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# Historical Origins of International Criminal Law: Volume 4

Morten Bergsmo, CHEAH Wui Ling, SONG Tianying and YI Ping (editors)

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## FOREWORD BY ANURADHA BAKSHI\*

In 1474 an *ad hoc* tribunal located in Breisach, Austria, comprising 28 judges from the cities of Austria and the Hanseatic League, tried Peter von Hagenbach, a Germanic knight and military commander from Alsace for murder, rape and other crimes. This trial has since been recognised as the first international war crimes prosecution.<sup>1</sup> The defence he put up was one that is still relevant: he was merely following orders. Much like today, his defence was dismissed and he was convicted and sentenced to death. Over five centuries, a myriad of wars and geopolitical developments later, the international community is in a position to punish modern-day Hagenbachs like never before, thanks to the emergence of the concepts of universal jurisdiction and individual criminal responsibility for certain international crimes, coupled with the establishment of the International Criminal Court ('ICC') and various criminal tribunals.

The success of these initiatives will, however, largely depend on how effectively they grasp the international political and legal climate surrounding these prosecutions. While the era after the Second World War has seen the granting of a broad cluster of rights to individuals, the casting of obligations, and therefore the prosecution of individuals rather than states, occupies a "distinct but narrow pedigree".<sup>2</sup> Understanding and appreciating the nature of the challenges that emerged during the evolution of universal criminal law, and the discourse that surrounded it, are integral to engaging with challenges that we face in the modern day. The project to explore the historical foundations of international criminal law undertaken by the Centre for International Law Research and Policy provides us with a unique opportunity to delve into both the theoretical and political origins of what is recognised as one of the most significant areas of international law and global politics.

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\* **Anuradha Bakshi** is Principal Legal Adviser of the Asian-African Legal Consultative Organization ('AALCO'). The views expressed in this Foreword do not necessarily reflect those of AALCO or any of its member states.

<sup>1</sup> See Georg Schwarzenberger, *International Law: As Applied by International Courts and Tribunals*, vol. II, Steven and Sons, London, 1968, pp. 15–16.

<sup>2</sup> Malcolm Shaw, *International Law*, 7th ed., Cambridge University Press, Cambridge, 2010, p. 397.

This book is the fourth in the series of volumes entitled *Historical Origins of International Criminal Law*. The volumes contain papers presented at two international conferences. The first was held in Hong Kong on 1 and 2 March 2014, and the second in New Delhi on 29 and 30 November 2014. Both conferences brought together leading experts including academics, lawyers, historians and sociologists to explore and theorise upon various aspects of the emerging sub-discipline of history of international criminal law. The first conference sought to trace how specific trials, treaties, declarations, acts of states and publications have contributed to the development of international criminal law, as it exists today, in a historical context. The Hong Kong conference findings have already been published by the Torkel Opsahl Academic EPublisher in two informative and coherent volumes.

The second conference in New Delhi sought to build on the findings and discourse of the Hong Kong conference by analysing the evolution of key doctrines and institutional contributions in international criminal law. On behalf of the Asian-African Legal Consultative Organization ('AALCO'), I was actively involved in the organisation of the New Delhi conference and was fortunate to participate in the programme. *Historical Origins of International Criminal Law*, Volumes 3 and 4 contain papers from the New Delhi event.

One of the key contributions of Volume 3 is the investigation into hitherto unexplored historical and geographical aspects of international criminal law. Ancient religious texts such as the Laws of Manu (*Manusmṛiti*) and forgotten or uncited cases of prosecutions in Ancient Greece, China and the Ottoman Empire offer a refreshingly new angle to this study. It is important that we move beyond the traditional narrative offered in most textbooks that limit the history of international criminal law to the trials at Tokyo and Nuremberg and the former Yugoslavia and Rwanda criminal tribunals. With the ICC attempting forays into an increasing number of geopolitical contexts, an appreciation of the evolution of international criminal law in such new contexts is imperative. The broad range of backgrounds of contributors to these volumes brings together various perspectives on this sub-discipline.

A second key feature of Volume 3 is the way it probes the origins of doctrines of core international crimes for the purpose of better understanding their parameters and elements. Chapters on instruments such as the Lieber Code and the Geneva Conventions serve as useful indicators of the evolution. A third, closely related, contribution of this volume is its

focus on the concept of individual criminal responsibility itself. Chapters address various aspects of the development of the principle and specific modes of liability, and by that also derive the essence of the acceptance of individual rather than state responsibility.

Volume 4 traces the institutional contributions made by national and international courts and other organisations, and highlights challenges and successes they have encountered in their work on core international crimes. It analyses the nature and extent of state participation in the evolution of this discipline of international law. Indeed, we must bear in mind that the implementation of international criminal law, like any field of international law, will always hinge on the extent to which states are willing to co-operate with each other to attain the said goal. Exploring political narratives that have shaped state response to the implementation of international criminal law is critical to project and resolve similar deadlocks that may occur in the present day.

The ICC, which at the time of its establishment was a hallmark of such political compromise, is now well into its second decade. At the time of writing, more than 35 individuals have been charged by the Court, including the Kenyan President Uhuru Kenyatta, former Libyan leader Muammar Gaddafi, Ugandan rebel Joseph Kony and Sudanese President Omar al-Bashir. Despite being criticised as a mere tool of Western imperialism, the Court has the potential to develop into a powerful tool for the prosecution of international crimes.

Yet, 41 United Nations Member States have refrained from signing or acceding to the ICC Statute for reasons ranging from definitional objections, the terms in the Statute to political strong-arming. This situation is very unfortunate. The International Criminal Tribunals for the former Yugoslavia and Rwanda brought a fair number of perpetrators to justice, thereby paving the way for reconciliation in these war-torn countries. It is imperative that the ICC too obtains the backing of all United Nations Member States, a move that will require sustained negotiation and interpretation of existing concepts within the international criminal law discourse, along with political compromise.

Studying international criminal law's theoretical and institutional evolution as explored in Volumes 3 and 4 of *Historical Origins of International Criminal Law* will help us develop a direction that could take this discipline forward. In an era torn by civil war, violent extremism and sustained human rights abuse on an international scale, there is an urgent

need for the further development of this discipline to account for the challenges that lie ahead.

I urge readers to approach Volumes 3 and 4 with an open mind so as to appreciate the fresh perspectives they offer. Much like the preceding Volumes 1 and 2, the present volumes serve as authoritative texts in a rapidly evolving discipline of international law.

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## Historical Origins of International Criminal Law: Volume 4

Morten Bergsmo, CHEAH Wui Ling, SONG Tianying and YI Ping (editors)

This fourth volume in the series Historical Origins of International Criminal Law concentrates on institutional contributions to the development of international criminal law rather than taking a chronological (Volumes 1 and 2) or doctrinal (Volume 3) approach. It analyses contributions made by institutions such as the Nuremberg, Tokyo, ex-Yugoslavia and Rwanda tribunals, INTERPOL, the International Association of Penal Law, the Far Eastern and Pacific Sub-Commission, and internationalised fact-finding mandates. It considers the role played by some jurisdictional principles and work methods of international and national institutions. Part 4 also looks at wider trends in the development of international criminal law

The contributors include Wegger Christian Strømme, LING Yan, Anuradha Bakshi, ZHU Wenqi, Volker Nerlich, David Re, LIU Daqun, Serge Brammertz, Kevin C. Hughes, Patricia Pinto Soares, Mareike Schomerus, Seta Makoto, Natalia M. Luterstein, Hilde Farthofer, Itai Apter, Md. Mostafa Hosain, Helge Brunborg, Mutoy Mubiala, Yaron Gottlieb, Mark A. Lewis, Marquise Lee Houle, Tina Dolgopol, Rahmat Mohamad, Barrie Sander, Furuya Shuichi, Chris Mahony, ZHANG Binxin and the editors.

In his foreword, Wegger Christian Strømme notes that the four-volume project “draws our attention to the common legacy and interests at the core of international criminal law. By creating a discourse community with more than 100 scholars from around the world, [CIL-RAP] has set in motion a wider process that will serve as a reminder of the importance of the basics of international criminal law”.

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