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REFLECTIONS ON THE PROSECUTION OF WAR CRIMES BY INTERNATIONAL TRIBUNALS

*By Theodor Meron**

Just over sixty years ago, the international community, seeking to heal the wounds of a brutal war, embarked on a bold legal experiment. For the first time in history, legal mechanisms were invoked to bring to justice the perpetrators of war crimes and crimes against humanity in international tribunals specifically established for that purpose. The trials at Nuremberg and Tokyo were extraordinary and risky; and, above all, unique in their time.¹

In his eloquent opening statement for the prosecution at Nuremberg, Justice Robert Jackson called attention to the trial's novelty: "That four great nations, flushed with victory and stung with injury stay the hand of vengeance and voluntarily submit their captive enemies to the judgment of the law is one of the most significant tributes that Power has ever paid to Reason."² Indeed, the idea of bringing perpetrators of war crimes before a tribunal was so novel, so contrary to ordinary practice, that it almost never happened. At Yalta, Stalin suggested that fifty thousand people should simply be killed after the war,³ and Churchill "thought a list of the major criminals . . . should be drawn up here . . . [and] they should be shot once their identity is established."⁴ Yet the American government forcefully advocated that trials be conducted,

* Of the Board of Editors. I write in a personal capacity, not in my official role as an appeals judge or as former President of the International Criminal Tribunal for the Former Yugoslavia. My personal views have naturally been influenced by my experiences on the Tribunal and my acquaintance with fellow judges, both in The Hague and in Arusha. I gratefully acknowledge the help of my judicial clerks Benjamin Mizer, Micah Myers, and Matthew Getz in preparing this essay.

¹ On the evolution of war crimes law, see generally THEODOR MERON, *INTERNATIONAL LAW IN THE AGE OF HUMAN RIGHTS* 112–83 (2004); Theodor Meron, *The Case for War Crimes Trials in Yugoslavia*, FOREIGN AFF., Summer 1993, at 122 [hereinafter Meron, *War Crimes Trials*]; Theodor Meron, *Classification of Armed Conflict in the Former Yugoslavia: Nicaragua's Fallout*, 92 AJIL 236 (1998); Theodor Meron, *Francis Lieber's Code and Principles of Humanity*, 36 COLUM. J. TRANSNAT'L L. 269 (1997); Theodor Meron, *From Nuremberg to The Hague*, 149 MIL. L. REV. 107 (1995); Theodor Meron, *The Humanization of Humanitarian Law*, 94 AJIL 239 (2000) [hereinafter Meron, *Humanization*]; Theodor Meron, *International Criminalization of Internal Atrocities*, 89 AJIL 554 (1995) [hereinafter Meron, *International Criminalization*]; Theodor Meron, *Martens Clause, Principles of Humanity and the Dictates of Public Conscience*, 94 AJIL 78 (2000); Theodor Meron, *The Normative Impact on International Law of the International Tribunal for Former Yugoslavia*, 1995 ISR. Y.B. HUM. RTS. 137; Theodor Meron, *Rape as a Crime Under International Humanitarian Law*, 87 AJIL 424 (1993) [hereinafter Meron, *Rape as a War Crime*]; Theodor Meron, *The Time Has Come for the United States to Ratify Geneva Protocol I*, 88 AJIL 678 (1994); Theodor Meron, *War Crimes in Former Yugoslavia and the Development of International Law*, 88 AJIL 78 (1994); Theodor Meron, *War Crimes Law Comes of Age*, 92 AJIL 462 (1998); see also ANTONIO CASSESE, *INTERNATIONAL CRIMINAL LAW* 37–42, 327–46 (2003).

² Justice Robert H. Jackson, *in* Second Day, Wednesday, 11/21/1945, 2 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL, NUREMBERG, 14 NOVEMBER 1945–1 OCTOBER 1946 [hereinafter IMT TRIAL], at 98, 99 (1947) [hereinafter Jackson Statement], available at <<http://www.law.umkc.edu/faculty/projects/ftrials/nuremberg/Jackson.html>>.

³ Norman Silber & Geoffrey Miller, *Toward 'Neutral Principles' in the Law: Selections from the Oral History of Herbert Wechsler*, 93 COLUM. L. REV. 854, 902 (1993).

⁴ FOREIGN RELATIONS OF THE UNITED STATES: DIPLOMATIC PAPERS: THE CONFERENCES AT MALTA AND YALTA 1945, at 849 (1955) (minutes of the Yalta Conference); see also TELFORD TAYLOR, *THE ANATOMY OF THE NUREMBERG TRIALS* 29–33 (1992); Silber & Miller, *supra* note 3, at 895.

not by national courts of the vanquished states or any victorious power, but by an international court. In the end, the Allies agreed, and they set up proceedings in which judges rigorously examined whether the actions of individual accused amounted to offenses under international law. Although many of the accused were convicted, some were acquitted, much to the shock of numerous people who expected the trials to be mere formalities preceding declarations of predetermined guilt.⁵ The integrity of the proceedings and the determination of the fates of Nazi and Japanese leaders by evaluating their actions against accepted, objective standards of conduct may also be one of the reasons why Germans and Japanese overwhelmingly accepted that the officials who were eventually punished were in fact guilty and deserving of sanction.⁶ Moreover, as Professor Herbert Wechsler, a participant in the Nuremberg trials, observed, the fact that the trials occurred, publicly aired the actions of the accused, and resulted in punishments for the guilty may have helped to stave off unauthorized acts of retribution against those believed to have been Nazis.⁷

By many measures, then, the Nuremberg and Tokyo Tribunals were a success, which partly explains why the concept of international criminal tribunals seems less radical to us today. To be sure, the tribunals had their shortcomings, some of which are endemic to courts themselves. On the whole, however, the Nuremberg experiment in particular proved to be, as Justice Jackson had hoped, a triumph of reason. And in time that triumph allowed the international community—with painful slowness, but eventually—to follow the lead of the Nuremberg and Tokyo Tribunals and establish the international criminal courts that now sit at The Hague and elsewhere.

There are obvious differences between the modern international courts and the post–World War II tribunals. One of the principal criticisms leveled against the earlier tribunals, for instance, was (and still is) that they were an exercise in victors’ justice—a trial of the losers by and for the winners. Justice Jackson acknowledged that criticism in his opening statement. But he explained that “[t]he worldwide scope of the aggressions carried out by these men has left but few real neutrals.”⁸

In this essay, I highlight some of the similarities and differences between the post–World War II tribunals and the modern tribunals to show how humanitarian law has evolved. Some of the differences, though, stem from the very fact that in the Nuremberg proceedings in particular, modern tribunals have an antecedent, while those in Nuremberg and Tokyo had none. To demonstrate how the mechanisms for enforcement of humanitarian law have evolved over the past hundred years, I begin by examining the status of war crimes law before the advent of the Nuremberg and Tokyo Tribunals. I then turn to these tribunals themselves and compare them with the modern international tribunals.⁹ I move from seemingly mundane evidentiary issues to more fundamental questions of due process, and ultimately consider the influence of the respective courts’ jurisprudence and other central issues of international criminal law. Limitations of space compel me to be selective

⁵ Silber & Miller, *supra* note 3, at 910–11.

⁶ However, one commentator considers, in the case of Japan at least, that “the Japanese public . . . [was] happy to make the defendants sacrificial scapegoats for the sins and shortcomings of the Japanese nation.” R. John Pritchard, *The International Military Tribunal for the Far East and Its Contemporary Resonances*, 149 *MIL. L. REV.* 25, 30 (1995).

⁷ Silber & Miller, *supra* note 3, at 911–12.

⁸ Jackson Statement, *supra* note 2, at 101.

⁹ I will devote greater focus to the Nuremberg Tribunals because they received more of the Allies’ time, money, and attention than the Tokyo Tribunal, and have been a greater influence on later international jurisprudence.

I suspect that this discrepancy has a great deal to do with the distrust felt for the methods and processes used in Tokyo, which even early on were compared unfavorably to those in Nuremberg. Justice William O. Douglas was highly critical of the Tribunal:

The conclusion is therefore plain that the Tokyo Tribunal acted as an instrument of military power of the Executive Branch of government. It responded to the will of the Supreme Commander as expressed in the

in the topics I address. I hope that this exploration of the key similarities and differences between the two sets of tribunals will allow us to see not only how international criminal and humanitarian law, and mechanisms for enforcing such law, have evolved since the beginning of the twentieth century, but also where they must still go.

I. WAR CRIMES LAW BEFORE NUREMBERG AND TOKYO

The Landscape Before World War I

A century ago, when the first issue of the *American Journal of International Law* came out, the laws of war—and indeed all of international humanitarian law—were largely uncodified.¹⁰ Until the mid-nineteenth century, the laws of war existed solely as custom, evidenced in national laws, military manuals, and religious teachings.¹¹ The second half of the nineteenth century witnessed the beginning of a trend toward codification. This period was marked by the 1856 Paris Declaration on Maritime Law, the 1864 Geneva Convention on wounded soldiers, and the 1868 St. Petersburg Declaration barring the use of certain small explosive projectiles.¹² Yet it was not until the turn of the twentieth century, at the 1899 and 1907 Hague Peace Conferences, that the modern law of war and war crimes began to take shape.

Spurred by fears that modern weapons technology would permit wars to get out of hand, delegates first met at The Hague in 1899 in response to a call from the Russian tsar.¹³ Though conferees discussed disarmament in addition to the laws of war, the conference produced agreements only on the latter subject, including a convention on maritime war and the Convention with Respect to the Laws and Customs of War on Land¹⁴—the first general, multilateral codification of the laws of land war.¹⁵ Far more productive than the 1899 conference, the 1907 conference concluded ten

military order by which he constituted it. It took its law from its creator and did not act as a free and independent tribunal to adjudge the rights of petitioners under international law. As Justice Pal said, it did not therefore sit as a judicial tribunal. It was solely an instrument of political power.

Hirota v. MacArthur, 338 U.S. 197, 215 (1948) (Douglas, J., concurring).

In his appeal to General MacArthur, the lead defense counsel, Ben Bruce Blakeney, was prescient as to Tokyo's future effect:

The state of the international law relating to crimes against peace is not clarified, but muddled, by this verdict. The Tribunal produced six separate opinions, from consideration of all of which it is impossible for even an international lawyer to determine what law is being applied. . . .

The verdict looks too much like an act of vengeance to impress the world with our love of justice and fair play. The conviction of all defendants alike . . . compares unfavorably with the result of the Nuremberg trial, where guilt or innocence, as well as sentence, were declared individually rather than en masse

Defense Appeal to General MacArthur (Nov. 21, 1948), *reprinted in* RICHARD H. MINEAR, VICTORS' JUSTICE: THE TOKYO WAR CRIMES TRIAL 204, 207 (1971).

¹⁰ Adam Roberts, *Land Warfare: From Hague to Nuremberg*, in *THE LAWS OF WAR: CONSTRAINTS ON WARFARE IN THE WESTERN WORLD* 116, 119–22 (Michael Howard, George J. Andreopoulos, & Mark R. Shulman eds., 1994).

¹¹ *Id.* at 119.

¹² UNITED NATIONS WAR CRIMES COMMISSION, HISTORY OF THE UNITED NATIONS WAR CRIMES COMMISSION 24 (1948) [hereinafter WAR CRIMES COMM'N HISTORY]; Roberts, *supra* note 10, at 119. For these early instruments, see Declaration Respecting Maritime Law, Apr. 16, 1856, *reprinted in* 1 AJIL Supp. 89 (1907); Geneva Convention for the Amelioration of the Condition of the Sick and Wounded of Armies in the Field, Aug. 22, 1864, *reprinted in* 1 AJIL Supp. 90; Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight, Nov. 29 (Dec. 11), 1868, *reprinted in* 1 AJIL Supp. 95.

¹³ Roberts, *supra* note 10, at 120.

¹⁴ Convention with Respect to the Laws and Customs of War on Land, July 29, 1899, 32 Stat. 1803, 1 Bevans 247.

¹⁵ Roberts, *supra* note 10, at 121.

agreements on the laws of war, including the Fourth Hague Convention¹⁶—a revamped version of the 1899 Convention with Respect to the Laws and Customs of War on Land.¹⁷

While the law of war developed significantly over the course of the two Hague Conferences, mechanisms to enforce that law did not keep pace with it. Even though the acts proscribed by the Hague Conventions on land warfare had “long been treated as criminal acts for which members of the armed forces or civilians” could be “held individually responsible,”¹⁸ the 1899 Convention contained no provisions on the punishment of violations, and the Fourth Hague Convention of 1907 made no allowance for the imposition of individual criminal responsibility upon persons responsible for violations of either its provisions or those of its annexed regulations.¹⁹ Instead, the Convention specified as the chief form of punishment the payment of compensation by states.²⁰ Moreover, it required states to negotiate the amount of compensation owed as a result of a violation, and these negotiations proved long and complex.²¹ Not surprisingly, the Fourth Hague Convention’s provision on compensation was criticized as having little deterrent effect.²²

Other means of enforcing the laws and customs of war at the turn of the century also lacked teeth. States could try their own nationals for war crimes, but they rarely did so.²³ And although an aggrieved state could take military action against the offending state, such reprisals were criticized for simply escalating the hostilities.²⁴ Even if a belligerent state wished to prosecute foreign war criminals, its entitlement to jurisdiction over captured enemy combatants was uncertain, and in any event the act-of-state defense traditionally immunized heads of state from prosecution in foreign courts. As a result, combatants accused of war crimes were ordinarily relieved of prosecution rather than subjected to an indictment.²⁵

World War I and Its Aftermath

War crimes law sprang to the fore at the end of World War I. Even as the war raged, commentators began calling for justice to be done in the wake of the atrocities. At an international law conference in London in 1916, one observer pledged that “the public opinion of the civilised world will not rest satisfied unless, upon the termination of the conflict, not only the instigators but also the actual perpetrators of the more heinous offences against the usages of war are brought to trial before some impartial tribunal.”²⁶

The process of establishing a legal framework to address the atrocities began shortly after the war. At its first plenary meeting in January 1919, the Paris Peace Conference appointed a

¹⁶ Convention Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, 1 Bevans 631 [hereinafter Fourth Hague Convention].

¹⁷ Roberts, *supra* note 10, at 122.

¹⁸ WAR CRIMES COMM’N HISTORY, *supra* note 12, at 30.

¹⁹ Fourth Hague Convention, *supra* note 16, annexed Regulations Respecting the Laws and Customs of War on Land [hereinafter 1907 Hague Regulations].

²⁰ Fourth Hague Convention, *supra* note 16, Art. 3.

²¹ Roberts, *supra* note 10, at 122.

²² See Hugh H. L. Bellot, *War Crimes: Their Prevention and Punishment*, 2 GROTIVS SOC’Y, TRANSACTIONS 31, 37–38 (1916).

²³ Roberts, *supra* note 10, at 126.

²⁴ See Bellot, *supra* note 22, at 34–35; WAR CRIMES COMM’N HISTORY, *supra* note 12, at 29.

²⁵ See Matthew Lippman, *Nuremberg: Forty Five Years Later*, 7 CONN. J. INT’L L. 1, 3 (1991).

²⁶ Bellot, *supra* note 22, at 54.

multinational commission to inquire into the war's causes and consequences.²⁷ The establishment of such a commission had been advocated chiefly by British prime minister Lloyd George, who sought to set new international precedent on aggressive warfare.²⁸ U.S. president Woodrow Wilson opposed the creation of a commission, but Lloyd George's view, which was supported by the Belgians and the French, prevailed, and the Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties—the first modern international investigative body of its kind—was formed.²⁹

After two months of secret meetings, the commission issued its final report,³⁰ which determined that Germany and Austria-Hungary bore primary responsibility for the war. It criticized Bulgaria and Turkey for supporting the German and Austrian aggression,³¹ and found that all of these states had practiced “barbarous or illegitimate methods” of warfare.³² Seeking a precise classification of the criminal acts committed by officials from these states, the commission prepared a catalog of thirty-two offenses that it denoted as falling within the meaning of war crimes. These included, among others, murders and massacres, torture of civilians, rape, and internment of civilians under inhuman conditions.³³ However, an annex that listed instances in which the Central Powers and their allies had committed such offenses described the acts in question as violations of “the Laws and Customs of War and the Laws of Humanity.”³⁴ Among the listed atrocities were some committed by Turkish and German forces against Turkish subjects (Armenians), and some by Austrian forces against Austrian subjects.³⁵ These acts were probably the ones that, in the commission's view, had violated the “laws of humanity” and not the “laws of war.”³⁶

Having concluded that officials and soldiers from Germany, Austria-Hungary, Bulgaria, and Turkey had committed illegal acts, the commission recommended the creation of an international tribunal to try officials responsible for some of the worst offenses.³⁷ The commission also concluded that criminal liability should extend to all persons responsible for war crimes, including heads of state; in its words, a prohibition on the prosecution of heads of state who were guilty of war crimes “would shock the conscience of civilized mankind.”³⁸

In a memorandum, the United States objected to many of the most significant aspects of the commission's report. According to the Americans, the commission should not have concerned itself with violations of the “laws of humanity” because these laws were vague and “var[ied] with

²⁷ JAMES F. WILLIS, PROLOGUE TO NUREMBERG: THE POLITICS AND DIPLOMACY OF PUNISHING WAR CRIMINALS OF THE FIRST WORLD WAR 68 (1982); M. Cherif Bassiouni, *World War I: “The War to End All Wars” and the Birth of a Handicapped International Criminal Justice System*, 30 DENV. J. INT'L L. & POL'Y 244, 253 (2002).

²⁸ WILLIS, *supra* note 27, at 68; Bassiouni, *supra* note 27, at 251–52.

²⁹ WILLIS, *supra* note 27, at 68; Bassiouni, *supra* note 27, at 251–52.

³⁰ WILLIS, *supra* note 27, at 68.

³¹ Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties: Report Presented to the Preliminary Peace Conference (Mar. 29, 1919), *reprinted in* 14 AJIL 95, 98 (1920) [hereinafter WWI Commission].

³² *Id.* at 115.

³³ *Id.* at 114–15. See *id.* for a complete listing of the offenses.

³⁴ VIOLATION OF THE LAWS AND CUSTOMS OF WAR: REPORTS OF MAJORITY AND DISSENTING REPORTS OF AMERICAN AND JAPANESE MEMBERS OF THE COMMISSION OF RESPONSIBILITIES, CONFERENCE OF PARIS, Annex I, at 28 (1919).

³⁵ *Id.* at 30, 34–35, 40.

³⁶ WAR CRIMES COMM'N HISTORY, *supra* note 12, at 35. Britain, France, and Russia had previously referred to massacres of Armenians by Turkish forces as “crimes against humanity and civilization.” *Id.*

³⁷ WWI Commission, *supra* note 31, at 121–22.

³⁸ *Id.* at 116.

the individual.”³⁹ Therefore, trying anyone for violations of such laws would contravene the principle of legality, or *nullum crimen sine lege*.⁴⁰ Of course, by the time the Nuremberg trials got under way nearly three decades later, the American position on this point had turned 180 degrees: the Nuremberg indictments charged both war crimes and crimes against humanity.⁴¹ Supported by the Japanese, the American members of the commission in 1919 also challenged the notion that a head of state could be placed on trial,⁴² while the British suggested that the Americans were simply afraid that the U.S. president would be incriminated some day.⁴³ Additionally, the United States objected to the concept we now refer to as “command responsibility,”⁴⁴ a position on which it reversed itself in the wake of World War II.⁴⁵ The American representatives did agree with the recommendation that criminal charges not be brought for acts that had provoked the war, including breaches of neutrality.⁴⁶ On this position, the United States later reversed itself twice, strongly advocating the inclusion of “crimes against peace” in the Nuremberg and Tokyo Charters, and then opposing the inclusion of the crime of aggression in the Statute of the International Criminal Court (ICC).⁴⁷ Not only did it object to important recommendations by the commission on legal doctrine; it also objected to one of the commission’s most significant practical recommendations: that an international tribunal try the offenders.⁴⁸ Expressing concerns that would echo eighty years later, the Americans protested the creation of an international criminal court “for which there is no precedent, precept, practice, or procedure.”⁴⁹ Instead, the Americans argued, military commissions or tribunals should try the offenders.⁵⁰

On June 28, 1919, several months after the commission filed its report, the Treaty of Versailles was signed. The Treaty contained several critical provisions relating to wartime conduct. The first concerned the responsibility of the kaiser. Despite the American and Japanese objections, Great Britain remained convinced that a head of state should be liable for crimes of war—and that Kaiser Wilhelm, in particular, should be prosecuted to deter future aggression.⁵¹ Britain’s insistence carried the day—sort of. Article 227 of the Treaty provided that “[t]he Allied and Associated Powers publicly arraign William II of Hohenzollern, formerly German Emperor, for a supreme offence against international morality and the sanctity of treaties,” and it specified that “[a] special tribunal will be constituted to try the accused.”⁵²

For the first time, a treaty thus addressed the individual responsibility of a head of state for initiating and conducting what we now call a crime of aggression or crime against peace. As a

³⁹ Memorandum of Reservations Presented by the Representatives of the United States to the Report of the Commission on Responsibilities (Apr. 4, 1919), *reprinted in* 14 AJIL 127, 134 (1920) [hereinafter U.S. Reservations].

⁴⁰ *Id.*

⁴¹ See Matthew Lippman, *Genocide*, in 1 INTERNATIONAL CRIMINAL LAW 589, 591 (M. Cherif Bassiouni ed., 1999).

⁴² U.S. Reservations, *supra* note 39, at 135; Reservations by the Japanese Delegation to the Report of the Commission on Responsibilities (Apr. 4, 1919), *reprinted in* 14 AJIL 151, 152 (1920).

⁴³ WILLIS, *supra* note 27, at 77.

⁴⁴ U.S. Reservations, *supra* note 39, at 128.

⁴⁵ Bassiouni, *supra* note 27, at 259.

⁴⁶ U.S. Reservations, *supra* note 39, at 128.

⁴⁷ WILLIS, *supra* note 27, at 174–75.

⁴⁸ WWI Commission, *supra* note 31, at 121–23.

⁴⁹ U.S. Reservations, *supra* note 39, at 142.

⁵⁰ *Id.*

⁵¹ WILLIS, *supra* note 27, at 98; Lippman, *supra* note 25, at 8.

⁵² Treaty of Peace with Germany, June 28, 1919, Art. 227, 2 Bevans 43, 11 Martens Nouveau Recueil (ser. 3) 323 [hereinafter Versailles Treaty].

practical matter, however, Article 227 was a dead letter. Rather than adopting the strident language of the commission's recommendation, the Treaty spoke in more abstract terms of the kaiser's "supreme offence against international morality." That phrase had as little meaning then as it does now. As one commentator put it, "This accusation . . . did not constitute a violation of existing international law and, instead, simply expressed a 'political' transgression and not an international crime. Said another way, Article 227 articulated a 'moral', rather than a 'legal', offense."⁵³ But that was part of its intent. Prosecution of the kaiser for "a supreme offence against international morality" would achieve some form of justice while still immunizing him from liability under international law.⁵⁴

In any event, the Netherlands, to which the kaiser had repaired after abdicating the throne on November 9, 1918, would not permit his extradition.⁵⁵ Queen Wilhelmina, who sympathized with the kaiser, granted him asylum, and he sought refuge in the country estate of Count Bentinck at Amerongen.⁵⁶ A group of American soldiers were thwarted in their effort to seize him forcibly,⁵⁷ and the Dutch denied all of the Allies' requests for his extradition.⁵⁸

The failure to prosecute the kaiser is not the only respect in which the implementation of the Treaty fell short of the commission's recommendations. The Treaty contained two other provisions related to the prosecution of individuals for war crimes. Articles 228 and 229 stated in part: "The German Government recognises the right of the Allied and Associated Powers to bring before military tribunals persons accused of having committed acts in violation of the laws and customs of war."⁵⁹

These clauses reflected the position expressed in the American memorandum of reservations to the commission's report of 1919. Thus, they did not call for an international criminal court; instead, they merely contemplated the use of military tribunals. Moreover, through Article 228, the German government recognized only the victorious powers' right to prosecute "violation[s] of the laws and customs of war," eliminating any chance of prosecuting violations of the "laws of humanity"—the type of prosecutions to which the Americans objected.

After the Treaty of Versailles was signed, German opposition to Allied-conducted trials proved considerable, prompting the Allies to worry that such trials would weaken the German government and enable militarists or Bolsheviks to take over.⁶⁰ Taking advantage of this fear, the German ambassador, Baron von Lersner, proposed that Germany conduct the trials of alleged war criminals itself, in its national courts.⁶¹ To make his proposal credible, the German legislature enacted a law granting the German Supreme Court at Leipzig jurisdiction to try the accused.⁶² Though the Allies did not initially agree to von Lersner's proposal, they pared down the list of 20,000 alleged war criminals that had been compiled by the commission and submitted the names of 895 to von Lersner to be tried. Yet because the list included some

⁵³ Bassiouni, *supra* note 27, at 271 (footnote omitted).

⁵⁴ Lippman, *supra* note 25, at 9.

⁵⁵ WILLIS, *supra* note 27, at 98, 104.

⁵⁶ *Id.* at 66.

⁵⁷ *Id.* at 100–01.

⁵⁸ Bassiouni, *supra* note 27, at 280–81.

⁵⁹ Versailles Treaty, *supra* note 52, Art. 228.

⁶⁰ WILLIS, *supra* note 27, at 116–24.

⁶¹ *Id.* at 118.

⁶² *Id.*

prominent military and public officials, the Germans were outraged and warned that the surrender of such notable leaders could cause political instability.⁶³

As fears about unrest in Germany mounted, the Allies agreed to allow Germany to conduct the trials in Leipzig before the Supreme Court.⁶⁴ The Allies also agreed to reduce the number of people to be prosecuted and later submitted a list of 45 individuals. But even that was too many for the Germans, and, since the procurator general of the Supreme Court retained prosecutorial discretion as to which cases would be pursued, ultimately only 12 military officers were brought to trial.⁶⁵

Two and a half years after the signing of the armistice, the trials finally commenced before the Penal Senate of the Reichsgericht in Leipzig.⁶⁶ Of the 12 defendants, 6 were convicted.⁶⁷ But even in those cases the German court imposed lenient punishments. The Commission of Allied Jurists determined that the Reichsgericht “had failed in carrying out its mandate and that ‘some of the accused who were acquitted should have been condemned and . . . in the case of those condemned the sentences were not adequate.’”⁶⁸

Other attempts to achieve justice for atrocities committed during the war period similarly fell short. The Treaty of Sèvres, an initial peace agreement between the Allies and Turkey, contained provisions consistent with the recommendations of the commission on responsibility in 1919. These provisions were never implemented, however, because the treaty was never ratified. The Treaty of Lausanne, which was eventually signed by the Allies and Turkey in 1923, when Turkey was in a much stronger position, contained no war crimes clauses; instead, it was accompanied by a “Declaration of Amnesty” that covered all offenses committed during the wartime period.⁶⁹ Rather than insist on war crimes clauses, the Allies agreed that Turkey itself would prosecute offenders, just as the Allies had permitted Germany to try offenders in Leipzig. The so-called Istanbul trials were no more successful than the Leipzig trials: many defendants were absent, the sentences were light, and the proceedings never gained any popular support.⁷⁰ For their part, the Turks denied that crimes against humanity had been committed against the Armenians between 1915 and 1917.⁷¹

In sum, while international humanitarian law saw considerable doctrinal development in the half century preceding the Nuremberg trials, as nations codified many laws of war in treaties, many powers embraced the concepts of crimes against humanity and command responsibility, and many nations rejected the notion of head-of-state immunity, enforcement lagged far behind the doctrinal development. Prosecutions in national tribunals were inadequate, justice was not done, and the opportunity was missed to promote compliance with the law by more transparent and more widespread punishment of war crimes. Nobody faced an international tribunal after World War I, few faced domestic prosecution in Germany and Turkey, and in those cases that were actually brought, the few-and-far-between convictions resulted in

⁶³ Bassiouni, *supra* note 27, at 281–82.

⁶⁴ WILLIS, *supra* note 27, at 124; *see also* Meron, *War Crimes Trials*, *supra* note 1, at 124.

⁶⁵ WILLIS, *supra* note 27, at 124.

⁶⁶ Judgment in Case of Commander Karl von Neumann: Hospital Ship “Dover Castle” (Reichsgericht Penal Senate No. 2 June 4, 1921), *reprinted in* 16 AJIL 704 (1922).

⁶⁷ Bassiouni, *supra* note 27, at 282.

⁶⁸ *Id.* at 285 (quoting Commission of Allied Jurists, *in* WAR CRIMES COMM’N HISTORY, *supra* note 12, at 48).

⁶⁹ Treaty of Peace with Turkey, July 24, 1923, Gr. Brit. TS No. 16 (1923), *reprinted in* 18 AJIL Supp. 4 (1924); Declaration of Amnesty, July 24, 1923, *reprinted in* 18 AJIL Supp. 92.

⁷⁰ Bassiouni, *supra* note 27, at 288.

⁷¹ *Id.*

light penalties. Indeed, as one commentator observed, “[A]part from helping to lay the legal foundations for international criminal justice in the future, the Allies’ experiment in retributive justice following the First World War was a dismal failure.”⁷² Thus, while the contours of war crimes law had been increasingly well established by World War II, persons violating that law faced only a hypothetical possibility of criminal sanction. In a sense, war crimes law had not yet truly become a form of criminal law.

II. FROM NUREMBERG TO THE HAGUE

It has often been said that the Treaty of Versailles in many ways sowed the seeds for World War II. But the Treaty also sowed the seeds for the development of the international criminal law that followed World War II. The Allies realized that entrusting trials of alleged war criminals entirely to the courts of the criminals’ own countries would not produce real justice. Instead, an international tribunal was required, and it had to be as impartial as possible.

During the war the Allies began to set up mechanisms for addressing the ongoing atrocities. In two early documents—the St. James Declaration of 1942 and the Moscow Declaration of 1943—the Allies resolved to prosecute war crimes,⁷³ and by 1945 their intention to establish an international military tribunal became evident. Although these declarations were given considerable publicity, they failed to produce any demonstrable deterrent effect.

The international legal community had also learned that a Versailles-like catalog of war crimes was not workable, at least not while international legal norms were still undergoing considerable development. As a result, the Nuremberg and Tokyo Tribunals drew heavily on the 1929 Geneva Prisoner of War Convention⁷⁴ and the Fourth Hague Convention of 1907⁷⁵ as establishing the substantive law to be applied—that is, as customary law and general principles of criminal law, and as norms of both state responsibility and individual criminal liability. For crimes against peace, the tribunals also applied principles embodied in treaties like the Kellogg-Briand Pact of 1928⁷⁶ and the League of Nations Covenant.

The Nuremberg—and also Tokyo—proceedings represented a substantial step forward in the development of the law of war crimes. But they, too, had their shortcomings. The modern tribunals at The Hague were established after half a century during which the idea of criminal accountability languished and impunity flourished even in the case of serious crimes against humanity. Nevertheless, the post-World War II tribunals served as an example to be imitated by the courts that came later in the ways they succeeded, and as an example for the later courts to avoid in the ways they fell short.

Let me start this comparison of the two sets of tribunals by saying that while the Nuremberg and Tokyo Tribunals were established by the occupying and victorious powers, the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) are the first truly international criminal courts. They were established by the United Nations Security Council and funded by the regular UN budget under the control of the

⁷² *Id.* at 290.

⁷³ M. Cherif Bassiouni, *The International Criminal Court in Historical Context*, 1999 ST. LOUIS-WARSAW TRANSATLANTIC L.J. 55, 60 (with citations).

⁷⁴ Geneva Convention Relative to the Treatment of Prisoners of War, July 27, 1929, 47 Stat. 2021, 118 LNTS 343 [hereinafter 1929 POW Convention].

⁷⁵ Fourth Hague Convention, *supra* note 16.

⁷⁶ Treaty Providing for the Renunciation of War as an Instrument of National Policy, Aug. 27, 1928, 46 Stat. 2343, 94 LNTS 57.

General Assembly. Judges are elected by the General Assembly from a short list prepared by the Security Council. The ICC is a treaty body established by states parties to the Treaty of Rome of 1998.

From Battlefield Violations to Prosecutions of Abuses Against Civilians

Most of the post–World War I prosecutions concerned classic violations of the law governing the conduct of hostilities. World War II prosecutions focused on abuses committed against civilians and civilian populations,⁷⁷ whether as crimes against humanity or as violations of the provisions on occupation in the Fourth Hague Convention. Although this focus was a product of the enormity of the abuses against the civilian population, it can also be partially explained by the desire to avoid *tu quoque* arguments, which could have arisen during the prosecution of conventional war crimes. In that connection, some charges were not presented and some were rejected on the ground that similar practices of the Allies demonstrated that certain norms had not hardened into clear prohibitory rules, such as target area bombardment of cities and unrestricted submarine warfare.⁷⁸ While the ICTY has dealt with some Hague law matters,⁷⁹ such consideration has been rare in the ICTR. In both tribunals, abuses against civilians have taken pride of place.

Paper Trail and Availability of Evidence

The most mundane factors can reveal deeper truths about institutions. Indeed, seemingly unremarkable facts about evidence and the profile of defendants reveal much about the evolution of the prospects for the enforcement of humanitarian law.

The case that the prosecution is able to make in any given criminal trial is dictated largely by the evidence available to it. This truism is often overlooked in international law, but it actually explains critical differences between the trials at Nuremberg and those at The Hague, differences that demonstrate the difficulties facing the modern tribunals. Thus far these difficulties have been nearly endemic to the modern tribunals, and they will remain a challenge for the foreseeable future.

Gathering evidence after World War II was comparatively easy. One thing can be said of the Nazi regime: it kept good records. Because the German bureaucracy did not destroy its official documents before the Allied victory, its extensive archives provided a “treasure trove” of evidence for the prosecution.⁸⁰ As Justice Jackson noted in his opening statement, “The Germans were always meticulous record keepers, and the[] defendants had their share of the Teutonic passion for thoroughness in putting things on paper.”⁸¹ The staggering volume of materials available to the prosecution affected the nature of the evidence adduced at trial. Rather than basing its case primarily on witness testimony, the prosecution was able to rely heavily on the defendants’ own words and records to prove its accusations. Add to that the extensive police powers that the Allies exercised in occupied Germany, and the result is an evidence-gathering apparatus that any prosecutor would envy.

⁷⁷ Prosecutions also dealt with the widespread mistreatment of prisoners of war, especially members of the Soviet army.

⁷⁸ Meron, *From Nuremberg to The Hague*, *supra* note 1, at 108.

⁷⁹ See, e.g., *Prosecutor v. Galić*, No. IT-98-29-T, paras. 45 n.78, 46 n.81, 57 n.103 (Dec. 5, 2003).

⁸⁰ Stephan Landsman, *Those Who Remember the Past May Not Be Condemned to Repeat It*, 100 MICH. L. REV. 1564, 1570 (2002) (book review); see also Jonathan A. Bush, *Lex Americana: Constitutional Due Process and the Nuremberg Defendants*, 45 ST. LOUIS U. L.J. 515, 529 (2001).

⁸¹ Jackson Statement, *supra* note 2, at 102.

The modern tribunals, in contrast, do not have the benefit of a police power to search for evidence or a paper trail. The ICTY must rely on the cooperation of supportive governments and of individuals who may realistically fear reprisals if they cooperate openly. There is a disconnection between the theory and the reality in this regard. The Security Council resolution adopting the ICTY Statute requires all member states of the United Nations to comply with the ICTY's requests and orders, including those for the production of evidence.⁸² Yet governments do not always cooperate, and when they do are often willing to share information only if its sources are kept confidential, a demand clearly in tension with the defendant's right to challenge the evidence against him. The ICTY has devised a system—principally regulated by Rule 70 of the Rules of Procedure and Evidence—permitting confidential information sharing at the investigative and pretrial stages but requiring disclosure if information is actually used in evidence at trial. However, in recognition of the Tribunal's utter dependence on the assistance of states, states supplying confidential information are permitted to block its use at trial.

The ICTR has enjoyed the solid support of the government of Rwanda, except when the ICTR prosecutor has tried to investigate crimes allegedly committed by the Tutsi. This stance further reveals how national-political considerations continue to affect the work of the tribunals. The ICC, as a treaty organization not created by the Security Council, may have even greater difficulties in marshaling evidence, except when the case is referred to it by the Council under Chapter VII of the UN Charter.

The problem of an incomplete evidentiary base also occurs much more often at the ICTY than in domestic criminal cases. On occasion, defendants have claimed that governments have deliberately withheld information to shield some defendants and implicate others. To cope with the problem of a shifting evidentiary foundation, the ICTY adopted a rule permitting the admission of additional evidence on appeal under certain circumstances.⁸³ But at some point, of course, criminal proceedings must reach a conclusion. Consequently, the balance between fairness (or at least confidence in accuracy), on the one hand, and finality, on the other—a balance that all systems of criminal justice must strike—presents particular challenges at the ICTY, as it presumably will in any tribunal trying accused from states that were not completely vanquished.

Difficulties in gathering evidence thus make it apparent that the bodies enforcing international criminal law still lack muscle within the international community. Whether international and mixed tribunals eventually gain the practical powers over evidence shared by national courts as a matter of course, rather than when it suits the political expediencies of the moment, will depend on the political will of the national community and the reputation of the tribunals.

Profile of Defendants

More optimistic signs can be seen in the profile of the defendants being tried. In my view, the ICTY is a microcosm for institutions enforcing international criminal law. Just as the strengths of Nuremberg paved the way for, and indeed made possible, the modern project of international criminal law, so the legitimacy earned by the ICTY has both encouraged national

⁸² SC Res. 827, para. 4 (May 25, 1993), 32 ILM 1203 (1993); Statute of the International Criminal Tribunal for the Former Yugoslavia, UN Doc. S/25704, annex, Art. 29 (1993), 32 ILM 1192.

⁸³ ICTY, Rules of Procedure and Evidence, *as amended*, Rule 115, UN Doc. IT/32/Rev.37 (Apr. 6, 2006), *available at* <<http://www.un.org/icty>> [hereinafter ICTY Rules].

governments to turn over more senior figures and, more important, spurred the international community to exert pressure on those governments.

Again, the Nuremberg and Tokyo Tribunals, with the might of the victorious Allies behind them, could prosecute *almost* anyone involved. Hitler escaped judgment only because he committed suicide. A political decision was taken by the powers constituting the Tokyo Tribunal not to prosecute Emperor Hirohito, but there was never a suggestion that the Tribunal could not have prosecuted him had it so wished.⁸⁴

Both tribunals, like their modern counterparts, dealt with defendants of varying status and levels of responsibility. There was more than one trial at Nuremberg. The first is the best known, because it involved the most senior defendants. In the London Agreement and Charter, the Allies agreed to create an International Military Tribunal, or IMT, to try the leading Nazi war criminals—the topflight leadership of the Third Reich.⁸⁵ The IMT's first (and only) trial—with 22 defendants in the dock—began in Nuremberg on November 20, 1945, and lasted nine months.⁸⁶ The Tribunal rendered its judgment on October 1, 1946. Three of the defendants were acquitted, 7 received prison terms, and 12 were sentenced to be hanged.⁸⁷

Following the IMT trial, the American occupation authorities conducted twelve proceedings at Nuremberg pursuant to Allied Control Council Law No. 10. In all, 177 defendants were tried in these later proceedings, including doctors, judges, prosecutors, government ministers, SS officers, military leaders, industrialists, and financiers.⁸⁸ While less prominent than the chief Nazi leaders tried by the IMT, the defendants in the Control Council 10 proceedings were leaders of Nazi Germany's government, military, and economy, and they were charged with playing central roles in the crimes perpetrated by the Nazi regime.⁸⁹

The Allied authorities in Japan also held separate sets of trials for senior officials and lower-ranking officials.⁹⁰ In the first set of trials, held at Tokyo, 25 senior officials, known as "Class A" criminals, were tried for war crimes.⁹¹ The group included premiers, foreign ministers, ambassadors, generals, and others.⁹² After more than two years, all were found guilty on at least one charge.⁹³ Seven were sentenced to death.⁹⁴ Three of those imprisoned actually returned to government after their release, as minister of justice, foreign minister, and prime minister, respectively.⁹⁵ That development suggests that public opinion saw the imprisoned men not so much as criminals as victims of the vindictive Allies.

⁸⁴ Mark D. Pollard, Book Review, 171 MIL. L. REV. 220, 224 (2002) (reviewing TIMOTHY P. MAGA, JUDGMENT AT TOKYO: THE JAPANESE WAR CRIMES TRIALS (2001)).

⁸⁵ Kevin R. Chaney, *Pitfalls and Imperatives: Applying the Lessons of Nuremberg to the Yugoslav War Crimes Trials*, 14 DICK. J. INT'L L. 57, 61 (1995).

⁸⁶ Henry T. King, *The Legacy of Nuremberg*, 34 CASE W. RES. J. INT'L L. 335, 339 (2002).

⁸⁷ 1 IMT TRIAL, *supra* note 2, at 171.

⁸⁸ See generally King, *supra* note 86.

⁸⁹ TELFORD TAYLOR, FINAL REPORT TO THE SECRETARY OF THE ARMY ON THE NUERNBERG WAR CRIMES TRIALS UNDER CONTROL COUNCIL LAW NO. 10, at 73–85 (1949).

⁹⁰ Richard May & Marieke Wierda, *Trends in International Criminal Evidence: Nuremberg, Tokyo, The Hague, and Arusha*, 37 COLUM. J. TRANSNAT'L L. 725, 730–31 (1999).

⁹¹ Twenty-eight had been indicted, but 2 died and 1 became ill before trial. Jordan J. Paust, Remarks, in *Forty Years After the Nuremberg and Tokyo Tribunals: The Impact of the War Crimes Trials on International and National Law*, 80 ASIL PROC. 56, 57 (1986) [hereinafter *Forty Years After*].

⁹² Pollard, *supra* note 84, at 221 n.6.

⁹³ JOHN L. GINN, SUGAMO PRISON, TOKYO: AN ACCOUNT OF THE TRIAL AND SENTENCING OF JAPANESE WAR CRIMINALS IN 1948, BY A U.S. PARTICIPANT 136–37 (1992).

⁹⁴ *Id.* at 122.

⁹⁵ Pritchard, *supra* note 6, at 35.

In the second set of trials, held at Yokohama, another 980 less senior officers and officials—“Class B and C” criminals—were tried for war crimes and crimes against humanity.⁹⁶ Some of them held a quite low rank.⁹⁷

Early on, the trials at The Hague looked less like the IMT trial of the top Nazi leaders and the first trial in Tokyo, and more like the later proceedings against significant, but less prominent, officials. But as time went on, the impression of the Tribunal’s worthiness grew, and international and local pressure led to fuller cooperation by national governments; as a result, a greater number of senior government officials and military commanders were held responsible. Slobodan Milošević is the most obvious example. Among those being tried or awaiting trials are President Milan Milutinović, senior generals, and chiefs of staff of the armed forces and the security service. Nevertheless, the ICTY remains on the whole at the mercy of the national governments in the Balkans in apprehending many defendants. But the higher profile of defendants who have surrendered or been sent to The Hague in recent years shows that the Tribunal is gaining legitimacy in the halls of the United Nations *and* in the region within its ambit. Such legitimacy both enables the ICTY to focus on the leaders and gives strength to its successor courts.

The ICTY has also intensified its focus on top-level officials as part of its completion strategy—the plan devised by the Tribunal and the Security Council, in recognition of the ICTY’s status as a temporary tribunal, to close shop within a reasonable period of time. The ICTY has amended its Rules of Procedure to permit the referral of certain cases to national authorities. In deciding whether to grant a request for referral by the prosecutor, or to order referral on their own initiative, the judges “consider the gravity of the crimes charged and the level of responsibility of the accused,”⁹⁸ as well as the likelihood of fairness and due process in the national courts.

Unlike the ICTY, the ICTR has always been able to focus on senior-level accused. From the beginning, the Tribunal in Arusha received substantial cooperation not only from the government of Rwanda, but also from the governments of other African nations to which many of the suspected war criminals had fled. As a result of this cooperation, the ICTR could quickly begin to try former cabinet ministers and high-level military commanders. Now, twelve years after Rwanda experienced unthinkable atrocities, those most responsible for them have been and are being punished.

It makes sense for international tribunals to focus on top officials who helped to orchestrate atrocities. These tribunals have far more limited resources than national legal systems,⁹⁹ which dictates some selectivity in who will be tried on the international level. Just as important, trials of those who orchestrate atrocities help to disseminate international condemnation of the crimes and yield vindication for substantial numbers of victims. These benefits do not flow to nearly the same extent from trials of lower-level, less responsible accused, trials that may focus on smaller areas or more specific incidents.

⁹⁶ GINN, *supra* note 93, at 33.

⁹⁷ In addition, the individual Allied countries tried tens of thousands of Germans and Japanese for crimes committed in connection with the war. PHILIP R. PICCIGALLO, *THE JAPANESE ON TRIAL: ALLIED WAR CRIMES OPERATIONS IN THE EAST, 1945–1951* (1977); David Cohen, *Transitional Justice in Divided Germany After 1945, in RETRIBUTION AND REPARATION IN THE TRANSITION TO DEMOCRACY* 59 (Jon Elster ed., 2006).

⁹⁸ ICTY Rules, *supra* note 83, Rule 11 *bis*.

⁹⁹ See TAYLOR, *supra* note 89, at 81 (describing how resource constraints limited the number and scope of trials conducted pursuant to Control Council Law No. 10).

By contrast, if nations where atrocities took place were capable of conducting adequate trials, even if only for lower-level accused, and such trials were marked by a vigorous, good faith prosecution, due process rights for the defendant, impartial judging, and protection of witnesses from intimidation and reprisals, significant benefits would accrue. Proceedings conducted close to home may be better followed than those in a distant forum and would serve to educate people more fully about atrocities that took place in their country. Moreover, condemnation of atrocities by the country's own legal system might more powerfully inspire the local populace to condemn the atrocities themselves. Of course, trials in national courts come with the risk that crimes committed by officials will be whitewashed, as the post-World War I Leipzig trials demonstrated. Yet when an international tribunal has fairly tried higher-level officials, creating a record of offenses and precedents for how certain acts should be judged, and contributing to the development of the rule of law, whitewashing by national courts becomes difficult, and the risks of domestic prosecution pale in comparison with the prospective benefits. Now that the ICTY has begun referring cases involving intermediate and lower-level accused to local courts in the former Yugoslav republics—particularly the new War Crimes Chamber of the State Court of Bosnia and Herzegovina¹⁰⁰—these courts will have an opportunity to prove that local trials in fact produce such benefits.

Offenses Recognized

Prior to the establishment of the Nuremberg Tribunal, although customary international law existed, it had never been applied in an international criminal court. The challenge for the Tribunal, then, was to find a way to bring the existing law to bear in a multinational court.

The London Charter¹⁰¹ that created the IMT dealt with this issue by identifying the crimes within the court's jurisdiction. These crimes fell into three categories, which the London Charter termed "crimes against peace," "war crimes," and "crimes against humanity."¹⁰² It then defined each of these classes of crimes.¹⁰³ The charter also allowed prosecutors to charge major war criminals with conspiracy, and it stated that defenses of state immunity and superior orders would not be relevant to guilt.¹⁰⁴

Each of the legal grounds set forth in the London Charter was controversial. Never before had aggression been treated as a legal, rather than a merely political wrong, and never had senior officials been held criminally liable as individuals. The concept of conspiracy liability not only was novel in international law, but was especially foreign to lawyers from civil law traditions. And although the notion of "crimes against humanity," which defined criminal liability as including citizen-to-citizen acts, seems like second nature to us now, it had never formed the basis for international criminal liability before World War II. Even the charge of war crimes

¹⁰⁰ As of July 2006, the ICTY had referred four cases involving seven accused to the War Crimes Chamber of the State Court of Bosnia and Herzegovina, and one case involving two accused to the courts of the Republic of Croatia.

¹⁰¹ Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, with annexed Charter of the International Military Tribunal, Aug. 8, 1945, 59 Stat. 1544, 82 UNTS 279 [hereinafter London Charter].

¹⁰² *Id.*, Art. 6; see also TAYLOR, *supra* note 89, at 238–39; Henry T. King, *Robert Jackson's Vision for Justice and Other Reflections of a Nuremberg Prosecutor*, 88 GEO. L.J. 2421, 2424–25 (2000).

¹⁰³ London Charter, *supra* note 101, Art. 6.

¹⁰⁴ *Id.*, Arts. 6–9; see also TAYLOR, *supra* note 89, at 239.

was ambiguous, since the laws of war had not previously delimited the boundaries of lawful military conduct with much precision.¹⁰⁵

In Japan the trials were conducted by the International Military Tribunal for the Far East. That Tribunal was not created by an international diplomatic conference but by a charter issued as a military order by General Douglas MacArthur, the supreme commander for the Allied powers in Japan.¹⁰⁶ Nevertheless, the Tokyo Charter tracked the London Charter closely, giving it at least initial legitimacy.¹⁰⁷ The Tribunal included representatives of eleven Allied countries.¹⁰⁸ The jurisdictional aspects of the Tribunal's charter followed the London Charter: it allowed prosecution of "Crimes against Peace," "Conventional War Crimes," and "Crimes against Humanity."¹⁰⁹ Like the London Charter, it disqualified state immunity and superior orders as defenses.¹¹⁰ All sentences had to be reviewed by General MacArthur, who could reduce or alter them but not increase their severity.¹¹¹

At Tokyo, 24 of the 25 defendants were convicted of crimes against peace,¹¹² whereas only one of the Nuremberg defendants was. This result probably reflects the Nuremberg Tribunal's greater adherence to principles of legality and due process: the crime of waging aggressive war was harder to define and to prove than the other crimes, and it was even doubted whether it constituted a crime at international law. Indeed, one judge at Tokyo said he had to find waging aggressive war a crime because he was a member of a tribunal whose charter made it a crime.¹¹³

Despite the initial controversy, the Nuremberg Tribunal's legal legacy was rapidly and broadly established.¹¹⁴ The United Nations quickly ratified the legal principles articulated in the London Charter, and American military law incorporated them as well.¹¹⁵ The Genocide Convention soon followed (1948), as did the Geneva Conventions for the Protection of Victims of War (1949), and pressure built to establish a permanent international criminal court.¹¹⁶ The major premise of the Nuremberg trials—that persons who lead their nations into aggressive wars should be held criminally liable as individuals—was widely accepted for crimes against peace, but remains controversial enough not to have been elevated into the ICC Statute.

These developments stimulated doctrinal developments. Writings by Hersch Lauterpacht¹¹⁷ and Richard Baxter, the former editor in chief of the *American Journal*,¹¹⁸ were critically important,

¹⁰⁵ See YORAM DINSTEIN, *THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT* 57–105 (2004).

¹⁰⁶ Charter of the International Military Tribunal for the Far East, Jan. 19, 1946, TIAS No. 1589, 4 Bevens 20 (as amended Apr. 26, 1946, 4 Bevens 27) (establishing the Tribunal) [hereinafter Tokyo Charter].

¹⁰⁷ MINEAR, *supra* note 9, at 20–22.

¹⁰⁸ Pritchard, *supra* note 6, at 27. The nations were Australia, Canada, China, France, Great Britain, India, New Zealand, the Netherlands, the Philippines, the Soviet Union, and the United States. *Id.* n.3.

¹⁰⁹ Tokyo Charter, *supra* note 106, Art. 5.

¹¹⁰ *Id.*, Art. 6.

¹¹¹ *Id.*, Art. 17.

¹¹² GINN, *supra* note 93, at 136–37.

¹¹³ MINEAR, *supra* note 9, at 65–66.

¹¹⁴ See Jonathan A. Bush, Review Essay, *Nuremberg: The Modern Law of War and Its Limitations*, 93 COLUM. L. REV. 2022, 2063 (1993) (reviewing TELFORD TAYLOR, *THE ANATOMY OF THE NUREMBERG TRIALS: A PERSONAL MEMOIR* (1992)). The Tokyo Tribunal has been much less influential. See *supra* note 9 and *infra* note 165.

¹¹⁵ King, *supra* note 86, at 347.

¹¹⁶ *Id.*

¹¹⁷ See, e.g., HERSCH LAUTERPACHT, *INTERNATIONAL LAW AND HUMAN RIGHTS* (1950); Hersch Lauterpacht, *The Law of Nations and the Punishment of War Crimes*, 1944 BRIT. Y.B. INT'L L. 58.

¹¹⁸ See, e.g., Richard R. Baxter, *Constitutional Forms and Some Legal Problems of International Military Command*, 1952 BRIT. Y.B. INT'L L. 325; Richard R. Baxter, *The Duty of Obedience to the Belligerent Occupant*, 1950 BRIT.

as were the later writings of Cherif Bassiouni.¹¹⁹ Then came the Vietnam War. The acts of war by both the United States and North Vietnam sparked a new debate over the applicability of international legal norms and, broadly, over the adequacy of compliance with the law.¹²⁰ The growing antiwar movement and the human rights community began to press for the application of international law to human rights violations in Vietnam and elsewhere, not just to war crimes. Significantly, the disagreement was *not* over the definition of the offenses but, rather, over the capacity of the law to deal with the conduct of hostilities, protection of medical evacuation aircraft, and treatment of prisoners of war. These difficulties were heightened by questions about the applicability of international humanitarian conventions to internal and mixed internal-international conflicts. Although the principles of Nuremberg had settled into place and the debate had moved on,¹²¹ the conflict in Vietnam, combined with national liberation wars, guerrilla wars, and civil wars, created the pressure necessary for renewal of the law through the elaboration of the two Additional Protocols to the Geneva Conventions, which were adopted in 1977.

That is how matters stood until the establishment of the modern tribunals at The Hague and Arusha. Using the London Charter as a model, the UN Security Council, exercising its authority under Chapter VII of the UN Charter, enacted the statutes that created the ICTY and the ICTR.¹²² Those statutes set forth in detail the crimes over which the ad hoc tribunals would exercise jurisdiction. As at Nuremberg, those crimes include war crimes and crimes against humanity, and the crime of genocide was added. Unlike the London Charter, however, the ICTY and ICTR Statutes do not include crimes against peace.¹²³ They are also marked by more detailed definitions and a broader scope—encompassing war crimes in internal conflicts; thus, these statutes manifest the growing humanization of humanitarian law under the influence of human rights.¹²⁴ And the Statute of the ICC contains even more detailed definitions.¹²⁵

In addition to the ad hoc tribunals, the ICC did not follow the Nuremberg model of criminalizing crimes against peace, despite intense debate. Many states consider the concept too political, and lacking in the required customary law underpinnings.¹²⁶ Nevertheless, attempts to include the crime of aggression in a revised version of the ICC Statute continue unabated.

At the ICTY, although the definitions are more detailed, they still require extensive judicial interpretation. In adding that judicial gloss, the ICTY judges, like the court at Nuremberg,

Y.B. INT'L L. 235; Richard R. Baxter, *Multilateral Treaties as Evidence of Customary International Law*, 1965-66 BRIT. Y.B. INT'L L. 275; Richard R. Baxter, *The Municipal and International Law Basis of Jurisdiction over War Crimes*, 1951 BRIT. Y.B. INT'L L. 382; Richard R. Baxter, *So-Called 'Unprivileged Belligerency': Spies, Guerrillas, and Saboteurs*, 1951 BRIT. Y.B. INT'L L. 323.

¹¹⁹ See, e.g., A TREATISE ON INTERNATIONAL CRIMINAL LAW (M. Cherif Bassiouni & Ved Nanda eds., 1973-).

¹²⁰ See Bush, *supra* note 114, at 2065.

¹²¹ See *id.* at 2065-69.

¹²² ICTY Statute, *supra* note 82; Statute of the International Criminal Tribunal for Rwanda, SC Res. 955, annex (Nov. 8, 1994), 33 ILM 1602 (1994) [hereinafter ICTR Statute].

¹²³ Compare TAYLOR, *supra* note 89, at 238-40, with ICTY Statute, *supra* note 82, and ICTR Statute, *supra* note 122.

¹²⁴ Meron, *Humanization*, *supra* note 1. For a detailed discussion of the substantive law applied at the ICTY and ICTR, see GUÉNAËL METTRAUX, INTERNATIONAL CRIMES AND THE AD HOC TRIBUNALS (2005).

¹²⁵ Rome Statute of the International Criminal Court, July 17, 1998, 2187 UNTS 3, available at <<http://www.icc-cpi.int/about.html>> [hereinafter ICC Statute].

¹²⁶ Theodor Meron, *Defining Aggression for the International Criminal Court*, 25 SUFFOLK TRANSNAT'L L. REV. 1 (2001).

refer to the customary underpinnings of the crimes.¹²⁷ The ICTY's resort to customary law, however, is more methodical than at Nuremberg, partly because of the criticisms leveled against the Nuremberg convictions. Critics of the Nuremberg trials charged that the law that was applied there originated in the London Charter and that it was unlawfully applied *ex post facto* to the German defendants.¹²⁸ This is not correct: the law applied at Nuremberg was grounded in existing conventional and customary international law.¹²⁹ But in any event, to forestall similar criticisms, the *ad hoc* tribunals take pains to explain the customary and conventional underpinnings of their decisions. Consequently, judgments of the ICTY are helping to revitalize customary law and to anchor international law firmly in both codified law and judicial decisions.¹³⁰ The ICC is different in this respect. Its statute is more like a civil law code and is to be applied as such, though, broadly speaking, I would say that the crimes it enumerates are declaratory of customary law.

Gender Crimes

Rape and violence against women have long been accepted as natural consequences of war.¹³¹ The Nuremberg and Tokyo Tribunals recorded a substantial amount of evidence of sex crimes committed during World War II, but they virtually ignored these crimes in their judgments.¹³² By contrast, the ICTY and the ICTR have been groundbreaking in this area.¹³³ Both statutes explicitly include rape as a crime against humanity,¹³⁴ and the tribunals have successfully prosecuted various forms of sexual violence as instruments of genocide, crimes against humanity, and crimes of war, thus developing a crucial area of international humanitarian law.¹³⁵ The tribunals made a major contribution in grounding the prohibition of rape in customary international law.¹³⁶ And the ICC Statute specifically defines sexual crimes such as rape and sexual slavery.¹³⁷

Jurisdiction

The respective jurisdictions of the post-World War II tribunals and the modern tribunals differ in another way. The London Charter limited its definition of crimes against humanity

¹²⁷ See, e.g., Prosecutor v. Hadžihasanović, Decision on Jurisdiction in Relation to Command Responsibility, No. IT-01-47-AR72 (July 16, 2003).

¹²⁸ See Chaney, *supra* note 85, at 71–72.

¹²⁹ *Id.* at 78–79.

¹³⁰ Theodor Meron, *The Revival of Customary Humanitarian Law*, 99 AJIL 817 (2005) [hereinafter Meron, *Revival*].

¹³¹ Meron, *Rape as a War Crime*, *supra* note 1, at 424–27; David S. Mitchell, *The Prohibition of Rape in International Humanitarian Law as a Norm of Jus Cogens: Clarifying the Doctrine*, 15 DUKE J. COMP. & INT'L L. 219, 224 (2005).

¹³² Mitchell, *supra* note 131, at 237–38. Some Japanese officers were prosecuted for sexual crimes, but not by the international tribunals: General Yamashita was prosecuted by an American military commission in Manila for allowing widespread rape in the Philippines. Jocelyn Campanaro, *Women, War, and International Law: The Historical Treatment of Gender-Based War Crimes*, 89 GEO. L.J. 2557, 2564 & n.40 (2001). Dutch colonial authorities in Indonesia prosecuted Japanese soldiers for enforced prostitution. Meron, *Rape as a War Crime*, *supra* note 1, at 426 n.13.

¹³³ See Mitchell, *supra* note 131, at 239–41.

¹³⁴ ICTY Statute, *supra* note 82, Art. 5(g); ICTR Statute, *supra* note 122, Art. 3(g).

¹³⁵ See, e.g., Prosecutor v. Furundžija, No. IT-95-17/1-T, para. 186 (Dec. 10, 1998). As the ICTR trial chamber said in *Prosecutor v. Akayesu*, “[R]ape and sexual violence certainly constitute infliction of serious bodily and mental harm on the victims and are even . . . one of the worst ways [to] inflict harm on the victim as he or she suffers both bodily and mental harm.” Prosecutor v. Akayesu, No. ICTR-96-4-T, para. 731 (Sept. 2, 1998).

¹³⁶ See Prosecutor v. Kunarac, Nos. IT-96-23 & 96-23/1-A, paras. 127–33 (June 12, 2002); Prosecutor v. Gacumbitsi, No. ICTR-2001-64-A, paras. 147–57 (July 7, 2006).

¹³⁷ ICC Statute, *supra* note 125, Art. 7(1)(g); see also Mitchell, *supra* note 131, at 242–44.

to offenses that had occurred “in execution of or in connection with any crime within the jurisdiction of the Tribunal.”¹³⁸ In other words, although the charter extended international criminal responsibility to atrocities committed within a single country, even between its own citizens (“against any civilian population, before or during the war”),¹³⁹ the scope of that liability was limited, because the offenses were required to be *wartime* atrocities within the Tribunal’s jurisdiction. As a result, the Nuremberg Tribunal did not have jurisdiction over atrocities committed within and by Germany in the years leading up to World War II. (The ambit of the Japanese proceedings was broader: the prosecution was allowed to argue a common plan or conspiracy to wage aggressive war from 1927 until 1945, and all twenty-four defendants convicted of crimes against peace were found guilty on that basis.¹⁴⁰) Nevertheless, there is no question that crimes against humanity constituted the most revolutionary contribution of the Nuremberg trials to international criminal law, exceeding even crimes against peace, which owed at least a semblance of a foundation to the Treaty of Versailles.

Over time, however, the definition of crimes against humanity lost the required nexus with armed conflict. For instance, the UN Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity of 1968 applies to “[c]rimes against humanity whether committed in time of war or in time of peace.”¹⁴¹ The ICTY Statute, in Article 5, defines crimes against humanity subject to the jurisdiction of the Tribunal as certain crimes “committed in armed conflict, whether international or internal in character.”¹⁴² Although this provision appears to require a nexus with armed conflict, the appeals chamber has interpreted the requirement of an armed conflict as related only to the Tribunal’s subject matter jurisdiction.¹⁴³ Under the case law of both ad hoc tribunals, then, a war nexus is not required under customary law.

The ICC Statute confirms that no nexus with armed conflict is required. Under Article 7, crimes against humanity can be committed in all situations—international wars, internal wars of whatever intensity, and peacetime.¹⁴⁴

These changes relate to another significant legal development: the international criminalization of internal atrocities. The Security Council’s statutes for the ad hoc tribunals have contributed significantly to the extension of international humanitarian law to noninternational armed conflicts. The ICTY Statute and jurisprudence treat the conflict in the former Yugoslavia as both international and noninternational in scope.¹⁴⁵ The Rwanda Tribunal’s Statute, however, is predicated on the assumption that the conflict in Rwanda was internal.¹⁴⁶ And the ICC Statute sets forth violations not only of the laws and customs of war applicable in international armed conflicts, but also of the laws and customs applicable in armed conflicts not of an international character—within the established framework of international law.¹⁴⁷ These developments are a natural, and necessary, extension of the Nuremberg principles.

¹³⁸ London Charter, *supra* note 101, Art. 6(c); TAYLOR, *supra* note 89, at 239.

¹³⁹ London Charter, *supra* note 101, Art. 6(c).

¹⁴⁰ Pritchard, *supra* note 6, at 28.

¹⁴¹ Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, Nov. 26, 1968, Art. 1(b), 754 UNTS 73 (entered into force Nov. 11, 1970).

¹⁴² ICTY Statute, *supra* note 82, Art. 5.

¹⁴³ Prosecutor v. Tadić, Appeal on Jurisdiction, No. IT-94-1-AR72, paras. 78–79 (Oct. 2, 1995); Meron, *International Criminalization*, *supra* note 1, at 557.

¹⁴⁴ ICC Statute, *supra* note 125, Art. 7.

¹⁴⁵ See *Tadić*, *supra* note 143, paras. 71–93.

¹⁴⁶ ICTR Statute, *supra* note 122, Art. 1.

¹⁴⁷ ICC Statute, *supra* note 125, Arts. 8(2)(c)–(f).

Due Process

The provisions on criminal procedure in the London and Tokyo Charters were rudimentary at best. As mentioned earlier, one of the principal criticisms of the Nuremberg and Tokyo Tribunals was, and is, that they were victors' courts trying the vanquished. That criticism resonates most strongly in the context of due process protections.

Two examples illustrate this point. First, the London Charter expressly provided in Article 12 that trials could be conducted *in absentia* "if the Tribunal, for any reason, f[ound] it necessary, in the interests of justice, to conduct the hearing in [the accused's] absence."¹⁴⁸ As it happened, the Allies were unable to locate and arrest Martin Bormann, head of the Nazi Party Chancellery, but the Tribunal tried, convicted, and sentenced him to death anyway.¹⁴⁹ Of course, *in absentia* trials are authorized by the civil law. The second example is that the charter contained no protection against double jeopardy. On the contrary, Article 11 stated that persons convicted by the Tribunal could be separately charged and punished by a national, military, or occupation court;¹⁵⁰ and some were. At least three Nuremberg defendants were prosecuted in German courts following prosecution by the IMT.¹⁵¹

All the same, the Nuremberg track record on due process protections was not all bad. The Allies agreed to the Nuremberg enterprise largely because they assumed that the trials would be quick, the outcome never in doubt. Frankly, the London Charter was short on due process protections because they were not among the Allies' chief concerns. But fairness norms inevitably crept into the proceedings, in spite of the conciseness of the Tribunal's charter. The charter, for instance, made no reference to burdens of proof.¹⁵² In fact, the Soviets took the view that the burden should rest on the defense rather than the prosecution.¹⁵³ Nonetheless, the Tribunal imposed a rigorous Anglo-American burden on the prosecution—one so rigorous that some of the accused were acquitted.

Due process protections also triumphed over the American plan to focus on trials of Nazi organizations such as the Gestapo.¹⁵⁴ The intention was to convict these organizations at trial and then use the convictions in follow-on proceedings to bring thousands of individual members to justice.¹⁵⁵ The only question in the later trials would be whether the individual defendants knowingly participated in the criminal conspiracy. But the Tribunal thwarted this plan by interpreting conspiracy narrowly and reading additional elements of specific intent into the conspiracy and aggressive war charges.¹⁵⁶ As a result, many of the individuals who were charged with conspiracy were acquitted of that charge, as were some of the organizational defendants. And the Tribunal held that individual members of organizations that were convicted were liable only if their participation or membership was both knowing and willing, and active.¹⁵⁷

¹⁴⁸ London Charter, *supra* note 101, Art. 12; TAYLOR, *supra* note 89, at 240.

¹⁴⁹ Bush, *supra* note 80, at 536.

¹⁵⁰ TAYLOR, *supra* note 89, at 239–40.

¹⁵¹ Chaney, *supra* note 85, at 69–70.

¹⁵² Bush, *supra* note 80, at 531–32.

¹⁵³ *Id.*

¹⁵⁴ *Id.* at 533.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* at 534.

¹⁵⁷ *Id.* The Japanese trials' use of conspiracy was somewhat more troubling (although membership of a criminal organization was never charged in those proceedings). According to R. John Pritchard, who compiled and published the twenty-two-volume transcripts of the proceedings,

as a direct result of the prosecution's emphasis on the doctrine of criminal conspiracy to wage aggressive war, evidence directly linking the individual defendants to what is a broadly historical record of domestic and world

Even some aspects of the Nuremberg plan that seemed at first blush to run contrary to due process norms ultimately gave way to notions of fairness. The London and Tokyo Charters, for example, did not create an appellate tribunal, so that defendants who were convicted at Nuremberg had no right to appeal. They did, however, have a right to seek clemency and pardons before senior military officials. Since about half of the death sentences imposed in the Control Council and Yokohama proceedings were commuted, and all the convicts who were not executed were released by 1958, this right was probably more valuable than appellate review,¹⁵⁸ though I mean to suggest neither that early releases are an appropriate substitute for appellate proceedings, nor that these early releases were necessarily desirable.

The Japanese trials encountered much greater problems over due process and bias.¹⁵⁹ The defense lacked time and resources, and was denied access to some relevant material.¹⁶⁰ The reliance on documentary materials, especially unchallengeable affidavits, caused concern.¹⁶¹ Justice Radhabinod Pal of India published a long dissent, in which he argued, *inter alia*, that the rules of evidence had been slanted against the defense.¹⁶²

The justices' behavior was not always exemplary. Three of them arrived after the trials started. All absented themselves from proceedings for greater or lesser periods.¹⁶³ Some of the death penalties were decided on a 6-5 basis.¹⁶⁴ Overall, it is hard to escape the conclusion that the Tribunal did not fully comply with norms of due process.

One of the enduring lessons of the Nuremberg and Tokyo (including the Yokohama) trials, then, is that due process protections are not an impediment to the administration of international justice;

history becomes hard to follow. For most of the Trial, there was little attention paid to any indisputably criminal activity on the part of the individual accused.

Pritchard, *supra* note 6, at 28. Two of the Tokyo defendants were found guilty only of conspiracy, not of any substantive crimes. GINN, *supra* note 93, at 136–37.

¹⁵⁸ Bush, *supra* note 80, at 530–31. In the second round of Nuremberg proceedings, 142 defendants were convicted. Each of these convictions was reviewed by an Allied military commander, and as a result, only 13 of the 26 men who were sentenced to death were executed. Although the remaining defendants received life sentences or long terms, nearly all those convicted in the second round had been released by 1952, and by the end of 1958, all had been released. *See id.* (Some of the defendants imprisoned by the IMT served longer sentences: Baldur von Schirach and Albert Speer were released in 1966, ANN TUSA & JOHN TUSA, *THE NUREMBERG TRIAL* 478 (1983); Rudolf Hess killed himself in prison in 1987, WHITNEY R. HARRIS, *TYRANNY ON TRIAL* 488 (rev. ed. 1995).) In the Yokohama proceedings, the death sentence was handed down to 119 of the 980 defendants, but after automatic review by General MacArthur, only 47 were actually executed, GINN, *supra* note 93, at 140–75; 123 were acquitted, May & Wierda, *supra* note 90, at 732 n.19. As in the trials held in Germany under Control Council Law No. 10, all the “minor” criminals who had been imprisoned were released by the late 1950s. Pritchard, *supra* note 6, at 33.

It can be seen that, although many more people were tried in Japan than in Germany, the treatment, at least in terms of death sentences, was more lenient. In the trials of the major war criminals, 50 percent of the Germans were sentenced to death and executed; in Japan, 28 percent were. As far as the subsequent trials are concerned, the German proceedings meted out the death penalty to 18 percent of the defendants and implemented it with regard to 9 percent; the Japanese proceedings sentenced 12 percent of the defendants to death and actually executed only 5 percent.

¹⁵⁹ The Filipino judge had actually been a prisoner of war of the Japanese, and had survived the infamous Bataan death march. MINEAR, *supra* note 9, at 82.

¹⁶⁰ May & Wierda, *supra* note 90, at 733.

¹⁶¹ *Id.* at 744; Pritchard, *supra* note 6, at 32. One of the two dissenting judges felt that the accuracy of the affidavits was suspect, because many were based on leading interrogatories; more generally, he was particularly concerned that “[t]he major part of the evidence . . . consist[ed] of hearsay.” Dissenting Opinion of Justice Pal (July 25, 1946), *reprinted in* 2 *THE TOKYO JUDGMENT: THE INTERNATIONAL MILITARY TRIBUNAL FOR THE FAR EAST*, 29 APRIL 1946–12 NOVEMBER 1948, at 527, 630 (B. V. A. Röling & C. F. Rüter eds., 1977) [hereinafter *Pal Dissent*].

¹⁶² *Pal Dissent*, *supra* note 161. Pal also argued that conspiracy and some of the conventional war crimes had not been proven, and that aggression was not a crime at international law. *See generally id.*

¹⁶³ MINEAR, *supra* note 9, at 88–89. Justice Pal missed 80 of the 417 days of open court; Chief Justice William Webb missed 22 consecutive days once. At one stage, only seven of the eleven justices were present. *Id.*

¹⁶⁴ Defense Appeal to General MacArthur, *supra* note 9, at 206.

rather, they are indispensable to it. The Tokyo Tribunal's more cavalier attitude toward the law and the defendants largely explains its relative marginality during the past sixty years, and its near-total lack of influence on international law.¹⁶⁵ The ad hoc tribunals at The Hague and Arusha and the permanent ICC are supported by detailed statutes and extensive rules of procedure and evidence—a far cry from the brief London Charter. The ICTY and the ICTR Statutes entitle the accused to be present at his trial, and accord primacy to the tribunals over national courts, preventing concurrent or consecutive convictions by multiple jurisdictions for the same charges. The UN statutes expressly created an appeals chamber to which defendants may appeal not only their convictions, but also certain interlocutory issues. Moreover, in general, the modern tribunals adhere to the catalog of human rights protections embodied in the International Covenant on Civil and Political Rights, and, increasingly, those in the European Convention on Human Rights. Therefore, while the Nuremberg Tribunal was hardly a failure from the perspective of due process rights, its shortcomings inspired its heirs to do better, and the result is a rigorous commitment to due process across the international criminal courts.

Criminality of Norms

The post–World War II tribunals built on a body of law that had clearly prohibited certain actions during wartime. However, before the creation of the Nuremberg and Tokyo Tribunals, whether these actions could be criminalized or only form the basis for state responsibility was far from clear. Indeed, as a practical matter, the Nuremberg Tribunal was the first international court to try defendants on the basis of this body of law.

The Fourth Hague Convention was silent on penal responsibility. The early Geneva Conventions contain no penal provisions whatsoever; nor does the 1929 Prisoner of War Convention¹⁶⁶ (except with respect to penal and disciplinary measures against prisoners of war), which figured so prominently in the Nuremberg trials as a basis for the prosecution and conviction of offenders. The other Geneva Convention of the same year, the Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field, contained a weak provision requiring governments to “propose to their legislatures should their penal laws be inadequate, the necessary measures for the repression in time of war of any act contrary to the provisions of the present Convention.”¹⁶⁷

The Nuremberg and Tokyo Tribunals appear to have taken it for granted that violations of the substantive provisions of the Hague and Geneva Conventions were criminal. These tribunals considered the provisions of the two treaties that were declaratory of customary law as having created an adequate basis for individual criminal responsibility. Thus, although neither the

¹⁶⁵ See M. Cherif Bassiouni, *Nuremberg: Forty Years After*, in *Forty Years After*, *supra* note 91, at 59, 64, stating that “[t]he enduring legacy of Nuremberg is due principally to its attempts to insure procedural fairness to the defendants. That is why Nuremberg is the point of historical and legal reference and not Tokyo.” This is not to say that the Japanese trials had no positive effects: among those convicted were bona fide war criminals, and the trials had an important educational influence on Japan. See Yasuaki Onuma, Remarks, *in id.* at 67, 68, stating:

Another legacy left behind by the war crimes trial is an educational one. When we Japanese were defeated, and we learned through such means as the Tokyo Tribunal what our armies had done . . . , we were truly ashamed. One of the ways we manifested our sense of guilt was through the enactment of article 9 [forbidding Japanese involvement in warfare].

¹⁶⁶ 1929 POW Convention, *supra* note 74.

¹⁶⁷ Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field, July 27, 1929, Art. 29, 47 Stat. 2074, 118 LNTS 303.

Geneva Conventions that preceded those of 1949 nor the Fourth Hague Convention contained explicit penal provisions, they were accepted as a basis for prosecutions and convictions in the post-World War II tribunals.

The Geneva Conventions of August 12, 1949, introduced the grave breaches system, which explicitly criminalized certain acts, and requires the states parties to criminalize certain acts and to prosecute or extradite the perpetrators. The advantage of this approach is its clarity and transparency, which are so important to criminal law. The disadvantage is the creation of the category of "other" breaches, which involves the violation of all the remaining provisions of the Conventions, some of which are arguably less categorically penal. Nevertheless, the introduction of the system of grave breaches cannot alter the possibility that the other breaches may be considered war crimes under the customary law of war. Some national statutes provide that violations other than grave breaches may also give rise to criminal responsibility, without necessarily being subject to universal jurisdiction. Moreover, the list of grave breaches may be expanded through treaty interpretation, and various types of conduct may be treated as war crimes.¹⁶⁸

Until recently, the accepted wisdom was that neither common Article 3 (which is not among the grave breaches provisions of the Geneva Conventions) nor Additional Protocol II (which contains no provisions on grave breaches) provided a basis for universal jurisdiction, and that they constituted, at least on the international plane, an uncertain basis for individual criminal responsibility.¹⁶⁹ It has been asserted that the normative customary law rules applicable in noninternational armed conflicts do not encompass the criminal element of war crimes. In commenting on the proposed draft statute for the ICTY, the International Committee of the Red Cross "underline[d] the fact that, according to International Humanitarian Law as it stands today, the notion of war crimes is limited to situations of international armed conflict."¹⁷⁰ The final report of the United Nations War Crimes Commission (for Yugoslavia) reached the same conclusion.¹⁷¹

¹⁶⁸ This happened in the case of rape. See Meron, *Rape as a War Crime*, *supra* note 1, at 426–47 (concerning the readiness of the International Committee of the Red Cross and the U.S. government to regard rape as a grave breach or war crime). Moreover, the indictments presented by the ICTY prosecutor against Međaković and others (No. IT-02-65-I, Initial Indictment, paras. 22.8–22.10 (Feb. 13, 1995)), and against Tadić and others (No. IT-94-1-I, Initial Indictment, paras. 4.2–4.4 (Feb. 13, 1995)) treat "forcible sexual intercourse" as "cruel treatment" in violation of the laws or customs of war recognized by Article 3 of the ICTY Statute and common Article 3(1)(a) of the Geneva Conventions, and also as a grave breach of the Conventions of causing "great suffering" under Article 2(c) of the ICTY Statute. "Rape" is treated as a crime against humanity recognized by Article 5(g) of the Statute of the Tribunal. Prosecutor v. Kunarac, *supra* note 136, paras. 125–33, 179–85.

¹⁶⁹ One of the legal advisers of the International Committee of the Red Cross thus wrote: "IHL applicable to non-international armed conflicts does not provide for international penal responsibility of persons guilty of violations." Denise Plattner, *The Penal Repression of Violations of International Humanitarian Law Applicable in Non-international Armed Conflicts*, 30 INT'L REV. RED CROSS 409, 414 (1990). The chapter on execution of the Convention in each of the 1949 Geneva Conventions contains provisions on penal sanctions. For example, for the grave breaches provisions of the Fourth Geneva Convention, see Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, Arts. 129–30, 6 UST 3516, 75 UNTS 287.

¹⁷⁰ Some Preliminary Remarks by the International Committee of the Red Cross on the Setting up of an International Tribunal (Feb. 22, 1993), reprinted in 2 VIRGINIA MORRIS & MICHAEL P. SCHARF, AN INSIDER'S GUIDE TO THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA 391, 392 (1995).

¹⁷¹ The UN War Crimes Commission reported that "the content of customary law applicable to internal armed conflict is debatable. As a result, in general . . . the only offences committed in internal armed conflict for which universal jurisdiction exists are 'crimes against humanity' and genocide, which apply irrespective of the conflicts' classification." Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992), UN Doc. S/1994/674, annex, para. 42. In addition, the report stated that "there does not appear to be a customary international law applicable to internal armed conflicts which includes the concept of war crimes," and emphasized that "the violations of the laws or customs of war referred to in article 3 of the statute of the International Tribunal [for the Former Yugoslavia] are offences when committed in international, but not in internal armed conflicts." *Id.*, paras. 52, 54.

As early as the discussions of the ICTY Statute, however, voices urging international criminalization of violations of common Article 3 and Additional Protocol II had been heard. In the Security Council, Ambassador Madeleine Albright explained the U.S. understanding that the “laws or customs of war” in Article 3 of the Statute (which is illustrative, not exclusive) “include all obligations under humanitarian law agreements in force in the territory of the former Yugoslavia at the time the acts were committed, including common article 3 of the 1949 Geneva Conventions, and the 1977 Additional Protocols to these Conventions.”¹⁷² An additional basis for considering common Article 3 applicable to the Yugoslav conflicts is the dictum of the International Court of Justice that common Article 3 contains rules that “constitute a minimum yardstick,”¹⁷³ or a normative floor, for international conflicts. With amazing speed, international conceptions of common Article 3 have changed and it is now generally accepted that its violation triggers individual criminal responsibility in noninternational armed conflicts. There is no moral justification, and no truly persuasive legal reason, for treating perpetrators of atrocities in internal conflicts more leniently than those engaged in international wars. When the ICTR Statute was debated in the Security Council, no state opposed treating violations of common Article 3 and Additional Protocol II as bases for the individual criminal responsibility of perpetrators.

Since the Nuremberg and Tokyo Tribunals showed themselves ready to proceed against violations of the 1907 Hague Regulations Respecting the Laws and Customs of War on Land¹⁷⁴ and the 1929 Geneva Convention Relative to the Treatment of Prisoners of War,¹⁷⁵ neither of which contains provisions on punishment of breaches or penalties, no one has seriously questioned that some acts of individuals that are prohibited by international law constitute criminal offenses, even when the instrument lacks an accompanying provision establishing the jurisdiction of particular courts or a scale of penalties.

Whether international law creates individual criminal responsibility depends on such considerations as whether the prohibitory norm in question is directed to individuals, states, groups or other authorities, and/or all of these.¹⁷⁶ The extent to which the prohibition is addressed to individuals, whether the prohibition is unequivocal in character, the gravity of the act, and the interests of the international community are all relevant factors in determining the criminality of various acts.

That an obligation is addressed to governments does not dispose of the penal responsibility of individuals, if individuals must carry out that obligation. The Nuremberg Tribunals thus considered as binding not only on Germany, but also on individual defendants, those provisions of the 1929 Geneva Convention and the 1907 Hague Convention that were addressed

¹⁷² UN Doc. S/PV.3217, at 15 (1993). The prosecution at the Yugoslavia Tribunal has followed this approach in treating forcible sexual intercourse as cruel treatment or torture in violation of common Article 3(1)(a). The prosecution brings actions for violations of common Article 3 as if they were violations of the laws or customs of war. Thus, the initial indictment against Dragan Nikolić (No. IT-94-2-I (Nov. 7, 1994)) states at paragraph 16.2 that Nikolić “violated the Laws or Customs of War, contrary to Article 3(1)(a) of the [Fourth] Geneva Convention” by participating in cruel treatment of certain victims. More generally, in its introductory paragraphs the indictment charges the accused with “[v]iolations of the Laws or Customs of War, including those recognized by Article 3 of the Fourth Geneva Convention.” On common Article 3 in the Yugoslavia Statute, see also James C. O’Brien, *The International Tribunal for Violations of International Humanitarian Law in the Former Yugoslavia*, 87 AJIL 639 (1993).

¹⁷³ *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, Merits, 1986 ICJ REP. 14, 114, para. 218 (June 27).

¹⁷⁴ 1907 Hague Regulations, *supra* note 19.

¹⁷⁵ 1929 POW Convention, *supra* note 74.

¹⁷⁶ See Meron, *International Criminalization*, *supra* note 1, at 562; see generally NGUYEN QUOC DINH, *DROIT INTERNATIONAL PUBLIC* 621 (Patrick Daillier & Alain Pellet eds., 5th ed. 1994).

to “belligerents,” the “occupant,” or “an army of occupation.”¹⁷⁷ As the International Military Tribunal so eloquently stated, “Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.”¹⁷⁸ This principle, however, should not obscure the fact that in some crimes states play a critical role, and that the criminal responsibility of individuals is cumulative with state responsibility. States must remain answerable for such collective crimes as those committed by the Nazis during World War II.

Typically, norms of international law have been addressed to states. They have engaged, in case of violation, the international responsibility of the state.¹⁷⁹ With increasing frequency, however, international law, and especially the law of war, has directed its proscriptions both to states and to individuals and groups. Indeed, a principal purpose of the punishment of war criminals is to improve compliance with the law; this goal can be achieved only through individual prosecutions. Moreover, treaties are increasingly being interpreted as creating individual criminal liability as well as state responsibility. The trend toward imposing individual criminal responsibility for violations of a mounting number of norms of international law is clearly ascendant. International conventions¹⁸⁰ that proscribe certain activities of international concern without creating international tribunals to try the violators characteristically obligate states to prohibit those activities and to punish the natural and legal persons under their jurisdiction for violations in accordance with national law. That international rules are normally enforced by national institutions and national courts applying municipal law does not in any way diminish the status of the violations as international crimes.

Generality to Specificity

In a development related to the criminalization of prohibited acts, penal provisions of international law have tended over time to shift from making brief references to the laws and customs of war, to including more or less comprehensive lists of specific crimes. However, the list approach has a fairly long pedigree: as noted above, the report of the commission established by the Preliminary Peace Conference in 1919 adopted a formal list of thirty-two crimes.¹⁸¹ This approach was also taken in the lists of grave breaches in the 1949 Geneva Conventions, and in the expanded list of grave breaches in Additional Protocol I to the Geneva Conventions. Nevertheless, in Article 228 of the Treaty of Versailles itself, the German government recognized the right of the Allied and Associated Powers to bring persons before military tribunals who were accused of having committed acts simply in violation of the laws and customs of war.¹⁸² Similarly, the Nuremberg Charter stated the principal categories of crimes within the

¹⁷⁷ *United States v. Von Leeb* (“The High Command Case”), in 11 IMT TRIAL, *supra* note 2, at 462, 537, 539–40 (1948).

¹⁷⁸ 1 *id.* at 223.

¹⁷⁹ Compare “crimes of state” in the meaning of Article 19 of the International Law Commission’s Draft Articles on State Responsibility (part one), adopted by the ILC on first reading. [1976] 2 Y.B. Int’l L. Comm’n, pt. 2, at 73, 95–96, UN Doc. A/CN.4/SER.A/1976/Add.1 (pt. 2).

¹⁸⁰ *E.g.*, Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, Jan. 13, 1993, Art. VII, S. TREATY DOC. NO. 21, 103d Cong. (1993), 1974 UNTS 45.

¹⁸¹ WAR CRIMES COMM’N HISTORY, *supra* note 12, at 34–35.

¹⁸² Versailles Treaty, *supra* note 52; *see also* WWI Commission, *supra* note 31, at 112–15; CARNEGIE ENDOWMENT FOR INTERNATIONAL PEACE, VIOLATION OF THE LAWS AND CUSTOMS OF WAR 16–19 (Division of International Law, Pamphlet No. 32, 1919). The commission recommended prosecuting all those guilty of offenses against “the laws and customs of war and the laws of humanity.” WWI Commission, *supra*, at 118.

Tribunal's jurisdiction (crimes against peace, crimes against humanity, and war crimes) at a high level of generality.

The ICTY and the ICTR Statutes contain far more detailed lists of crimes. In contrast to the draft ICC Statute prepared by the International Law Commission in 1994, which did not attempt to codify crimes but referred to such broad categories as crimes under general international law or certain listed treaties,¹⁸³ the Rome Statute lists and defines crimes and enumerates those that it deems applicable to noninternational armed conflicts. This approach has the advantage of preventing or reducing *ex post facto* challenges, and the detailed and comprehensive nature of the lists harmonizes more closely with the principle of *nullum crimen*. The latter approach is clearly ascendant in contemporary practice. The specificity approach has also been enhanced by the detailed and elaborate discussion of prohibitory norms in the case law of the tribunals.

Sources of Law

Like the ICTY, other international criminal tribunals are bound by the principle of *nullum crimen sine lege*. Indeed, this principle has been much discussed with respect to the Nuremberg Tribunals. Customary law was essential to the Nuremberg Tribunals' ability to convict Nazi war criminals: the Geneva Prisoner of War Convention of 1929 was not applicable on the eastern front, and the Fourth Hague Convention was challenged on the ground that the situation of the belligerents did not conform with its *si omnes* clause, as not all of them were party to it.¹⁸⁴ Moreover, the applicable provisions of the Geneva and Hague Conventions that define the relevant substantive proscriptions and are considered declaratory of customary law did not expressly criminalize their violation.¹⁸⁵ The Nuremberg Tribunals therefore faced the question as to whether, for the purposes of the legality principle, offenders had been sufficiently on notice that their conduct entailed criminal liability. The International Military Tribunal described the Nuremberg Charter as both the exercise of the sovereign power of the victorious countries and "the expression of international law existing at the time of its creation."¹⁸⁶ In dismissing the challenge based on the principle of legality, the IMT noted that the law of war was to be found in treaties, as well as in the customs and practices of states and the general principles of justice.¹⁸⁷

Addressing this question, the Military Tribunal under Control Council Law No. 10 similarly explained:

It is not essential that a crime be specifically defined and charged in accordance with a particular ordinance, statute, or treaty if it is made a crime by international convention, recognized customs and usages of war, or the general principles of criminal justice common to civilized nations generally. If the acts charged were in fact crimes under international law when committed, they cannot be said to be *ex post facto* acts or retroactive pronouncements.¹⁸⁸

¹⁸³ See Draft Statute of the International Criminal Court, Art. 20, Report of the International Law Commission on the Work of Its Forty-sixth Session, UN GAOR, 49th Sess., Supp. No. 10, at 76, UN Doc. A/49/10 (1994).

¹⁸⁴ THEODOR MERON, HUMAN RIGHTS AND HUMANITARIAN NORMS AS CUSTOMARY LAW 41–62 (1989).

¹⁸⁵ Meron, *International Criminalization*, *supra* note 1, at 564.

¹⁸⁶ 1 IMT TRIAL, *supra* note 2, at 218.

¹⁸⁷ *Id.* at 221.

¹⁸⁸ United States v. List, 11 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, at 759, 1239 (1950).

Some criticized the Nuremberg Tribunals for this relatively loose approach to the legality principle.¹⁸⁹ To be sure, the Nuremberg Tribunal did not provide a very satisfactory explanation as to how aspects of the 1929 Geneva Prisoner of War Convention and the 1907 Fourth Hague Convention had so quickly metamorphosed into customary norms.¹⁹⁰ Nonetheless, I believe that, under the circumstances the tribunals' general approach was appropriate.¹⁹¹ The crimes with which the Nuremberg defendants were charged—including murder, torture, and enslavement, carried out on an enormous scale—were so clearly criminal under every domestic legal system in the world that it could hardly be said that the prospect of criminal liability for them was unpredictable. Ultimately, the *nullum crimen* principle turns on fairness to the defendant; in my view, it cannot be said that the Nuremberg war crimes proceedings compromised that fairness. One thing is clear, however. The Nuremberg Tribunals rooted the principle of legality not only in custom, but also in treaties and general principles of criminal law. The criticism of the proceedings for violating the legality principle was directed primarily to crimes against peace, and secondarily to crimes against humanity. The tribunals' exercise of war crimes jurisdiction triggered few dissents.

The ICTY has likewise declined to engage in an overly formalistic assessment of custom in instances where the criminality of conduct is obvious (or, to use the Nuremberg terminology, where it is clearly established under the relevant "general principles" of law). In its seminal interlocutory decision on jurisdiction in the *Tadić* case, the ICTY appeals chamber stated that to be subject to prosecution by the Tribunal as a violation of the laws and customs of war, an offense must violate either customary law or a treaty that was unquestionably binding on the parties at the time of the alleged offense.¹⁹² The Nuremberg trials, of course, serve as a precedent for the principle of legality to be satisfied by reference to treaties that were in force at the time of the offense. However, in the case of the ICTY, such reliance on treaties must be reconciled with the statement in the United Nations secretary-general's 1993 report that the Tribunal should apply rules of international humanitarian law that beyond any doubt form part of customary law. The *Tadić* panel found that the purpose of this statement was merely to avoid a conflict with the *nullum crimen* principle when a party to the conflict was not a party to a treaty; the statement therefore does not exclude reliance on treaties in the absence of potential conflict.¹⁹³ If the principle of legality can thus be satisfied by grounding a prosecution in a treaty binding the parties, why has the ICTY not made treaty law the principal foundation of its approach to *ratione materiae* jurisdiction, preferring instead to rely on customary principles (especially since treaties have the added advantage of satisfying the principle of specificity¹⁹⁴)? One obvious reason was to follow as closely as possible the language of the secretary-general's report. Another may have been to avoid doubts as to succession to treaties, their continuing binding character and reservations, and the scope and validity of ad hoc agreements between the belligerents. Reliance on customary law provides additional comfort because of its generality. In addition, where the ICTY has shown some readiness to apply treaties, they were, wholly or largely, declaratory of customary law—for example, the Geneva Conventions and

¹⁸⁹ Hans-Heinrich Jescheck, *The General Principles of International Criminal Law Set out in Nuremberg, as Mirrored in the ICC Statute*, 2 J. INT'L CRIM. JUST. 38, 40–42 (2004).

¹⁹⁰ MERON, *supra* note 184, at 37–41.

¹⁹¹ Meron, *International Criminalization*, *supra* note 1, at 564–67.

¹⁹² Prosecutor v. Tadić, *supra* note 143, paras. 94, 143.

¹⁹³ *Id.*, para. 143; see Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), UN Doc. S/25704, para. 34 (1993), reprinted in 32 ILM 1163, 1170 (1993).

¹⁹⁴ Jescheck, *supra* note 189, at 41.

Additional Protocol I. This factor only underscores the point that the ICTY has found customary law to be a more solid basis for its jurisdiction.

The legality principle governs the other international and mixed criminal tribunals operating today, including the ICTR, the Special Court for Sierra Leone,¹⁹⁵ and the ICC.¹⁹⁶ Since the conflict in Rwanda was noninternational in character, and since (as the secretary-general noted when the ICTR Statute was adopted) Rwanda had been party to the relevant international humanitarian law treaties, which constituted part of its domestic law, the ICTR generally need not consider whether a violation of its Statute was also a violation of customary law at the time of the offense; it suffices that the treaties were violated.¹⁹⁷

As much as possible, the Rome Conference sought to formulate the content of customary international law in the language of the Statute. Subjects on which it exceeded customary law may pose particular difficulties when nationals of nonstate parties to the ICC Statute are prosecuted.

III. WAR CRIMES LAW GOING FORWARD: THE INFLUENCE OF THE NUREMBERG AND MODERN TRIBUNALS

The Nuremberg trials had an almost incalculable effect on normative international law, and their success went far toward ending the impunity of political and military leaders around the world. But if one of the goals at Nuremberg was to make the call “never again” a reality, it did not succeed as much as its proponents might have hoped. Sadly, the second half of the twentieth century and, now, the beginning of the twenty-first have been so marked by atrocities that one commentator has termed the period “the age of genocide.”¹⁹⁸ From the brutal regime of Pol Pot to Saddam Hussein’s extermination of ethnic Kurds; from the genocide in Rwanda to the massacres in Darfur; from the “ethnic cleansing” in Bosnia and the Šrebreniča enclave to the attacks on Kosovo Albanians; and from Sierra Leone to Uganda; the world has continued to witness malevolent deeds that surpass understanding.

These atrocities recur, not only in spite of the Nuremberg proceedings and their legacy, but also in spite of the increasing interest in international and mixed criminal tribunals, and an unprecedented interest in international humanitarian and criminal law. Thus, one may reasonably ask: since such atrocities still occur, what is the legacy of the Nuremberg Tribunals and their latter-day heirs? Why can we still call them a success? Or can we?

It would be wrong to conclude that the international tribunals do not have a deterrent effect or perform an important function simply because atrocities have continued to be committed. After all, domestic criminal law can hardly be said to have no deterrent force simply because some citizens continue to commit murders or assaults. It is impossible to measure how many such crimes would occur were no system of punishment in place. In any event, international criminal tribunals serve a variety of noble goals beyond deterrence. By throwing the consequences of ethnic and religious hatred into stark relief, the tribunals’ trials have demonstrated the viciousness of those who built their power by encouraging their followers to embrace such hatred, which in turn has contributed to the rule of law in the region. The ICTY, for one, has

¹⁹⁵ See Agreement on the Establishment of a Special Court for Sierra Leone, UN–Sierra Leone, Jan. 16, 2002, UN Doc. S/2002/246, annex, app. 2 (to which the Statute of the Special Court is attached); Sierra Leone, Special Court Agreement, 2002 (Ratification) Act, Act No. 9, Mar. 29, 2002.

¹⁹⁶ For a detailed discussion of legality in those courts, see Meron, *Revival*, *supra* note 130, at 829–32.

¹⁹⁷ Report of the Secretary-General Pursuant to Paragraph 5 of Security Council Resolution 955 (1994), UN Doc. S/1995/134, paras. 11–12.

¹⁹⁸ SAMANTHA POWER, *A PROBLEM FROM HELL: AMERICA AND THE AGE OF GENOCIDE* (2002).

made a fundamental and lasting contribution to bringing justice to the peoples of the former Yugoslavia, for example, by helping the large-scale return of refugees across ethnic boundaries. The Tribunal's very existence has served an educational function far beyond the borders of the Balkan region. In no small part because of the Tribunal, international humanitarian law and human rights law today enjoy greater currency and are better understood throughout the world than just a decade ago. The existence of the ICC may prompt more extensive prosecution of war criminals and their ilk in the courts of the countries within its jurisdiction.

After some ten years, the ICTY and the ICTR have established an impressive body of jurisprudence on both substantive international humanitarian and criminal law and, equally important, criminal procedure and evidence. Their judgments have filled the gaps in international procedural and evidentiary law left by the Nuremberg decisions, and their success serves as an example for national prosecutions of those who commit atrocities. Their jurisprudence will also contribute to the success of other courts designed to enforce international humanitarian law, such as various national courts, as well as the Special Court for Sierra Leone and the ICC, both of which have used the tribunals as a model. The development of substantive international criminal law, as well as the law of procedure and evidence, and the creation of enforcement mechanisms—which characterized the end of the twentieth century—have left much better tools for ending impunity and enforcing accountability.

Over the past decade, in dozens of trials and appeals, the tribunals have shown that international criminal and humanitarian law can be applied in actual cases—not just a few times, as in Nuremberg and Tokyo, but repeatedly, and in a manner even more rigorous than at the post-World War II trials. The tribunals have in fact served as a training ground for the next generation of leaders in the field of international criminal law. They have helped to instill the idea that justice, not retribution or impunity, should be the response to horrific crimes.

One must not forget, however, that international criminal law does not provide all the answers. It is only one component of the highly complicated reactions to humanitarian emergencies. Just as domestic criminal law is not expected to address all the effects of serious crimes, so international criminal trials should not be expected to address all of the effects of large-scale atrocities. Rather, a careful and concerted response by the international community—including diplomats, national governments, human rights organizations, and private individuals—is needed. A multifaceted approach that marshals legal judgments by national courts—which bear the primary responsibility—and international courts and tribunals, as well as other tools—such as asset freezes, travel restrictions, and political stigmatization—should have a meaningful impact on deterring future crimes. As the risk of being caught in the web of criminal tribunals grows, so will the prospects for deterrence. Given the limited number of international criminal tribunals and their scarce resources, war crimes prosecution by national courts will assume ever more importance.

Still, in the shifting landscape of international relations, crimes committed by sovereign entities are only part of the picture. More and more, atrocities are being perpetrated by non-governmental actors who purport to operate entirely outside of international norms. Casting themselves as interstitial players, these groups—primarily terrorists and religious fanatics—consider themselves exempt from legal rules and bound only by their own moral code.

Groups like Al Qaeda refuse to acknowledge the legitimacy or applicability to their own conduct of all accepted rules of humanitarian and criminal law. The challenge for the international community, then, is to reassert humanitarian and criminal law in the face of these professions

of impunity—to maintain the foothold gained at Nuremberg and continue to extend the principle of universality to all peoples, groups, and nations. This task involves both implementation of systems for criminal justice and enhancement of a system of universal values.

As the ad hoc tribunals move toward the completion of their mandates, the future of effective compliance with international criminal law will depend on the ICC, and national and mixed tribunals. The reference of the Darfur case to the ICC has created a great opportunity and an immense challenge for the Court.

The mission of the IMT at Nuremberg, in Justice Jackson's words, was "to summon such detachment and intellectual integrity" to the task that the trial would "commend itself to posterity as fulfilling humanity's aspirations to do justice."¹⁹⁹ Sixty years later, the task of international criminal justice remains the same: to achieve justice through reason rather than force; to uphold the basic principles of human rights and due process; to improve compliance with the law; and to eliminate impunity, not through vengeance, but through the rule of law. Work always remains to be done, but with these noble goals as the lodestar, progress is being made, and the expanding universe of international humanitarian law is stronger as a result.

¹⁹⁹ Jackson Statement, *supra* note 2, at 101.