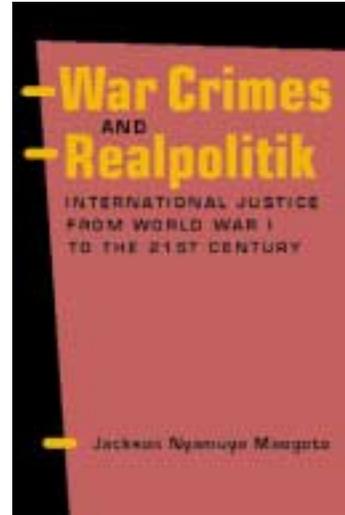


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War Crimes and Realpolitik:  
International Justice from  
World War I to the 21st Century

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# Introduction

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In the past five millennia, thousands of wars have been fought and billions of lives extinguished. Ironically, it was in the modern era, characterized by a codification of laws and customs of war and a growing body of international norms, that war achieved unprecedented destructive capacity. The twentieth century has the infamy of being the bloodiest century in the history of mankind. This legacy does not show any loss of momentum today. Total war made its way into the international vocabulary, with the two world wars alone claiming some 50 million lives, including many civilians who had little or no role in their governments' bloody adventures.<sup>1</sup> Given the grim statistics and the history of armed conflict, the importance of regulation of the conduct of war cannot be doubted. The law of war—with its unique role in preserving rights, creating a body of rules that are realistic for the exigencies of combat situations, and providing further regulations that are meaningful to those facing armed conflicts—is irreplaceable.

The law of war (in general parlance today, “international humanitarian law”) is as old as war itself and remains the umbrella term covering all laws that govern the conduct of states, individuals, and other entities during armed conflict. The law of war historically developed in two separate categories, and this separation remains largely intact. The first category, *jus ad bellum* (the right to initiate war),<sup>2</sup> refers to the legality of purpose of the war. The second category, *jus in bello* (the law during war), regulates the conduct of war, independent of the war's legality.<sup>3</sup> *Jus in bello* laws matured primarily through custom and military manuals, until the atrocities of late-nineteenth-century warfare, spurred by the technological advances of industrialism, led to public outcry and a desire to centralize the laws of war. This second aspect is the focus of this book.

The modern trail of warfare dates to the middle of the seventeenth century, when the independent nation-state was founded upon a reverence for

sovereignty, emanating from the Peace of Westphalia of 1648 that ended the wars of religion between the Protestant and Catholic states. The Westphalia Treaty completed a process that had begun toward the end of the Middle Ages, which focused upon the establishment of single overriding authorities in the growing national areas of Europe.<sup>4</sup> We now know of course, that despite the promise of the Westphalian peace, the advent of the sovereign independent nation-state did not usher in a new era of peace and stability but rather inaugurated the modern nation-state—the most monopolistic and exacting of all associations, one that made devotion to national interest the most revered of all virtues. The post-Westphalian era reinforced the government's duty to maximize the assets of their states (through militarism and conquest) without regard to the consequences (real or hypothetical) to society. Although international law was seen as an essential institution to reinforce reason against passion, the impatience of the nation-state invoked national interest to justify violation of legal or ethical rules and win support for a calculated gain in material or geopolitical advantage.

And even though force, diplomacy, and law<sup>5</sup> predate the modern nation-state, its birth at Westphalia<sup>6</sup> and the growing maturity of international society elevated these institutions in light of insecurity and fear of other states, necessitating individual states to look after their own security and possibly dominate others by extending their own power. As international society developed, war was seen as a normal feature of international relations and an important attribute of the state. International law aimed to regulate war as an institution rather than to sanction the act of war. The institutions of force, diplomacy, and law were gradually established as central techniques of influence in international relations through which states attempted to change their environment in accordance with determined aims and objectives or attempted to adapt to the environment. There was not a great deal of theorizing on the causes of war in general because most people thought that the causes of war were obvious. “States went to war for gain, or in self-defense because they were attacked by some other state acting for gain.”<sup>7</sup> Put simply, war was inherent in the nature of sovereignty; it was what states did. Yet attempts to regulate war are as old as war itself. From ancient societies until today, some have purported to limit the conduct of war with legal codes. Proponents of such efforts assume that bringing war within the bounds of rational rules may somehow “humanize” war and contain its brutalities.<sup>8</sup> As Michael Walzer comments, “War is so awful that it makes us cynical about the possibility of restraint, and then it is so much worse that it makes us indignant at the absence of restraint.”<sup>9</sup>

Post-Westphalia international law, such as it was, imposed no effective restraints on nation-states and their leaders in starting and carrying out aggression. Foreign policy was premised on a need to protect and advance something that was called “national interest,” and the tendency then and

now was to define that notion primarily in terms of the state's power<sup>10</sup> and well-being, and secondarily in terms of the citizenry's welfare. Thus national interests rather than moral "abstractions" of principles and norms guided state action—a mode that favored political expedience over appreciable gain in norms and principles. With imperialistic ambitions taking root, national interest came to encapsulate the extension of a state's territory and the consolidation of hegemonic power. What varied was the degree of shrewdness in the calculating self-interest of diplomats and politicians. The post-Westphalia era was a world with minimal constraints on national leaders and almost no constraints on the state's treatment of its own nationals. Leaders of nation-states were not accountable for alleged violations of international law and the strongest states—militarily, economically, and politically—prevailed.

In the formative period of the modern international community, war, especially between states, was seen and held to be the ultimate mechanism for the resolution of conflict. The paradox is that law and war seem to occupy mutually exclusive terrain. As Cicero wrote, *inter arma silent leges*—"in time of war the law is silent."<sup>11</sup> Law implies order and restraint; war epitomizes the absence of both. It is precisely when the legal system fails that conflict turns to violence. Law may act to deter war, but it has no practical role once the fighting has begun.<sup>12</sup> The paradox in regulating the conduct of armed conflict is best expressed in the contrasting views of Montesquieu (a jurist) and Clausewitz (a military general). Montesquieu gives the humanistic perspective—the parties to an armed conflict (war) should inflict on each other the least possible harm. In contrast, Carl von Clausewitz, in his celebrated book *On War*, affirms that "in war the party seeking to win should inflict upon his enemy as much harm as is necessary to ensure a decisive victory."<sup>13</sup> Though one can assume that Clausewitz's approach may theoretically lead to reduced victimization, it is not the primary goal in the conduct of war. The reduction of victimization was, however, Montesquieu's primary goal. In time, Montesquieu's humanistic view was to prevail and be expressed in the international community's commonly shared values, as reflected in conventional and customary international humanitarian law, as well as in the domestic laws of a number of states. "Regrettably, however, the practices of states remained consistent with the teachings of von Clausewitz as opposed to those of Montesquieu."<sup>14</sup>

The establishment of formal enforcement mechanisms to govern the international system has long been sought by those who believe that the nature of the modern international legal order demands clear rules governing international behavior<sup>15</sup> and especially the unilateral use of force, as this threatens the legitimacy of international law by diminishing the rule of law. The hope of "civilized society" has long been that nations would cease to pursue interests through violence and coercion and attempt instead to

negotiate in quest of agreement and enshrine this in settled norms that would condition the behavior of states in the international system. Yet from the early development of the laws of war and enforcement mechanisms, the nature of the state-centric international system dictated that law played second fiddle to the hard reality of power politics. Strong domestic-based political, moral, or ideological motivations (the hallmark of *realpolitik*)<sup>16</sup> crippled the early development of international humanitarian law and subsequently hobbled its enforcement in the twentieth century, when the legitimacy of war was first put in question and its use subjected to legal constraints.

Prior to the twentieth century, war was a formal business with uniformed armies occupying delineated territory, a code of conduct that was usually (though not always) observed, a formal declaration, and a formal end in the peace treaty.<sup>17</sup> The “decisive battle” was a feature of Clausewitzian war—formal fighting and formal peace—but technological and strategic developments increasingly displaced this formal warfare dominated by set-piece battles, paving the way for an epoch of unbridled ferocity. Victory at whatever cost replaced politically inspired calculus, and end objectives and virulent nationalism replaced “rational” state egoism as the basis of war.

In the twentieth century technological advancements and the birth of total war combined with a strong body of multilateral rules and norms governing war—and the challenge of Clausewitzian conceptions of war. The landscape of war had undergone dramatic transformation. The combatant/noncombatant distinction had been blurred, and the immense power of new weapons and the indiscriminate tactics of warfare inspired a need to discipline excesses occurring beyond delineated battlefields. Previous conceptions of war (i.e., legitimate and/or rational as long as the warring state had the authority to act) were put in doubt as the common-sense view gained ascendance that war represents a breakdown, a malfunctioning, of the international system. It took the senseless mayhem of World War I—the destruction of economic structures, dissipation of financial resources, and undermining of political stability—to erase the traditional notion that war was a rational political act. World War I was disastrous for its initiators and the victims. Millions died pointlessly, and regimes fell. The carnage forced modern industrial societies to question war as an instrument of national policy in which the benefits of conquest seemed trivial compared to the costs of war: large-scale death and destruction, political instability, and economic turmoil. It seemed obvious that war was no longer a profitable enterprise. Resultant economic and political chaos, reinforced by increasing moral disquiet over the idea that states had free rein, focused minds on the moral and legal responsibilities for the outbreak of this war.

World War I was a watershed. Apart from marking the maturation of total war, the postwar peace saw an unsuccessful process of penalization by

individualizing criminal responsibility for violations of laws of war and for crimes against humanity. The punishment provisions of the peace treaties signed at Versailles and Sevres sought to limit sovereign immunity by punishing military and civilian officials while extending universal jurisdiction to cover war crimes and crimes against humanity. In the end, this international penal process yielded to national sovereignty, leading to sham national trials in Germany and in Turkey against a relative handful of defendants. The political concessions that translated into immunity for wartime atrocities reignited the debate on whether international law was simply a convenience leading to free rein in diplomacy.<sup>18</sup> The hypocrisy of the victor as well as the vanquished raised crucial questions. Was international humanitarian law a useful mechanism in the international system, or just another weapon in the game of diplomacy? Was international humanitarian law a vital component of international relations, or an acceptable minor obstacle in the pursuit of policy offering no significant restraint on a nation's freedom to pursue national interests? The international system began to establish mechanisms to ensure the practical application and enforcement of international humanitarian law. But it took another round of state-orchestrated carnage two decades hence to spur states into giving international humanitarian law life and vitality.

At Nuremberg (and later at Tokyo) the modern international penal process was practically inaugurated. Nuremberg was designed to change the anarchic context in which nations and peoples of the world related to one another. Nuremberg and Tokyo demonstrated that national leaders as well as state officials and personnel could be held responsible for their actions under international law, revealing the enforceability of international norms governing the conduct of armed conflict. Despite the successful establishment of the tribunals pursuant to international law invocations, the process demonstrated that international law, though affording a crucial framework for international society, was not a self-contained abstraction. It is a force in international affairs, but its influence can be understood only in light of other forces governing the behavior of nations and governments.

Despite the dominance of geopolitical interests at the end of World War I, which shadowed the post-World War II international trials, Nuremberg and Tokyo marked a turning point in the understanding of sovereignty and the protection that it afforded. The traditional state-centered view of personality—predicated on the view of the state as the relevant subject of the international regime—experienced a radial shift after World War II when the concept of individual criminal responsibility was laid down as the cardinal principle governing international law violations. With international humanitarian law interlocking with the emerging law of human rights, the shift away from states to the individual became a dominant development. The nation-state was no longer the sole subject of international law because

international law was expanding its frontiers and extending to domestic areas jealously guarded by Westphalian sovereignty. International law was moving toward direct applicability to individuals—endowing them with rights and protections and in return demanding adherence to international norms.

These developments in the transforming juridical discourse reflected a paradigm shift in the conceptualization of the international rule of law. This new subjectivity was evident in the later enforcement of expanded norms, which are directed beyond states to persons and peoples with new enforcement structures based on institutionalization. However, this movement was to be first checked and then routinely interrupted by the volatile politics of the Cold War, preventing an immediate fulfillment of its lofty ideals.

The precedent set at Nuremberg and amplified at Tokyo—pointing to a restrained state disciplined by international law norms—was curtailed with the onset of the Cold War. The Cold War largely put an end to the spurt of international judicial activity inaugurated at Nuremberg and Tokyo and contributed to the preservation of a statist international order. But even amid the dominant ideological rivalry of the Cold War, the United Nations (UN) was beginning to move, tentatively but assuredly, from mere standard-setting to implementing those standards. The Cold War era involved mixed blessings for the international penal process. Tremendous advances were made in the codification and broadening of international humanitarian law, but East-West rivalries prevented meaningful enforcement at the international level. The resultant bipolar politics rendered the United Nations powerless to deal with many of the humanitarian crises accompanied by gross human rights violations.

The moral abdication of states during the Cold War era set the stage for the series of internecine conflicts in Rwanda, Somalia, Liberia, Bosnia, and elsewhere that occurred in the immediate aftermath of the Cold War. States and individuals had come to regard international humanitarian law as more of a moral code of conduct than as binding obligations on states and individuals. The lack of an enforcement regime contributed to cynicism and a lack of respect for the legitimacy of international justice. The ad hoc international criminal tribunals in the 1990s represented an international effort to put in place such a regime. In that same decade, states voted to adopt the Rome Statute establishing the International Criminal Court (ICC), seemingly closing the circle on the efforts first inaugurated after World War I.

The wave of accountability has in recent times gathered strength. At no point in history has so much attention been focused on human wrongs: by global media, by nongovernmental organizations (NGOs), and by the organs of national and international law. Holding individuals accountable for those wrongs—criminal prosecution—has become popular. Though

prosecution for human rights offenses had been a historical rarity, in 2000 former officials from at least fourteen countries were under indictment for violations of international humanitarian law. The institutions currently commanding the most attention for ongoing international prosecutions are the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR). With the entry into force of the Rome Statute, the ICC promises to be a powerful new institution for ensuring accountability. Much is expected of the nascent ICC, but promise may yet outstrip reality in light of international realpolitik.

From the optimists' standpoint, the new international spirit for corraling international outlaws is gathering pace. The recent design innovations of the Special Court for Sierra Leone (SCSL)<sup>19</sup> provide an encouraging model for generating a tighter weave of international norms and the reality of enforcing them. Established in 2000,<sup>20</sup> the SCSL is part of a growing attempt to more effectively meet the goals of international justice through incremental changes in the familiar institutions of prosecution. Prosecution seems the sole presumptive response to violations of international humanitarian law. Yet it is just one tool in the toolbox of accountability. While one tool—international prosecution—has gained ascendance, it has the potential to distract attention and take away resources from more suitable mechanisms. Those seeking accountability should know what they seek to accomplish, employ well-designed prosecutions to satisfy the highest priorities, and supplement tribunals with other mechanisms to address the things that prosecution does not.

The complexities of ensuring clear-cut international justice in the international system will be evident throughout this book. Politicians and diplomats responsible for setting up bodies mandated to investigate and prosecute violations of international humanitarian law often favor political expedience. And trials occur only when and in the manner dictated by prevailing political currents. Justice is compromised through a series of mechanisms, both legal and political. Often, timely investigations can lead to politically undesired results. Indeed, the investigation of the alleged criminal conduct by military and political leaders who are essential to achieving a peaceful settlement can impede the process, creating major dilemmas in which political settlements are favored over justice. That is why so many international and noninternational conflicts have resulted in *de jure* or *de facto* immunity for the leaders, as well as most of the perpetrators of international humanitarian law and international human rights violations.<sup>21</sup>

Important changes have occurred in the international legal regime, driven by international humanitarian law in its quest to discipline sovereign excesses. Legal rhetoric reflects changing conceptions of legitimacy in contemporary international politics and represents a paradigm shift toward a

definite conception of rule of law in the international domain with greater significance for the juridicization of international affairs discourse. A distinct dimension of the juridical transformation is its enforcement and entrenchment through international institutionalization. The 1990s witnessed a remarkable expansion in the institutionalization of international law. New institutions ranging from international courts to nongovernmental organizations mediated both public and private realms. And though the dual purpose of criminalization of atrocious wartime conduct is to deliver justice and deter future atrocities, in practice principles of justice are often subjugated to the vagaries of *realpolitik*, and sovereignty overrides the laws of war.

The humanitarian regime has been entrenched through codifications chartering new international judicial institutions that make criminal justice the primary means of enforcing international rights law. Although international criminal tribunals began on an *ad hoc* basis, they have become the international community's primary response to humanitarian crises. A consensus on establishing a new institution dedicated to ongoing international adjudication of violations of humanitarian law is seen in the ICTY and ICTR, leading to the establishment of the permanent ICC. The expanded discourse of international criminal justice has revised traditional understandings of the law of war, the parameters of war and peace, and the state's duties to its citizens by extending international jurisdiction beyond national borders and situations of conflict to penetrate states during times of peace.

Establishing an international regime that contemplates the coercive enforcement of humanitarian law reflects a reconceptualization of the rule of law in the international order. The aim of the newly established enforcement machinery in the form of independent international institutions dedicated to enforcing humanitarian law supports the perception of a heightened international rule of law. These new international institutions incorporate criminal sanctions into the international legal system. Criminal sanctions are a distinctive dimension of legal norms and can plausibly be used to signal and reinforce the difference between general and positive law norms.<sup>22</sup>

Contemporary developments point to a reliance on law, legal processes, and judicial structures in international politics, which raises a question about how to interpret these judicial developments. The international humanitarian legal regime supports a transformation of global politics through its articulation of an international discourse of rule of law. Global rules of law enable and restrain power in today's political circumstances in order to manage new conditions of political disorder through the rubric of law. In the absence of a common world government it is the humanitarian legal regime that is used to lend authority and legitimacy to the international realm through its tribunals, proceedings, juridical language, and public justificatory processes. Humanitarian law and courts are the preeminent institutions and processes aimed at managing current global politics and at representing the legalist view on how to advance the core goal of ending political violence.

The international penal process is intended to advance the goal of rationalizing foreign policy decisionmaking and to assist in the legitimization of globalizing an international rule of law order. However, the enterprise has troubling ramifications. To a large extent, international penal process aims to ensure minimal preservative rights that rationalize the erosion of the territorial status quo in favor of the protection of human rights. Beyond the role of the law as constraint, the concept of international justice would allow for military interventions beyond their historical goal (protecting national sovereignty) to the broader goal of protecting peoples who are facing atrocities.

Often prosecution at the international level may become a tool for political gain. This motivation may arise most prominently in the decision to establish tribunals or target regional conflicts for prosecution. Once a prosecutorial structure is in place, the possibility for political gain depends more directly on the prosecutor's susceptibility to political influences. Tribunals may provide an avenue to reduce the political influence of indictees or to enhance public opinion of regimes helping to deliver "justice." In addition, tribunals may provide a symbol for international power brokers to show that they are remedying humanitarian deprivations but without having to muster resources more suitable to the task at hand.<sup>23</sup> The international penal process is often caught in the unhealthy grip of bureaucratic self-preservation. The institutions of international prosecution may have a vested self-interest in the prominence and perceived efficacy of international prosecution as a mechanism of accountability. Although it is true that preserving a prosecutorial institution as an institution may be necessary to achieve long-term ends, self-preservation also has the potential to crowd out an institution's original aims and to emerge as an end unto itself. In tribunals, this self-preservation may manifest itself as a concern for institutional growth and credibility for their own sake.

The history and record of international criminal investigation and adjudication bodies, from the Treaty of Versailles to the Rome Statute, demonstrate the dominance of competing interests of politics or the influence of a changed geopolitical situation. The ad hoc tribunals and investigations have suffered from the competing interests of politics or the influence of a changed geopolitical situation. In the observation of renowned international criminal law scholar M. C. Bassiouni:

Between 1919 and 1994 there were five *ad hoc* international investigation commissions, four *ad hoc* international criminal tribunals, and three internationally mandated or authorized national prosecutions arising out of World War I and World War II. These processes were established by different legal means with varying mandates, many of them producing results contrary to those originally contemplated. The investigations and prosecutions were established to appease public demand for a response to the tragic events and shocking conduct during armed conflicts. Despite public

pressure demanding justice, investigative and adjudicating bodies were established for only a few international conflicts. Domestic conflicts, no matter how brutal, drew even less attention from the world's major powers, whose political will has been imperative to the establishment of such bodies.<sup>24</sup>

The interplay between law and politics characteristic of the twentieth century's ad hoc international tribunals is manifest in the allocation of responsibility during the different trial stages. Frequently, there is total separation between the establishment of the bodies and their administration. Similarly, the investigation stage is separated from the adjudication stage, and in each case, without exception, the judicial bodies that pronounce sentences are terminated immediately afterward. The fact that diplomats and politicians are largely entrusted with authority to establish international tribunals and delineate their mandates and authority means that important decisions are not necessarily motivated by justice concerns.<sup>25</sup> "Often, institutional records documenting the various stages seldom reflect the activity occurring behind the political curtain."<sup>26</sup>

Pursuing political settlements while concurrently seeking to obtain justice is an incongruent goal. Pursuing each contemporaneously compromises justice in favor of political settlements because nations are the actors, the legislators, the executives, as well as the judges of international law. Despite norms, standards, and obligations, the implementation or enforceability of this is inevitably policy-oriented, informed by a process of authoritative state decisionmaking based on calculations of self- as well as collective interest or disinterest. The law then is in many ways part of the political process; law is made and agreements are given meaning by the total political process—when governments act and other governments react, when courts (national or international) decide cases, when political bodies debate and pass resolutions and nations act in their light. International law, then, is in many aspects an "architecture of political compromise."<sup>27</sup>

In the twentieth century, international trials occurred at different times and places. The singling out of certain conflicts in a world full of aggression and inhumanity highlights the hypocritical selectivity of major powers. The complacency of government leaders results in inaction, compelling the occasional ad hoc tribunals that have ethical weaknesses and present legal and practical difficulties. "The phenomenon of political complacency in the face of repeated atrocities in various parts of the world is regrettably a feature of international realpolitik."<sup>28</sup> After every conflict or event during which the perceived need arises to prosecute and punish those who commit international crimes, "the world community ultimately settles for the legal status quo ante."<sup>29</sup> Of course, to dismiss international norms and standards as entirely hostage to politics would be a misleading simplicity. The whole body of the law, including the legal framework of international society,

shapes and limits the behavior of nations and determines the alternatives available to them. Even as to the norms of the law, their influence on diplomacy is subtler and more complex than merely to deter violation or induce compliance. However, the domineering influence of *realpolitik* in the international order is frequent, as law intersects with state interests, necessitating the need for political accommodation. In the words of L. Henkin:

Relations between nations are primarily the responsibility neither of generals nor of judges; they remain the domain of diplomacy between representatives of nations promoting national policies . . . diplomacy, and law do not represent discrete stages in international history. They have long coexisted, waxing and waning, in different “proportions” at different times, among different nations in different contexts.<sup>30</sup>

This overview and general introduction of war and the vagaries of *realpolitik* introduces the two dominant themes of this book. In subsequent chapters, a detailed analysis looks at the interplay of justice requirements in the face of political expedience. The central point is that nations, though relying on the rubric of international humanitarian law in establishing international penal mechanisms, nonetheless seek to concurrently promote individual interests through various techniques of influence that lead to compromises and political accommodation.

This book is divided into three parts. Chapter 1 introduces war generally as a sovereign right and the development of the laws of war regime to address sovereign excesses. It sets the stage for the subsequent analysis, which focuses on the manner in which the international penal process has developed over time. Chapter 2 considers World War I and the efforts to secure international criminal accountability as envisaged under the peace treaties of Versailles and Sevres. While the envisaged international efforts failed to materialize, important principles were established. Chapter 3 deals with World War II and the groundbreaking international penal processes at Nuremberg and Tokyo. The chapter notes that the Nuremberg judgments, by establishing individual accountability for violations of international law, explicitly rejected the argument that state sovereignty was an acceptable defense for unconscionable violations of human rights.

In Part 2, we’ll discuss the Cold War and the ad hoc international criminal tribunals of the 1990s that symbolized a move from the old diplomacy grounded in power and politics to a new diplomacy based on law and authority. Chapter 4 is a general commentary on the Cold War era, discussing the manner in which the Nuremberg principles crossed over into the national sphere, as well as the disappointment created when international humanitarian law was consigned to the backseat. Chapters 5 and 6 focus on the two ad hoc international criminal tribunals created under UN

auspices in the 1990s to prosecute those responsible for grave violations in the former Yugoslavia and Rwanda.

Part 3 includes an extended discussion on the International Criminal Court, the last great institution to be established in the twentieth century and a crowning achievement. It establishes a permanent international penal mechanism and thus seals a major lacuna in the international system. Chapter 7 discusses efforts to establish a permanent tribunal for crimes violating international law and examines the organization and operating principles of the ICC. The chapter explores the politics of establishing the court and the reflection of this in the Rome Statute. Chapter 8 concludes with a discussion of international justice in retrospect and prospect.

## Notes

1. See Jean Pictet, *Developments and Principles of International Humanitarian Law* (Dordrecht, Netherlands, and Boston: M. Nijhoff, 1985), 79.

2. Remigiusz Bierzanek traces the origin of this distinction to the Romans in "The Prosecution of War Crimes," in *A Treatise on International Criminal Law*, edited by M. Cherif Bassiouni and Ved P. Nanda (Springfield, IL: Thomas, 1973), 559. A modern example of a law of *jus ad bellum* is the United Nations Charter, prohibiting "threat or the use of force" by states against other states (UN Charter, art. 2, para. 4).

3. *Jus in bello* laws are attributed to the Greeks. See Bierzanek, "The Prosecution of War Crimes," 559.

4. The intention of the treaty was the termination of conflicts between private and public jurisdictions as well as the more general conflict all over Europe between ecclesiastical and secular claims for the citizenry's obedience and allegiance.

5. Louis Henkin, *How Nations Behave: Law and Foreign Policy* (London: Pall Mall, 1968), 4. Broadly speaking one can conceive of force as an institution of violence and coercion, diplomacy as an institution of problem-solving and negotiation, and law as an institution of rules and norms that aims to manage interaction, be it in the sociopolitical or economic sphere.

6. See Adam Watson, *The Evolution of International Society: A Comparative Historical Analysis* (London and New York: Routledge, 1992), which is one of the best guides to the origins of the Westphalia system.

7. Chris Brown, *Understanding International Relations* (New York: Palgrave, 2001), 9.

8. *Ibid.*, 55.

9. Michael Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations*, 2nd ed. (New York: Basic Books, 1992), 46.

10. "State power" is a multifaceted and complex notion. State power in international relations may be defined as the ability of an actor on the international stage to use tangible and intangible resources and assets in such a way as to influence the outcomes of international events to its own satisfaction. For a discussion of the dimensions of state power, see Brown, *Understanding International Relations*, 89–99; Walter S. Jones, *The Logic of International Relations*, 5th ed. (Boston: Little, Brown, 1985), 245–248.

11. Quoted in Quincy Wright, *A Study of War* (Chicago: University of Chicago Press, 1965), 863.

12. Chris A. F. Jochnick and Roger Normand, "The Legitimation of Violence: A Critical History of the Laws of War," *Harvard International Law Journal* (1994): 49.

13. M. Cherif Bassiouni, *Crimes Against Humanity in International Criminal Law*, 2nd rev. ed. (The Hague and Boston: Kluwer Law International, 1999), 44.

14. *Ibid.*, 42.

15. See for example T. L. H. McCormack and G. Simpson, "The International Law Commission's Draft Code of Crimes Against the Peace and Security of Mankind," *Criminal Law Forum* 5 (1994): 10; M. Cherif Bassiouni and C. L. Blakesley, "The Need for an International Criminal Court in the New International World Order," *Vanderbilt Journal of Transnational Law* 25 (1992): 54.

16. "Realpolitik" is a word of German origin and literally means "practical politics." It is broadly used here to denote power politics designed to produce or achieve certain desired outcomes whether based on legal, moral, or ideological considerations.

17. Brown, *Understanding International Relations*.

18. Henkin, *How Nations Behave*, 5.

19. United Nations Security Council Resolutions (UN SCOR), *Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone*, 55th sess., UN Doc. S/2000/915, 2000.

20. *Ibid.*

21. M. Cherif Bassiouni, "Former Yugoslavia: Investigating Violations of International Humanitarian Law and Establishing an International Criminal Court," *Fordham International Law Journal* 18 (1995): 1191, 1209.

22. See generally H. L. A. Hart, *The Concept of Law* (Oxford: Oxford University Press, 1961), 213–214 (discussing the uses of sanctions for norm-strengthening functions in domestic law); Judith N. Shklar, *Legalism: Law, Morals, and Political Trials* (Cambridge, MA: Harvard University Press, 1986) (discussing legalism as an ideology internal to the legal profession and, more important, as political ideology). Growing emphasis on positivism in international law has tended to derive largely from U.S. jurisprudence.

23. See, for example, United Nations General Assembly Resolutions (UN GAOR), *Annual Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991*, 49th sess., Agenda Item 152, UN Docs. A/49/342, S/1994/1007, 1994, 44, para. 7 (admitting that the tribunal was created to fill the "need to demonstrate to the international community that the United Nations was not sitting back idly while thousands were being brutally abused or massacred"); see also Jackson Nyamuya Maogoto, "International Justice in the Shadow of Realpolitik: Re-Visiting the Establishment of the Ad Hoc International Criminal Tribunals," *Flinders Journal of Legal Reform* 161 (2001) (arguing that the establishment of the two ad hoc international criminal tribunals was an act of tokenism by the world community, which was largely unwilling to intervene in either the former Yugoslavia or Rwanda but did not mind creating institutions that would give the appearance of moral concern).

24. M. Cherif Bassiouni, "From Versailles to Rwanda in Seventy-Five Years: The Need to Establish a Permanent International Criminal Court," *Harvard Human Rights Journal* 10 (1997): 11–12.

25. *Ibid.*

26. *Ibid.*

27. Gerry Simpson, “‘Throwing a Little Remembering on the Past’: The International Criminal Court and the Politics of Sovereignty,” *University of California Davis Journal of International Law and Policy* 5 (1999): 133, 142.

28. M. Cherif Bassiouni, “‘Crimes Against Humanity’: The Need for a Specialized Convention,” *Columbia Journal of Transnational Law* 31 (1994): 458.

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