Preface

The various contributors to this book began writing their essays almost exactly half a century after the greatest war crimes trials in history took place at Nuremburg and Tokyo. As we completed the editing process another event occurred of perhaps comparable significance for the history of war crimes. In Paris on December 17, 1995, the Dayton Peace Agreement was formally signed by the various warring parties in the Former Yugoslavia. A conflict which had given rise to the first international war crimes tribunal since the Tokyo and Nuremburg tribunals may have finally ended after five years of exceptional brutality. Although many predicted an ‘amnesty for peace’ clause in any final negotiated settlement to the conflict, it is significant that the Dayton Agreement explicitly provides that there will be no amnesty for alleged atrocities. In the meantime, the War Crimes Tribunal for the Former Yugoslavia, meeting in the Hague, has now issued indictments against thirty-four suspected war criminals and the prospect of further trials has been enhanced by the Peace Agreement.¹

In the second half of this century of extremes, Europe has suffered two wars in which wartime violence hitherto limited to military personnel was visited on civilian populations, with appalling consequences. A legal regime designed to mitigate suffering in war was severely undermined in both conflicts. In each case one response of the international community has been to establish ad hoc war crimes tribunals. This book is at least partly about the journey from Nuremburg to The Hague. Indeed, one of the purposes in editing this volume was to mark the anniversary of the Tokyo and Nuremburg war crimes trials with a novel and geographically ambitious contribution to the literature on war crimes and international criminal law. That is not to suggest, however, that our purposes are primarily retrospective. As we reflect on almost fifty years since Nuremburg and Tokyo, we are keen to draw attention to the developments

¹ See ‘Case Files’ on War Crimes Tribunal for the Former Yugoslavia Home Page, WORLD WIDE WEB, http://www.cij.org/tribunal.
during this period which have placed the international community on the
threshold of the creation of a permanent international criminal law regime.

As we both sat with the Australian Delegation in the Sixth Committee
of the UN General Assembly during discussions on the International Law
Commission's Draft Statute for a permanent international criminal court, it
occurred to us that there has been a relatively recent but dramatic political
shift in the attitude of the international community to the whole question of
international criminal law. Had we published this book only ten years ago
its subject matter could plausibly have been dismissed as arcane or of purely
commemorative interest. The war crimes field was in recess. The last great
trials of the Nazis in France and Germany had ended and there were few
prospects of international or domestic initiatives in the future. However, in
the last decade the issue has again surfaced on the international agenda – this
time with an unprecedented flourish.

A principal objective of the book is to bring together two approaches to war
crimes which are most commonly considered separately in the huge literature
in the area. Accordingly, the book discusses both domestic and international
approaches to war crimes. Though the chapters appear to be evenly divided
between the two approaches, we are concerned not to give the impression that
the two are distinct. The individual chapters confirm this intermingling of the
international with the domestic. For example, as Gillian Triggs points out, the
Australian domestic approach was very much reliant on previous international
law definitions of criminality, while Roger Clark shows how these definitions
themselves drew on already existing jurisprudence in national jurisdictions.
Tim McCormack’s historical survey suggests that this cross-fertilisation of
domestic and international law has a number of forerunners and anticipates
future co-operative interaction. It is increasingly likely now, with the plethora
of developments in both fields, that new proposals will draw on the experi­
ences of jurists in both domestic and international jurisdictions.

Indeed, one of the key developments in the last decade has been the increas­
ing resort by governments to domestic war crimes legislation and prosecu­
tions. France, Canada, Israel, Australia and the UK have all either held war
crimes trials recently or enacted new war crimes legislation. These have all
been highly controversial – and occasionally embarrassing – attempts by gov­
ernments to respond to the prevailing public mood. The trials of Barbie, Finta
and Demjanjuk have illustrated that, to paraphrase Ronald Dworkin,2 “good
history makes bad law”. In a critical introduction to this volume, Gerry Simp­
son locates these trials and their international counterparts at Nuremburg and
Tokyo within a philosophical inquiry into the cultural and political meanings
of war crimes as well as their historical reverberations.

Too often, of course, a discipline merely repeats its own history. Thus, the
history of war crimes has often been told as a sequence of events beginning

at Nuremburg and ending with Eichmann or Calley or more latterly Demjanjuk. This could be described as the Great Powers approach to war crimes history. Indeed, war crimes trials have become synonymous with the events at Nuremberg and Tokyo and a relatively small number of heavily publicized successors. As Editors, then, we were keen to excavate some of the more obscure examples of war crimes trials and phenomena. In doing this we have sought to tell a different story, one in which Nuremburg and Tokyo remain dominant landmarks but not monuments which dwarf the surrounding scene. This scene includes the numerous war crimes trials held in Germany, Austria and France between 1945 and the present day. This body of jurisprudence is comprehensively described and analysed in Axel Marschik’s original and detailed contribution. Equally, North American and European readers may be unfamiliar with the legislation and case law from Australia covering the period 1945 to 1993 with a curious hiatus in the 1950s and 60s. This has given rise to some peculiar insights into issues such as the constitutionality of war crimes legislation, the relationship between international criminal law and domestic war crimes statutes and the various evidentiary problems associated with war crimes proceedings. Gillian Triggs discusses these matters with great aplomb in her chapter on Australia. Sharon Williams’ interesting analysis of the Canadian war crimes indicates that Australia was not alone in addressing this complex array of problems to be solved by any state embarking on a fresh series of war crimes prosecutions. Even where the war crimes scene may be relatively well known, as is the case with Israel, there are often aspects of the history which remain less visible. Jonathan Wenig’s thoughtful discussion of the trial of Kapos and the Judenrat in Israel falls into this category.

As this book went off to press it was evident that the surge in domestic war crimes activities was not about to abate. The Ethiopian Government, for example, has already issued indictments against alleged perpetrators of atrocities during the recent civil war in that country, and trials are expected to commence this year. Italy has also announced the successful application for extradition from Argentina of Mr Erich Priebke who has been accused of atrocities in the Ardeatine Caves outside Rome during World War II. Proceedings in this trial are also expected to commence some time in 1996. Meanwhile, Mr Szymon Serafinowicz has just become the first British resident to be prosecuted for alleged war crimes offences under the War Crimes Act 1991.3

In addition to the growing concern with war crimes in domestic jurisdictions, several other global trends have emerged to contribute to the momentum for an international criminal regime. The first of these, and perhaps the most obvious, is the heightened awareness among policy-makers of the possibility of bringing to trial individuals suspected of either committing massive violations of human rights or acts in breach of the international communi-

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ty’s norms of *jus cogens*. This awareness may simply be a response to the frustration and anger felt by millions of human beings that the requirements of *realpolitik* have too often come between war criminals and prosecution. While this concern has often been selective and somewhat dependent on the level of media coverage of a particular outrage, it has nevertheless been a constant factor. It explains, in part, the creation of the Nuremburg and Tokyo tribunals as reactions to the debacle of war crimes trials following World War I. Since the 1940s a similar reaction emerged to Pol Pot’s killing fields in Cambodia and has again found expression in response to Saddam Hussein’s brutalities in the Gulf, the activities of the SLORC in Burma and to the current war in the Former Yugoslavia. On each occasion the cry has gone up: why can’t we prosecute those guilty of atrocious crimes? Too often it seems that the punishment for war crimes atrocities is a place at the negotiating table.\(^4\)

However, in recent years the public mood has been so compelling that even previously wary world leaders have responded to it by suggesting war crimes trials in instances where a cautious pragmatism would have normally held sway. Two examples come to mind. The first was the flurry of suggestions that Saddam Hussein be brought to trial after the successful prosecution of the war against his forces in Kuwait.\(^5\) The second example was Laurence Eagleburger’s description of the Serbian leadership as war criminals.\(^6\) In neither instance is it likely that this labelling hastened the end of hostilities or was motivated by national self-interest. Rather these leaders were reacting to the force of world public opinion, their own sense of moral indignation, or perhaps, in the last-named instance, a feeling of impotence. The United Nations did of course respond by establishing the world’s first international criminal tribunal since the Nuremburg and Tokyo war crimes trials. The fervour for these initiatives, however, tends to wax and wane in accordance with the requirements of diplomacy. These efforts, and any future developments, whatever their consequences, are likely to remain transitory and *ad hoc* in the absence of a permanent international criminal court and statute. Christopher Blakesley’s chapter provides an in-depth analysis of the two new *ad hoc* war

\(^4\) For example, the Serbian President Slobodan Milosevic has been described as a war criminal by major figures in the world community. Indeed, the international community seems unable to decide whether to cast President Milosevic as a war criminal or a consummate and pragmatic statesman. *See generally* Gilbert, *Punishing the Perpetrators*, 142 NEW L.J. 1237 (1992). At present he is playing a full role in the final stages of the peace process in Bosnia: The Australian, June 26–27, 1993, at 12. Conversely, General Mladic and Dr Karadzic have been denied a voice at the Dayton negotiations precisely because of indictments already issued against them by the War Crimes Tribunal.


\(^6\) This ultimately led to a Security Council Resolution which raised the possibility of the creation of a war crimes tribunal. *See* Concerning Former Yugoslavia S.C. Res. 780, 47 U.N. SCOR (3119th mtg.), U.N. Doc. S/RES/780 (6 October 1992) at 970–73.
crimes tribunals and their likely impact on proposals for such a permanent criminal court.

A second global trend is a result of increasing international interdependence and integration. With this latter process has come a change in the nature of criminal behaviour. Criminals have known for some time what international lawyers are just beginning to realise: the world is no longer a tapestry of autonomous national identities. Domestic enforcement agencies and legislatures are simply incapable of responding to much internationalised crime. There is now a perceived need for a global enforcement and prosecution strategy against crimes which threaten the world order and cannot be controlled by individual states.\(^7\)

In any case, the dangers arise not only from the behaviour itself but also from the tendency of states to become frustrated by the absence of effective international mechanisms for prosecuting criminals and preventing future criminal activity. The Mexico Kidnapping (United States v. Alvarez-Machain)\(^8\) and the bombing of Tripoli were illegal acts committed by a powerful nation dissatisfied with existing legal remedies.\(^9\) Again, the lack of appropriate international structures to deal with emerging realities seems to explain, at least in part, the unprecedented level of support for a permanent international criminal law regime.

The third and final global trend is a perceptible theoretical shift in the basis of international legal regulation since 1945 which may well reach its peak with the introduction of an international criminal court and code. There has been a well-documented historical transformation in international law from a state-based system to one that is more attentive to the needs of individuals and more willing to hold individuals responsible for particularly serious, globally significant crimes.\(^10\) Although the expanding jurisdiction of human rights law has not yet been matched by similar developments in the area of international criminal law, there is a definite increase in the scope and content of criminal regulation at this transnational level. International criminal law began with an exclusive concern with war crimes and only recently broadened to include

\(^7\) For example, the Columbian judiciary has virtually ceased to function in respect of drug trafficking crimes. See J.F. Petras, Latin America in the Time of Cholera (1992). Extradition, too, has become an impossibility in countries like Brazil and Panama. See Findlay, Abducting Terrorists Overseas for Trial in the United States: Issues of International and Domestic Law, 23 Tex. Int’l L. J. 1 (1988).


a more catholic approach encompassing narcotics offences, terrorism and

R. Clark's excellent discussion of the

Roger Clark's excellent discussion of the Nuremberg and Tokyo tribunals includes a helpful analysis of the legacy of the tribunals for the development of international criminal law. He persuasively argues that, despite the valid criticisms of the ad hoc, ex post facto and selective imposition of victors' justice which Nuremberg and Tokyo represent, the tribunals did entrench the notion of individual culpability for international crime. Acceptance of that notion has facilitated the subsequent negotiation and adoption of a substantial corpus of treaty-based international crimes.

Each of these trends points to the need to focus on the establishment of an international criminal regime. Tim McCormack and Gerry Simpson's final chapter provides a prospective conclusion to the rest of the book with a consideration of the two contemporary proposals for a permanent international criminal court and for a codification of international criminal law. It remains to be seen whether the political will exists for the international community to take what could well be one of its most ambitious institutional and theoretical leaps since the creation of the human rights system in Geneva. However, while the obstacles are many, the circumstances could hardly be more propitious.

These essays reflect the contributors' views of international criminal law as at 31 December 1995.

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11 The arguments for piracy or slavery as international crimes prior to the twentieth century is at least controversial. In the case of piracy it seems that international law knew of no crime of piracy in the period prior to the twentieth century but allowed any state to apply its domestic laws to its suppression on the basis of universal jurisdiction over the offence. See, e.g., INTERNATIONAL LAW: CASES AND MATERIALS 380 (L. Henkin, R.C. Pugh, O. Schachter & H. Smit eds 1993). Slavery did not become a crime until 1926 with the adoption of the Slavery Convention. See Slavery Convention, Sept. 25, 1926, 60 L.N.T.S. 253; Protocol Amending the Slavery Convention of Sept. 25, 1926, opened for signature Dec. 7, 1953, 212 U.N.T.S. 17.