, he was transferred to the International Criminal Tribunal for the Former Yugoslavia (ICTY), which in turn transferred his case to the Court of Bosnia and Herzegovina later that year. Found guilty of crimes against humanity, he was sentenced to 34 years imprisonment. An Appellate panel modified certain parts of the verdict against Jankovic with regards to legal qualification of the acts constituting 'crimes against humanity.' The trial court's sentence of 34 years, however, remained unchanged.

§ 2–8 FURTHER READING

The text of the London Charter, formally known as the Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis and Establishing the Charter of the International Military Tribunal (IMT), August 8, 1945, 82 U.N.T.S. 279 (1951), is available at *http://www.icrc.org/ihl.* For the Tribunal's official records, *see The Trial of German Major War Criminals, Proceedings of the International Military Tribunal Sitting at Nuremberg, Germany* (1950). See also *https://www.loc.gov/rr/frd/Military_Law/Nuremberg_trials.html.* A rich source of documentation is Morten Bergsmo, Cheah Wui Ling and Yi Ping, eds., HISTORICAL ORIGINS OF INTERNATIONAL CRIMINAL LAW *(vols 1-5)* (Torkel Opsahl Academic EPub. 2014-2017).

See also David Crane, Leila Sadat and Michael Scharf, THE FOUNDERS: FOUR PIONEERING INDIVIDUALS WHO LAUNCHED THE FIRST MODERN-ERA INTERNATIONAL CRIMINAL TRIBUNALS (Cambridge 2018); Jonathan Hafetz, PUNISHING ATROCITIES THROUGH A FAIR TRIAL: INTERNATIONAL CRIMINAL LAW FROM NUREMBERG TO THE AGE OF GLOBAL TERRORISM (Cambridge 2018); Margaret M. deGuzman, "Justifying Extraterritorial War Crimes Trials," 12 Crim. L. & Phil. 289 (2018); M. Cherif Bassiouni, "Codification of International Criminal Law," 45 Denv. J. Int'l L. & Pol'y 333 (2017); Nicholas Strapatsas, "The International Criminal Judgments: From Nuremberg to Tadić to Taylor," in Schabas, RESEARCH HANDBOOK ON INTERNATIONAL COURTS AND TRIBUNALS (Elgar 2017); Leila Sadat, "The Nuremberg Trial, Seventy Years Later," 15 Wash. U. Global Stud. L. Rev. 575 (2016); Kevin John Heller, THE NUREMBERG MILITARY TRIBUNALS AND THE ORIGINS OF INTERNATIONAL CRIMINAL LAW (Cambridge 2011); Telford Taylor, THE ANATOMY OF THE NUREMBERG TRIALS (1993).