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War Crimes: History, Basic Concepts, and Structures

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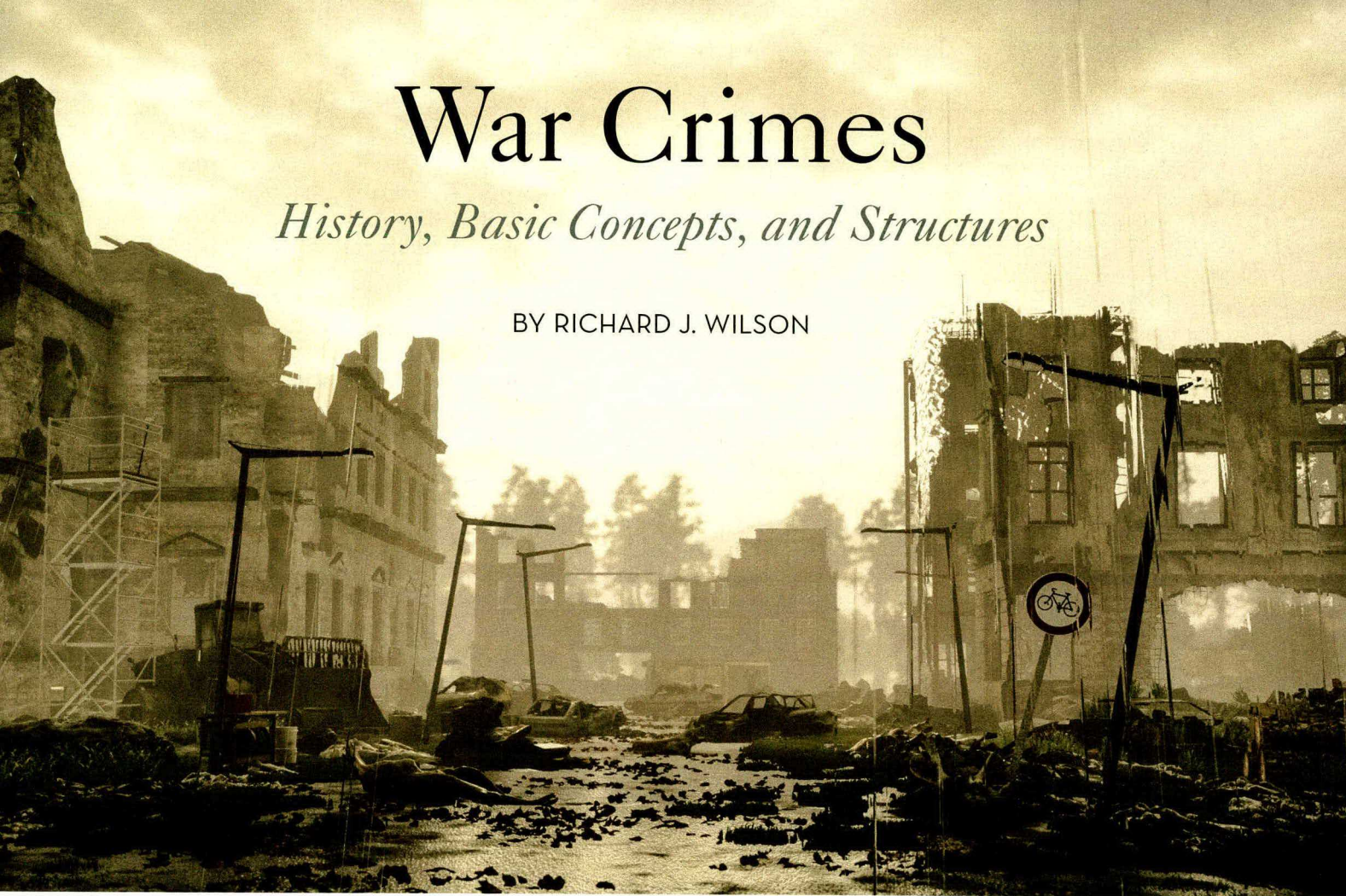
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War Crimes

History, Basic Concepts, and Structures

BY RICHARD J. WILSON



The state of peace among men living side by side is not a natural state; the natural state is one of war. This does not always mean open hostilities, but at least an unceasing threat of war. A state of peace, therefore, must be established....

—Immanuel Kant, *Perpetual Peace* (1795)

On May 24, 2022, the *Washington Post* carried front-page news that a court in Ukraine had sentenced a 21-year-old Russian soldier, Vadim Shishimarin, to life imprisonment for the war crime of premeditated murder of a civilian, 62-year-old Oleksandr Shelipov. The session was the first war crimes trial in Ukraine since Russia's invasion three months earlier. Shishimarin, said to be a tank commander, was present in court, captured and accused of shooting a man walking his bicycle near his home in the Sumy region because he had a cell phone to his ear and could alert authorities to the Russian presence. By May 18, Shishimarin had pled guilty to the offense, arguing that he had acted under orders, but admitting the facts. The defendant's court-appointed lawyer announced that he would appeal, eventually seeking intervention of the European Court of Human Rights if unsuccessful in domestic courts.

Ukraine's prosecutor general, Iryna Venediktova, announced that the government had evidence of "over 13,000" war crimes committed by invading Russian troops. In Russia, prosecutors announced that war crimes trials of captured Ukrainians would also take place, pointing particularly to the more than 1,900 Ukrainian fighters who had surrendered from the Azovstal steel plant in Mariupol. Experts worried that the Russian justice system, under strong state control, could result in show trials for soldiers accused of being "Nazis" by Vladimir Putin. Those fears appear to be confirmed with death sentences imposed on two British nationals fighting with the Ukrainian army in June, who should have been treated as prisoners of war.

Stories of war crimes, sadly, have become an almost daily occurrence in global news outlets, as have broader questions of criminal responsibility in that

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conflict. Could Russia's military leadership, indeed Vladimir Putin himself, for example, face charges or trial for war crimes? If so, where? Are all war crimes trials merely glorified show trials? Many have suggested that Russia's military and civilian government leaders may be guilty of the most serious of war crimes: genocide, crimes against humanity, or waging aggressive war. Pundits abound.

For many in the United States, even experienced lawyers working in the criminal justice system, war crimes are a different animal, something seldom prosecuted in the United States, and certainly not familiar terrain for most prosecutors and defense counsel, let alone judges. This article will attempt to give shape to some of the basic concepts involved in the history and evolving structures of war crimes prosecutions. It does not pretend to be a comprehensive guide to all war crimes; such a task is far beyond the scope of this work. Indeed, scholars have

IN WARTIME, THE PRINCIPLE OF COMBATANT IMMUNITY PROVIDES SUCH ACTIONS WITH A CLOAK OF PROTECTION. BUT THE IMMUNITY IS NOT UNLIMITED.

filled volumes on the nature of war crimes and the issues involved in accountability for them. Instead, it will introduce some basic concepts and structures, with examples as guidance. It is not a comprehensive catalog of all available offenses in domestic or international law, or of the defenses that can be raised against such charges. Because this is an area increasingly addressed by international law and institutions, the article will also address broader questions such as how international humanitarian law—the law of war—comes into play, and whether war itself is legal. The latter is a question we seldom ask anymore, but it should always be somewhere in legal and political discussions. States as well as individuals can be legally responsible for aggressive war, and, in international law, tribunals can ascertain both individual and state responsibility.

What Are War Crimes?

The very idea that war can produce criminal liability seems somewhat anomalous. Ancient rules permitted, indeed applauded, the killing or wounding of legitimate opponents in war, as well the destruction, occupation, or seizure of physical military objectives. In times of peace, these acts would be crimes of murder, assault, destruction of property, or other serious offenses. However, in wartime, the principle of combatant immunity provides such ac-

tions with a cloak of protection. But the immunity is not unlimited. Telford Taylor, one of the Nuremberg prosecutors and author of the modern classic *Nuremberg and Vietnam: An American Tragedy* (1970), argues that the term “war crime” is a misnomer, “for it means an act that remains criminal even though committed in the course of war, because it lies outside the area of immunity prescribed by the laws of war.” *Id.* at 20. This article will not explore the more complex questions of what constitutes an armed conflict, when conflicts begin or end, or what constitutes an occupying or neutral power. However, it will offer brief analysis of each of the four categories of crimes in war that are most recognized today: war crimes, crimes against humanity, genocide, and aggressive war, or crimes against peace.

War Crimes. The most significant and fullest articulation of what constitute war crimes came with the Nuremberg trials after World War II—about which more below—and the adoption of the four Geneva Conventions in 1949, together with their Additional Protocols in 1977. In 1949, the International Committee of the Red Cross (ICRC), which has led the way on the systematic development of the law of war, set out the four Geneva Conventions, which deal with a wide range of topics but focus most heavily on the protection of civilian populations and prisoners of war. They are about how war is conducted, not whether and how to go to war at all. They are now universally adopted treaties—the United States has long been a party to them—and they use the term “grave breaches” to refer to what constitutes commission of a war crime. The list is long, but representative examples include the willful killing of protected civilians or legitimate prisoners of war; torture or inhuman treatment, including biological experiments; the taking of hostages; extensive destruction of property not justified by military necessity; and willfully depriving a prisoner of war of the right to a fair and regularly constituted trial. Other international treaties, adopted as the Hague Conventions, deal with the means and methods of war and forbid the use of poison or poisonous weapons, the use of weapons calculated to cause unnecessary suffering, pillage, and bombardment of undefended buildings, villages, or towns, among other limitations. Together, these two bodies of treaty law give shape to most domestic and international definitions of war crimes: crimes committed during war and crimes using prohibited means.

Perhaps the most significant limitation on contemporary prosecution of war crimes, whether in the United States or elsewhere, is the inherent limitations of international humanitarian law. The Geneva Conventions, by their terms, apply overwhelmingly to international armed conflicts. Those are traditional

wars between countries, such as the armed conflict between Russia and Ukraine. Such wars, however, are increasingly rare in contemporary history; most armed conflicts in recent decades are either what we call civil wars, wars that involve a state with some non-state actor, such as a rebel or insurgent force, or conflicts involving the various terrorist groups now operating on both a local and global level. For those “non-international” armed conflicts, as the Geneva Conventions call them, the formal rules are much more limited.

The most explicit provisions on non-international armed conflicts are in Common Article 3, a single provision that appears in identical form in each of the four Geneva Conventions. Those provisions provide more limited protections in non-international armed conflicts than those amply delineated in the Conventions. The US Supreme Court famously found that Common Article 3 applied to protect prisoners at Guantanamo Bay, in *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006). The Court rejected arguments that, as what the government called nonprivileged enemy combatants, the detainees enjoyed no protection under the laws of armed conflict. Additional Protocol 2 to the Geneva Conventions, adopted in 1977, deals more fully with non-international armed conflicts. The United States, however, has not ratified that treaty. The ICRC argues that most provisions relating to international armed conflict also apply to internal conflicts by means of customary international law—the actual established practice of nations—but that position, too, is controversial and not accepted by the United States.

Crimes Against Humanity. Both this category and the next, genocide, are crimes of mass atrocity. Crimes against humanity first appeared in codified form as part of the Nuremberg Charter, with its further provisions for an International Military Tribunal, in article 6(c). It was included to cover

murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.

A similar provision was included for the Tokyo trials but did not play as important a role there. The Nuremberg provision was designed to reach issues that traditional war crimes could not, issues that were the defining features of the Nazi regime, particularly persecution of Jews and the ensuing Holocaust. Modern versions of the crime have expanded its



scope to include rape and torture and have included language that the offending acts be committed “as part of a widespread or systematic attack directed against any civilian population.”

Genocide. The crime of genocide famously came into being through the efforts of a Polish jurist, Rafael Lemkin, who developed the idea of acts directed not at persons, in their individual capacity, as with crimes against humanity, but acts directed at the destruction of groups. Genocide, too, was discussed at Nuremberg, and even appeared briefly in the indictments and oral arguments, but was not included among the crimes charged or eventual verdicts. The crime came into being through the adoption of the first modern human rights treaty, the Convention on the Prevention and Punishment of the Crime of Genocide, adopted by the UN in 1948. The Convention, in its article II, included a definition of genocide that has largely stood the test of time: “acts committed with intent to destroy, in whole or part, a national, ethnical, racial or religious group,” by such means as killing or serious bodily or mental harm, measures to prevent births, forcibly transferring children to another group, or inflicting conditions to bring about the group’s destruction.

Philippe Sands, a British barrister and law professor, recently wrote a poignant and eloquent book, *East West Street* (2016), that documents the origins of the offenses of crimes against humanity and genocide. He links the history of his own ancestors with that of Hersch Lauterpacht and Rafael Lemkin,

all Jews from the same town of what is now Lviv, in western Ukraine, who shaped the concepts. He notes that an “informal hierarchy” has developed in which genocide has evolved into the “crime of crimes,” whereby politicians and activists use the word to evoke the worst possible crime. That status may move prosecutors to charge the crime, when, in his view, it is harder to prove than crimes against humanity. *Id.* at 364. This may explain in part why US politicians are so reluctant to invoke the term for mass crimes committed outside of the United States, and why both Russia and Ukraine have charged genocide, Russia to justify its invasion, and Ukraine to describe the devastation wrought by the Russians in its territory. It is also noteworthy that the first modern conviction for genocide did not occur until 1998, with the conviction for that crime of Jean-Paul Akayesu, a former teacher and mayor of a small community in Rwanda, during the 1994 genocidal rampage in that country. *Prosecutor v. Akayesu*, ICTR Judgment (Sept. 2, 1998).

Aggression. The crime of aggression was intended to be the centerpiece of the Nuremberg prosecutions. It was hoped that all defendants would be found guilty of waging aggressive war, there called “crimes against the peace.” Eventually, 12 of the 21 defendants in the courtroom were convicted of that crime, while most were convicted of crimes against humanity. Aggression is particularly challenging in law because it easily slips into the moral terrain of which wars are “just” and which are “unjust,” a question that has plagued theologians and experts for centuries. One must decide if armed intervention in another’s territory is justified or unjustified, provoked or merely defensive. The Nuremberg Charter defined crimes against the peace as:

planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing.

Charter of the Int’l Military Tribunal, art. 6(a). The definition leaves open what exactly is “a war of aggression,” though the judges of the Tribunal had no difficulty in finding guilt for what they considered, in an oft-quoted passage of their 1946 judgment, to be “the supreme international crime” because “it contains within itself the accumulated evil of the whole.” Current debates about the existence and definition of the crime of aggression are developed below.

War Crimes Prosecutions in US History

US law on war crimes is both old and new, both domestic and international. Trials of war crimes in the

United States have traditionally been carried out in military tribunals, via courts martial or military commission. During the Civil War, President Lincoln adopted General Order No. 100, a document prepared by a German immigrant and veteran of European wars, Francis Lieber, who became a professor of the new field of law of war at Columbia University. The “Lieber Code” included provisions for punishment of war crimes and was the basis for the prosecution of Mary Surratt and others following President Lincoln’s assassination.

One reason so little is known about war crimes here in the United States is because war crimes prosecutions are so rare. The United States adopted a War Crimes Act (18 U.S.C. § 2441) in 1996, during the Clinton administration. That act defines war crimes as any of the “grave breaches” of the Geneva Conventions noted above, and others, and certain provisions of the Hague Conventions. There has never been a prosecution under the act. The statute follows the traditional list of what constitutes a war crime and limits application to US nationals who are involved as either perpetrators or victims. It does not allow for universal jurisdiction, which would give authority to US courts to hear evidence of certain serious war crimes against an accused within US jurisdiction, wherever in the world and whenever that offense may have been committed.

This is not to say that the United States does not have other means to address war crimes. The Departments of Justice (DOJ) and Homeland Security each have units that deal with war crimes violations. In DOJ, the Criminal Division has a Human Rights and Special Prosecutions Section, while in DHS, Immigration and Customs Enforcement (ICE) runs a Human Rights Violators & War Crimes Center. The DOJ program deals with war crimes and other violations of human rights, while the ICE program enforces immigration laws barring the entry of war criminals into the United States, and deporting those who enter illegally as war criminals. However, war crimes trials within the United States are still unusual.

Telford Taylor points to early war crimes trials during the American Revolution, during which both Captain Nathan Hale and British Major John André were convicted of spying and hanged. Taylor, *Nuremberg and Vietnam*, *supra*, at 21. A book-length global bibliography on war crimes, published in 1986, touches on a few of the other most significant war crimes trials in US history. They are as noteworthy for their rarity as for their notoriety. One of the earliest trials for war crimes included in the bibliography occurred after the Civil War, when Confederate Captain Henry Wirz was tried in 1865 for war crimes. He was convicted and hung for his role as administrator of the Andersonville Prison in Georgia. The book documents wide

AN INTERNATIONAL GUIDE TO Corporate Internal Investigations

Edited by Mark Beardsworth, Patrick Hanes, Ibtissem Lassoued, Saverio Lembo, and Frances McLeod

Foreword by Sally Yates

Corporate internal investigations are increasingly global in nature and inextricably linked across different legal jurisdictions. Best practice requires a different but complementary approach in each jurisdiction. This means the practitioner will in the least need to have regard to the landscape in any jurisdiction touching the one where they are principally engaged. Local legal advice will almost inevitably be required.

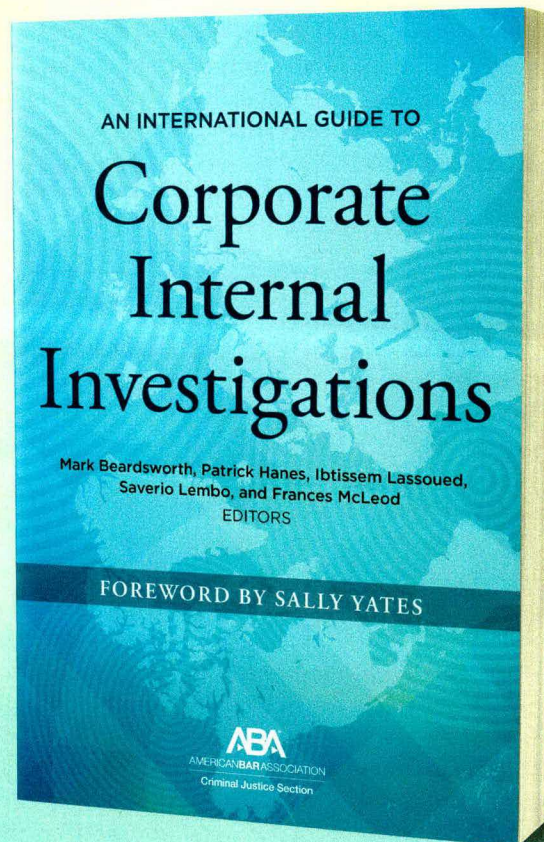
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reports of war crimes by US troops in the Korean conflict (1950–53), mostly during air attacks, but no one was charged. N.E. Tuterow, *War Crimes, War Criminals, and War Crimes Trials—An Annotated Bibliography and Source Book* (1986).

A conspicuous oversight in the book is its failure to mention anything about war crimes trials arising from the relentless campaign by the US military against Native American populations, particularly in the last decades of the 19th century. No mention is made, for example, of the trial of 392 Dakota men for war crimes after their surrender in the Dakota War of 1862. Those trials, lasting only days and profoundly lacking in any due process, resulted in the conviction and death sentences for 303 of the Native Americans. President Lincoln commuted all but 39 sentences, and 38 of those men were hanged for their crimes. Another famous trial was that of the

SOME HAVE CALLED FOR WAR CRIMES PROSECUTIONS OF US LEADERS FOLLOWING THE INITIALLY SECRET DETENTION, STARTING IN 2002, OF MORE THAN 770 SUSPECTED TERRORISTS AT GUANTANAMO BAY FOLLOWING THE ATTACKS OF SEPTEMBER 11, 2001.

20-year-old Brulé Sioux man, Tasunka Ota, known as Plenty Horses, in South Dakota in 1891. He shot and killed Lieutenant Edward Casey, a Seventh Cavalry soldier who had ridden into a tribal gathering to explore diplomatic solutions to an ongoing conflict. Plenty Horses' defense counsel argued that the Sioux were at war with the United States, and since both men were soldiers, the killing was not murder. Plenty Horses had been held by the US Army as a prisoner of war, thus recognizing his status as a combatant, and a jury had no problem acquitting him of the charges based on the combatant's privilege.

Yet another oversight in the bibliography was the World War II trial, in the United States, of eight German soldiers, all of whom had entered the United States clandestinely by submarine in 1942 to carry out acts of sabotage. All wore uniforms at the time they came ashore, presumably so they could later claim combatant status. They were quickly captured and later tried by military commission as spies and war criminals. All were convicted and sentenced to death. Their unsuccessful appeal to the US Supreme

Court is reported in *Ex Parte Quirin*, 371 U.S. 1 (1942); all were soon executed. Lieutenant Colonel Kenneth Royale ably conducted their defense at trial and on appeal, and later became the last Secretary of War, serving under President Truman until forced into retirement for his unwillingness to enforce or carry out Truman's executive order to desegregate the military.

A much more contemporary example comes from the conflict in Iraq, during the Battle of Mosul in 2017. Navy SEAL Eddie Gallagher was charged with the serious war crime of killing a captured enemy soldier, a 17-year-old ISIS fighter in military custody. The case was unusual because it was Gallagher's own men who reported what they saw as his erratic and possibly illegal behavior. After his conviction by court martial and subsequent demotion, President Donald Trump intervened, reversed the demotion, and restored Gallagher's Trident Pin, the SEAL emblem. He later granted Gallagher clemency despite severe criticism from military leaders.

Without a doubt, however, the best remembered and most notorious of US war crimes trials in contemporary history arose from events in March of 1968, in My Lai, a hamlet in Quang Ngai province in South Vietnam. There, US soldiers, acting on orders from superiors to destroy a Viet Cong enclave (subsequently shown to be mistaken), killed more than 500 unarmed civilian men, women, and children, essentially the entire village. Some women, one as young as 12, were gang-raped before their murders. Twenty-six soldiers were charged, but one soldier, Lieutenant William Calley, became the focus of blame, and his trial for war crimes made international news. It also gave increasing momentum to both accountability of US leadership and the ending of the Vietnam conflict. Subsequent publication of the Pentagon Papers in *The New York Times* in 1967 also revealed the depths of US disinformation about the war. The My Lai incident left an indelible mark on the actions of the US military in that war. No other superior officer was ever tried, and Calley himself, though initially sentenced to life imprisonment at hard labor, eventually served only three years of house arrest. The events in My Lai also garnered intense focus within the academic community, giving rise to an acerbic volume called *Crimes of War*, published in 1971 in the wake of the massacre.

Most recently, some have called for war crimes prosecutions of US leaders following the initially secret detention, starting in 2002, of more than 770 suspected terrorists at Guantanamo Bay following the attacks of September 11, 2001. The US government has released or repatriated all but 37 of the detainees, and only eight have been convicted of any crime. Many of the detainees were interrogated under torture in "black sites" or otherwise mistreated. The US invasion of Iraq in 2003, based on spuri-

ous evidence of the existence of weapons of mass destruction, again drew calls by some experts for prosecution of leaders, with massive peace marches taking place in Europe and the United States, calling for the end of the conflict. Iraqi leader Saddam Hussein, captured in ignominious circumstances, stood trial in Iraq for crimes against humanity and was convicted and executed.

International War Crimes Prosecutions

Although the US experience with war crimes is somewhat limited, international war crimes prosecutions, though relatively recent, are significantly more developed. Again, this is not to give primacy to international prosecutions; there are many who believe that only states should conduct war crimes prosecutions. This section will explore the issue of war crimes at the international level, with focus on the landmark post-World War II trials; the ad hoc international criminal tribunals in the former Yugoslavia and Rwanda; the International Criminal Court; the International Court of Justice, and the European Court of Human Rights.

War Crimes Trials After the World Wars. The trial of wartime leaders is relatively new to history. Napoleon was exiled—twice—rather than standing trial for possible war crimes. After World War I, there were calls for accountability of German leadership. The Treaty of Versailles contained a provision “arraigning” Kaiser Wilhelm II of Germany for his offenses against “international morality” and the “sanctity of treaties,” without any formal legal charge. The Dutch government, where he had fled, refused his release to the Allies and granted him asylum in the Netherlands, where he lived out his life. After World War II, many leaders within the Allied forces, including Churchill, called for summary execution of the captured Nazi leadership. Instead, the Allied powers—Russia, Great Britain, France, and the United States—adopted the Nuremberg Charter and its accompanying Charter of the International Military Tribunal, leading to war crimes trials in that German city in 1946. General Douglas MacArthur adopted a similar charter for the later Tokyo war crimes trials in Japan.

The best known of the Nuremberg trials is the International Military Tribunal (IMT), which tried the Nazi leadership in 1945–46 before a tribunal made up of four judges and four alternates, two each from the Allied countries of Russia, the United Kingdom, France, and the United States. Alternates sat through the trial and took part in the judgment. Of the 24 Nazi leaders charged, 21 well-known if infamous individuals appeared in the dock for trial. Martin Bormann was tried in absentia. The defendants included Hermann Göring, Rudolph Hess, Albert Speer, and other notorious leaders of the Reich. Members of the group faced three categories of charges: traditional

war crimes, crimes against humanity, and crimes against peace—the waging of aggressive war. The latter two categories were new, but prosecutors argued that they were well grounded in prior treaties or the customary law of nations, which allowed prosecutors to avoid ex post facto claims, but have been part of the lasting critique of that trial.

Robert Jackson, on leave from the US Supreme Court, served as US chief counsel at the Tribunal. The IMT trial opened on November 20, 1945, and, after 403 sessions held over 216 days, the Tribunal delivered its verdict on October 1, 1946. Often overlooked in the process is the trial and conviction of criminal organizations within the Nazi hierarchy. The tribunal found the Nazi leadership; the Gestapo; the SS, a paramilitary security organization; and the SD, the intelligence agency of the SS, to be culpable as organizations. Of the individual defendants, 12 were convicted of engaging in aggressive war while only two of the defendants were found not guilty of war crimes or crimes against humanity. Ten of the defendants were hanged, seven were sentenced to prison terms, and three were acquitted. Göring committed suicide before his execution.

Lesser known, but important to development of the law on war crimes, are the Nuremberg Military Tribunals, or Subsequent Trials, which took place under US aegis from 1946 through 1949. These 12 trials, under Control Council Law No. 10, grouped various Nazi elements for trial, including, for example, doctors, industrialists, judges, and the *Einsatzgruppen*, or mobile SS death squads. Those trials, together, provided a solid groundwork for future war crimes prosecutions. It would be several decades before the international community had the will to create new tribunals with jurisdiction over war crimes. However, this is not to suggest that there were not war crimes prosecutions at the domestic level. After World War II, there were hundreds of prosecutions in various countries of Europe for war crimes and related offenses, and many

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countries have brought war crimes charges within the domestic regime since.

In the historical shadows of their European counterparts, the Japanese war leadership also stood trial for their war crimes—minus Emperor Hirohito, who retained his throne in the face of strong criticisms that he too should be in the dock. Much of what happened in Tokyo at the International Military Tribunal for the Far East (IMTFE) replicated the structures of the Nuremberg IMT. The tribunal used the same structure for its charges, and roughly the same number of defendants stood in the dock: 28. Many countries were involved in discussions about that structure, unlike the four major powers in Europe. They included Australia, Canada, China, France, India, the Netherlands, New Zealand, the Philippines, the Soviet Union, the United Kingdom, and the

COMMON DEFENSES INCLUDE NECESSITY, COMBATANT'S PRIVILEGE, HEAD-OF-STATE IMMUNITY, OR AMNESTY.

United States. Overall design and operation of the IMTFE finely rested solely in the hands of General Douglas MacArthur, Supreme Commander of the Allied Powers. The charter for the tribunal came out on January 19, 1946, and required that anyone standing trial be charged with crimes against the peace. The 11 judges of the Tribunal came from the Allied Powers: one each from the United States, France, Philippines, China, Canada, New Zealand, India, United Kingdom, Netherlands, the Soviet Union, and Australia.

The trial lasted for over two years, from May of 1946 through November of 1948. It heard testimony from 419 witnesses, with 4,336 pieces of evidence. Many former US POWs testified to atrocities during their detention. The best known of the defendants, most of whom were military leaders, was probably Hideki Tojo, a general in the Imperial Japanese Army and prime minister for much of the war. The final opinion of the judges ran to 1,500 pages; all defendants were found guilty, with dissents issued by three of the judges. One of the defendants was acquitted by virtue of his mental unfitness, and two defendants died during the proceedings. Six defendants, including General Tojo, received death sentences for war crimes, crimes against humanity, and crimes against peace. Another was sentenced to death for war crimes and crimes against humanity. All of those defendants were hanged in 1948. The others received sentences ranging from life imprisonment to a term of years. Like Nuremberg, there were many “subsequent” war crimes trials in the Far East, although they

were carried out by many governments in the region rather than the United States. The last ended in 1951; more than 5,500 individuals were tried and convicted, and many were executed.

Defenses in the international tribunals remain largely the same now as they did then. The classic “Nuremberg defense” of superior orders is probably the most common and was explicitly excluded in the Nuremberg Charter’s article 8. Another common defense, particularly in the early days of war crimes trials, was *nullum crimen sine lege*, the *ex post facto* argument. Prosecutors went to great lengths to prove the provenance of various newly codified crimes of war, but some still argue that the early trials had no proper basis in law. Other common defenses include necessity, combatant’s privilege, head-of-state immunity, or amnesty. Finally, the *tu quoque* defense is unique to war. It argues, as the name implies, that “you too” did the offense, arguing that if one side breaches the law, the other’s breach on the same grounds is justified. German Admiral Karl Dönitz, who also served as head of state of Germany briefly after Hitler’s suicide, was one of the Nuremberg defendants. He was charged with the war crime of waging unrestricted submarine warfare. It alleged the sinking of merchant ships and freighters without warning and the shooting of survivors in the water. He was found not guilty because of similar orders having been issued early in the war by the Allied powers. The defense was definitively rejected as “flawed in principle” in *Prosecutor v. Kupreskic*, ICTY, Judgment of Jan. 14, 2000.

Israel’s trial of Adolph Eichmann also deserves mention here because of its international celebrity then and now. In 1960, Israeli agents successfully kidnapped Eichmann from his anonymous and hidden redoubt in Argentina, a country that became a haven for many fleeing Nazis, and which was not likely to extradite the general, who had been one of the principal authors and administrators, in 1942, of the “final solution” for extermination of Europe’s Jews. Eichmann was convicted of 15 counts of war crimes and crimes against humanity, and he was hanged on May 31, 1962.

New life came to domestic prosecutions for war crimes with the emergence of expanded use of universal jurisdiction. In October of 1998, while seeking medical treatment in England, Chilean dictator Augusto Pinochet was put under house arrest on an international warrant issued by Spanish judge Baltasar Garzón. The judge charged Pinochet with crimes against humanity, grounded in extensive claims of torture. Garzón based his actions on his court’s universal jurisdiction, which permitted him to charge the most serious crimes, committed anywhere in the world and without a statute of limitations, so long as the defendant could be apprehended by judicial

Continued on page 24