CHAPTER TWELVE

A HISTORICAL REVIEW AND QUANTITATIVE ANALYSIS
OF INTERNATIONAL CRIMINAL JUSTICE

SECTION 1. THE HISTORICAL STAGES OF INTERNATIONAL CRIMINAL JUSTICE

ICJ made its way into international practice in several stages. The first period ranges from 1268 until 1815, effectively from the first international criminal prosecution of Conradin von Hohenstaufen in Naples through the end of World War I. The second stage begins with the signing of the Treaty of Versailles and ranges from 1919 until 2014, when it is expected that all of the existing direct and mixed model tribunals will have closed, leaving only the International Criminal Court (ICC). The third impending stage will begin in January 2015, when the ICC will be the primary international criminal tribunal.

1.1. The Early Historic Period—Thirteenth to Nineteenth Centuries

The first period, which could prosaically be called the early historic period, is characterized by three major events occurring in 1268, 1474, and 1815, respectively.

In 1268, the trial of Conradin von Hohenstaufen, a German nobleman, took place in Italy when Conradin was sixteen years of age. He was tried and executed for transgressing the Pope’s dictates by attacking a fellow noble French ruler, wherein he pillaged and killed Italian civilians at Tagliacozzo, near Naples. The killings were deemed to constitute crimes “against the laws of God and Man.” The trial was essentially a political one. In fact, it was a perversion of ICJ and demonstrated how justice could be used for political ends. The crime—assuming it can be called that—was in the nature of a “crime against peace,” as that term came to be called in the Nuremberg Charter’s Article 6(a), later to be called aggression under the UN Charter.

Conradin, of the German Hohenstaufen Dynasty, succeeded his father, Conrad IV, at the age of two as the titular Duke of Swabia, King of Jerusalem, and King of Sicily. The Kingdom of Sicily at the time included Naples, and was frequently referred to as the Kingdom of the Two Sicilies. The Italian Pope Clement IV, who strongly disliked the German Hohenstaufens, offered Sicily to the French

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Charles d'Anjou. Conradin rebelled against the papal decision and led his German troops across the Alps seeking to regain the Kingdom of the Two Sicilies, which greatly displeased the Pope. It was at Tagliacozzo that Conradin's army engaged in plunder and ultimately lost the battle. He was betrayed and captured by his inner circle and sold to Charles, who brought him to Naples, the capital of the Kingdom of the Two Sicilies, and tried him for treason, as well as for the plunder and killings of civilians at Tagliacozzo. Conradin was charged with lèse majesté for his defiance of the Pope and was consequently excommunicated. He was then beheaded along with his companion, Frederick of Baden, the titular Duke of Austria, as well as a number of his German followers. Conradin's defense, conducted by a Neapolitan jurist, was that, because he was a legitimate contender to the throne of the Kingdom of the Two Sicilies, he should not be considered as having acted in a sacrilegious manner against the will of the Pope, and that he should be considered a prisoner of war, which would free him from responsibility for the plunder and murder. Of the four judges, only one ordered the death penalty while the other three remained silent. It was clearly a political trial: the Pope and Charles sought to justify the removal of the Kingdom of the Two Sicilies from the suzerainty of a German noble family to the Bourbons, who were French and Spanish. This arrangement sat better with the Italian Pope who, like the Bourbons, was a Mediterranean.

The second trial of this historic period was that of Peter von Hagenbach in 1474 in Breisach, German. Peter was a Dutch condottiere—the equivalent of a modern mercenary leader who was hired by the Duke of Burgundy to raise an army to occupy the city of Breisach and exact taxes from its population. The Duke had acquired the city in exchange for services rendered to the Holy Roman Empire. Uninterested in the fate of the distant German townspeople, the French Duke ordered Peter to sack, pillage, rape, and burn the city. Peter obeyed his superior's orders, as was expected of subordinates at the time.

The attack on Breisach was so horrendous that the news spread throughout the empire, bringing about an uncommon consensus that this situation was a “crime against the laws of God and Man.” The leaders of the twenty-six member states of the Holy Roman Empire, either in person or through representatives, acted as international judges to prosecute Peter, a Dutchman, for crimes

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3 It was only under Article 8 of the Nuremberg Charter in 1945 that the defense of obedience to superior orders was eliminated in ICL. See generally Yoram Dinstein, The Defence of 'Obedience to Superior Orders' in International Law (1965); Ekkehart Muller-Rappard, L’Ordre Supérieur Militaire et la Responsabilité Pénale du Subordonné (1965).