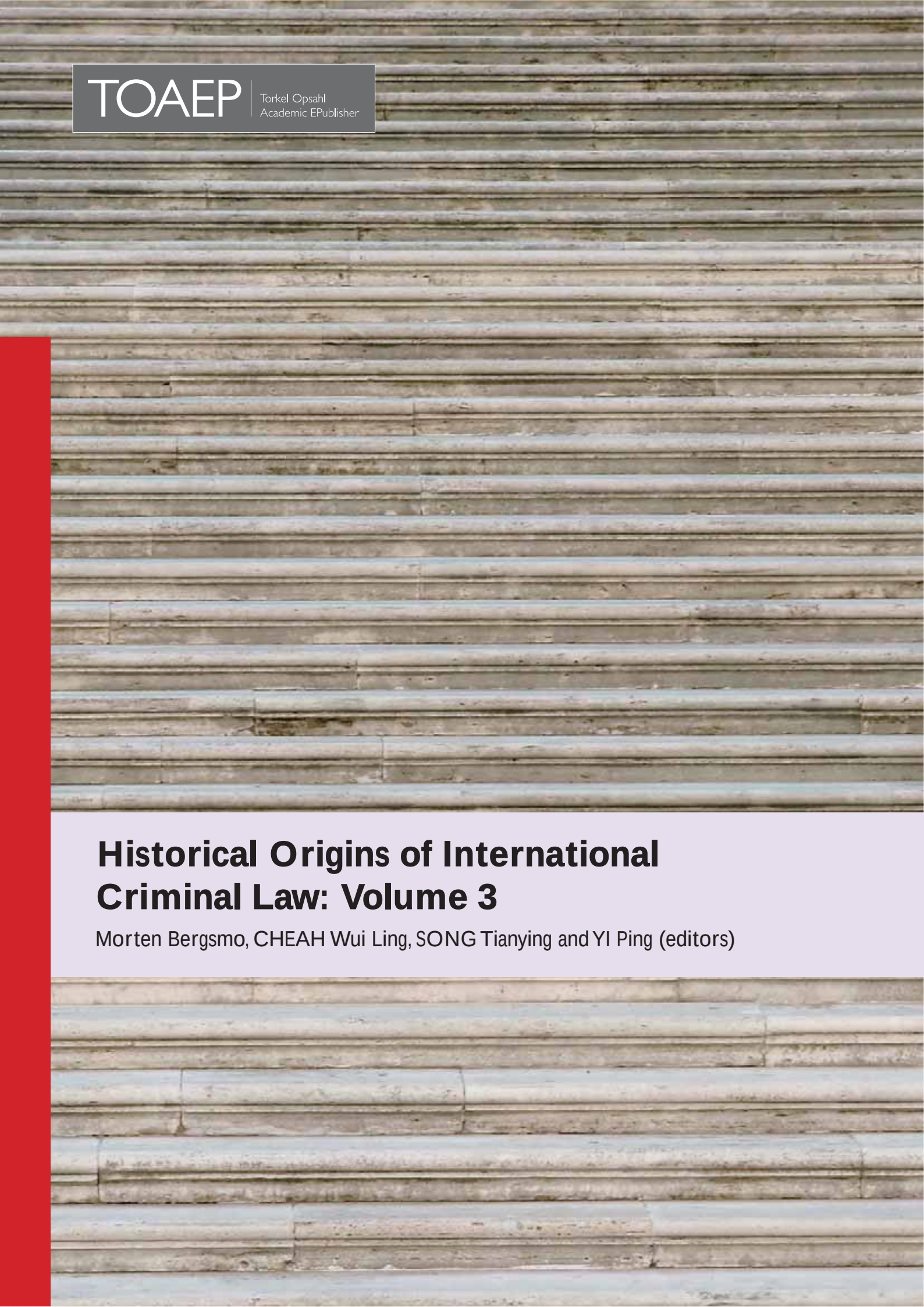

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5

The Trials of Charles I, Henry Wirz and Pol Pot: Why Historic Cases Are Often Forgotten and the Meaning of International Criminal Law

Jens Iverson*

5.1. Introduction

Trials involving historic figures such as the King of England, co-conspirators with the President of the Confederacy, and one of the most infamous *génocidaires* of the twentieth century seem like obvious subjects of enduring notoriety and fascination. The subject matter of these trials – crimes against peace, murder in violation of the laws and customs of war, and genocide – are central to international criminal law. The settings of the trials were striking: the High Court of Justice in Westminster Hall, London after the second English Civil War; military proceedings in the Capitol building, Washington, DC after the Civil War in the United States; and the theatre-like Chaktomuk Hall in Phnom Penh, Cambodia after the Khmer Rouge regime was overthrown by Vietnamese intervention. The trials were promoted by the governing authorities as historic events. The trials of Charles I (Charles Stuart), Colonel Henry (Heinrich) Wirz and Pol Pot (Saloth Sar) are nonetheless often absent in studies of international criminal law, and are sometimes even unknown to its scholars and practitioners.

The formation of these lacunae, not in the law itself but in dominant histories of international criminal law, is worthy of additional attention. This chapter first describes the trials themselves, articulating why they should be included in the canon of seminal events in the history of international criminal law. It then explains three reasons why they have not been so included: the contested nature of the circumstances of each trial, the domestic nature of the forum, and the utility of rooting the historiog-

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raphy of international criminal law primarily in the post-Second World War order. These proposed reasons for collective scholarly forgetting reveal much about the trials, and illuminate contemporary international criminal law even more. A careful study of the reasons for the absence of these trials in the dominant histories of international criminal law provides its own means of analysing the discipline. International criminal law is a field seized with inherent tensions – tensions that are as present in history as today. These tensions include minimising allegations of politicisation while addressing politically charged subjects, and seeking the imprimatur and apparent independence of international law while maximising the use of domestic judiciaries and authority. This chapter suggests that for the potential of international criminal law to be fully realised, particularly in domestic trials, the history of domestic criminal prosecutions with an international law character must be more carefully considered.

International criminal law is often taught based around the concept of an 'international crime'. For the textbook *An Introduction to International Criminal Law and Procedure*,[1] an international crime is simply "those offences over which international courts or tribunals have been given jurisdiction under general international law".[2] With respect, a better definition of an international crime is a crime created by international law, regardless of whether it is within the jurisdiction of an international court or tribunal.[3] This is the definition emphasised at the International Military Tribunal ('IMT') at Nuremberg, discussing international crimes as "crimes against international law"[4] and emphasising that "individuals have international duties which transcend the national obligations of obe-

1 Robert Cryer, Håkan Friman, Darryl Robinson and Elizabeth Wilmshurst, *An Introduction to International Criminal Law and Procedure*, 3rd ed., Cambridge University Press, Cambridge, 2014.

2 *Ibid.*, p. 4.

3 Ibid. See also Bruce Broomhall, International Justice and the International Criminal Court: Between Sovereignty and the Rule of Law, Oxford University Press, Oxford, 2003, pp. 9–10; Robert Cryer, Prosecuting International Crimes: Selectivity and the International Criminal Law Regime, Cambridge University Press, Cambridge, 2005, p. 1; Gerhard Werle, and Florian Jessberger, Principles of International Criminal Law, 2nd ed., Oxford University Press, Oxford, 2009, p. 29.

4 International Military Tribunal (Nuremberg), Judgment and Sentences, reprinted in *American Journal of International Law*, 1947, vol. 41, pp. 172, 221.

dience imposed by the individual state".[5] This may seem a trivial distinction for students first introduced to the subject, but has profound implications for the history of the field as well as the future of the field, if the main work of international criminal law is not to be relegated to the minute number of trial and appeals chambers belonging to international institutions and instead to be carried forward in and by the uncounted number of domestic judicial fora.

5.2. The Trials

5.2.1. Introduction

There are several problems with drawing conclusions from three historical events, which take place in different centuries, in varied cultures, on separate continents. Each of these events is worth extensive study in its own right. Any encapsulation is necessarily limited. The choice of these three trials is inherently somewhat arbitrary. The specialist who spends their career focused on any of these events might find the brief mention of any of these trials comparatively facile. These are the risks of any comparativist venture, and a risk that must be run should the benefits of comparison be gained. The author is mindful of these difficulties, and hopes that this chapter can serve (for many readers) as an introduction to the subjects addressed, rather than the last word.

More substantially and subtly, the viability of a history of international criminal law that includes such disparate events is not without difficulty. It is tidier to treat the history of international criminal law as a relatively triumphant march of post-Second World War international institutions. One can reasonably read the following with a sceptical mindset, feeling that historical research should ordinarily be limited to discrete periods and locations, and that a more 'global' history is more likely to mislead than clarify. In addition, the use of history in legal scholarship has its own unique difficulties, not the least of which is that few scholars have extensive training in both history and the law.

Nonetheless, the need for the study of legal history remains compelling. Historical jurisprudence emerged as a separate school of legal philosophy in the 1800s in the midst of the debate between positivism and

[5] *Ibid*.

natural law.[6] Friedrich Karl von Savigny is cited as making the first formulation of this school in his response to a German professor of Roman law, A.F.J. Thibaut.[7] Thibaut proposed in 1814 that Germany should adopt a civil code, modelled after the 1804 French Civil Code. Savigny responded that law was "developed first by custom and belief of the people, then by legal science – everywhere, therefore, by internal, silently operating powers, not by the arbitrary will of the legislator".[8] If law, like language, is part of the common consciousness of the nation, then international criminal law, the direct criminalisation of conduct by the 'international community' requires an examination of a more global history. In order to understand the selective forgetting, the primary subject of this chapter, one must first look at the primary history of the events in question – to which we now turn.

5.2.2. The Trial of Charles I

5.2.2.1. The Context

The reign of King Charles I of England lasted from 1625 until the moment of his execution on 30 January 1649.[9] It was a troubled reign, marked by war with Scotland and Ireland. It was also marked by conflict within His Majesty's government. Parliament provided funds for the wars twice – but only reluctantly, partially, and on the condition of a transfer of some authority from the king to Parliament. On the king's third request for war funding, Parliament refused.[10] The royal response was to enter the House of Commons with armed soldiers intending to arrest members of Parliament. He failed, and was forced to flee London and form an army. War was no longer merely between England and neighbouring countries. England was riven by civil war.

Charles lost the civil war. Before it ended, people suffered. At his trial, Charles I was charged with "treasons, murders, rapines, burnings,

6 Harold J. Berman, "The Historical Foundations of Law", in *Emory Law Journal*, 2005, vol. 54, p. 16.

7 Ibid.

8 *Ibid*.

9 Charles Anthony Smith, *The Rise and Fall of War Crimes Trials: From Charles I to Bush II*, Cambridge University Press, Cambridge, 2012, p. 30; C.V. Wedgwood, *The Trial of Charles I*, Collins, London, 1964, p. 13.

10 Smith, 2012, p. 30, see *supra* note 9.

spoils, desolations, damages and mischiefs to this nation".[11] It was in this raw atmosphere that the House of Commons created a High Court of Justice for one month to try the king.

5.2.2.2. The Accused

Charles I never stopped being king. It was as the King of England that he was charged, put on trial and executed. Unlike Edward II, Henry VI or Mary Stuart, he was not simply killed extrajudicially or deposed. His status as king was recognised by his opponents in war, and by those who charged him, prosecuted him, judged him and signed his death warrant. He was described as the "King of England" in the charges against him, and the warrant for his execution continued to describe him as the "King of England".[12] His last words were an order to the executioner not to behead him until he was ready: "Stay for the sign".[13] The executioner's response indicated his continued royal status: "I will, an' it please Your Majesty".[14]

Aside from his status as king, the nature of the accused is contested. This contestation goes beyond the normal discussions of individual criminal responsibility common in criminal law – the question went to whether he was sacred or damned. For his detractors, he was "Charles Stuart, That Man of Blood"[15] – a phrase that indicated he had shed innocent blood, and thus had blood guilt. Blood guilt indicates spiritual pollution, not ordinary culpability – a man unintentionally guilty of shedding blood could be barred from ordination in the Church.[16]

5.2.2.3. The Prosecution

The most interesting aspect of the collective identity of the prosecution is revealed by their choice not to merely kill or depose the king, but to put the king on trial. Oliver Cromwell, leader of the army, originally favoured

11 Wedgwood, 1964, p. 130, see *supra* note 9.

12 *Ibid.*, p. 10.

13 *Ibid.*, p. 193.

14 *Ibid*.

15 Patricia Crawford, "Charles Stuart, That Man of Blood", in *Journal of British Studies*, 1977, vol. 16, no. 2, pp. 41–61.

16 *Ibid.*, p. 42.

a ceremonial kingship, but later backed the destruction of the monarchy.[17] On 20 November 1648 the Puritan army, controlled by Cromwell, demanded that the House of Commons bring the king to trial.[18]

5.2.2.4. The Trial

Charles I declared before the trial began that he would not recognise the authority of the court. As the trial began on 8 January 1649, in the stately Painted Chamber of Westminster Hall, he continued this approach. Not only did the king not recognise the legitimacy of the trial, he refused to plead – which under the procedural requirements at the time meant the trial could not proceed.[19] Normally, this would be remedied by torture. Rather than torture the king, the requirement for the accused to overtly plead was relaxed, with the prosecutor instead arguing he would put in a plea of guilty by implication.[20]

More fundamentally, the tenet of English law that justice proceeded from the sovereign was thrown into doubt by the trial of the sovereign. The House of Commons tried to square this circle with the revolutionary idea of the sovereignty of the people. In this conception, the House of Commons represented the people, and could subject anyone to the law, even the king. The king, in contrast, was described as merely "trusted with a limited power to govern by, and according to the laws of the land, and not otherwise".[21]

The prosecution's theory may remind the scholar of international criminal law of the language used in Nuremberg that starting a war "is the supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole".[22] The prosecution charged that because the king caused war in furtherance of his "wicked design to erect and uphold in himself an unlimited and tyrannical power to rule according to his Will, and to overthrow the Rights and Liberties

[17] Smith, 2012, pp. 31–33, see *supra* note 9.

[18] Wedgwood, 1964, p. 13, see *supra* note 9.

[19] *Ibid.*, pp. 94–95, 103, 109–10.

[20] *Ibid.*, p. 142.

[21] *Ibid.*, pp. 96, 130.

[22] Nuremberg Trial Proceedings, vol. 22, 30 September 1946, available at http://avalon.law.yale.edu/imt/09-30-46.asp, last accessed on 25 November 2014.

of the People",[23] he was responsible for "all the treasons, murders, rapines, burnings, spoils, desolations, damages and mischiefs to this nation, acted and committed in the said Wars, or occasioned thereby".[24]

In contemporary international criminal law, the substantive crimes alleged seem to be less focused on the resort to armed force itself (what might later be described as a violation of *jus ad bellum*, crimes against peace or the crime of aggression), and more on war crimes – with the distinction between what would now be called international and non-international armed conflict made somewhat indistinct between the conflicts with Ireland, Scotland, and within England. The prosecution's theory is also reminiscent of modern crimes against humanity, with a widespread and systematic attack against civilian populations, wickedly designed under governmental plan and policy, criminal under a law supreme to the sovereign even though the crimes were against the sovereign's subjects.

The trial was public, and the galleries were filled, from the lower hall to the galleries above the seats, with some individuals even climbing to the embrasures of the gothic windows. The conduct described before the crowd was damning. One witness gave evidence that those who surrendered to the king were plundered in his presence. Another swore that the king permitted prisoners to be stripped and cut, and that when one of the king's officers tried to stop the cutting of the prisoners the king had said "I do not care if they cut them three times more, for they are mine enemies".[25]

The Act of the House of Commons establishing the High Court of Justice described him as follows:

> Charles Stuart, the now King of England, not content with the many encroachments which his predecessors had made upon the people in their rights and freedom, hath had a wicked design totally to subvert the ancient and fundamental laws and liberties of this nation, and in their place to introduce an arbitrary and tyrannical government, and that besides all other evil ways and means to bring his design to pass, he hath

[23] Wedgwood, 1964, p. 130, see *supra* note 9.

[24] *Ibid.*, p. 130.

[25] *Ibid.*, pp. 123, 148−49.

> prosecuted it with fire and sword, levied and maintained a civil war in the land, against the Parliament and Kingdom.[26]

His response was not merely that he was the king but also semi-sacred, literally anointed at his coronation and reportedly able to heal through the power of his touch.[27] As the inevitable result of the trial became evident, he declared, "I am the Martyr of the people".[28] His strongest arguments at trial, at least to the modern ear, were when he related to the people of England, and their freedoms and liberties.

> If it were only my own particular case […] I would have satisfied myself with the protestation I made the last time I was here against the legality of the Court, and that a King cannot be tried by any superior jurisdiction on earth. But it is not my case alone, it is the freedom and the liberty of the people of England; and do you pretend what you will, *I stand more for their liberties*. For if power without law may make laws, may alter the fundamental laws of the Kingdom, I do not know what subject he is in England, that can be sure of his life, or anything that he calls his own.[29]

For both sides, then, the approach was not to appeal to revolutionary or counter-revolutionary rhetoric, but to a conservative sensibility. For the prosecution, this conservative sensibility was grounded in the sovereignty of the people, and the trial was seen as an exercise in reclaiming and establishing that sovereignty, and re-establishing the universality of law. The prosecution cited Henry de Bracton and other ancient authorities, and referenced the Barons' War leading to the enshrinement of the Magna Carta, "[w]hen the nobility of the land did stand out for the liberty and property of the subject". [30] The prosecution defended their approach as a defence of sovereignty:

> There is a contract and a bargain made between the King and his people, and your oath is taken: and certainly, Sir, the bond is reciprocal: for as you are the liege lord, so they liege subjects. […] This we know now, the one tie, the one bond, is the bond of protection that is due from the sovereign; the

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26 Sean Kelsey, "Politics and Procedure in the Trial of Charles I", in *Law and History Review*, 2004, vol. 22, no. 1, p. 11.

27 Crawford, 1977, pp. 41–42, see *supra* note 15.

28 Wedgwood, 1964, p. 192, see *supra* note 9.

29 *Ibid.*, pp. 137–38 (emphasis added).

30 *Ibid.*, p.60.

> other is the bond of subjection that is due from the subject.
> Sir, if this bond be once broken, farewell sovereignty! [31]

The idea of 'impunity' for heads of state as a problem begins with this trial, with the High Court of Justice established so that no one "may hereafter presume traitorously or maliciously to imagine or contrive the enslaving or destroying of the English nation, and expect impunity for so doing".[32] For the accused, this conservative sensibility was grounded when pressed not only in royal authorities but also in the "freedom and the liberty of the people of England". [33]

5.2.2.5. The Verdict

To widespread amazement across all of Europe, Charles I was convicted and executed. While many considered this to be blasphemy against a divinely appointed sovereign,[34] those who chose to subject the king to a trial defied the theory of divine right, both on religious and (tightly intertwined) legal grounds. On 30 January 1649, less than three months after the Puritan army made their demand that the king be tried, he was publicly decapitated outside the royal banqueting house of Whitehall.[35]

5.2.2.6. The History

Cromwell's victory did not last long. King Charles II restored the monarchy in 1660, and those deemed responsible for the death of Charles I were themselves put on trial and killed.[36] The historical approach to the trial of Charles I has been tied to the author's approach to the royal family ever since. At a minimum, from a royalist perspective and a plain reading of a 1351 statute, the trial was treason, as treason included the "compassing or imagining" the death of the king.[37] More than that, it was regicide and the purest form of revolution. But going further once again, and from the perspective less sympathetic to the monarchy (at least at the time), the trial

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31 *Ibid.*, p. 161.

32 Geoffrey Robertson, The Tyrannicide Brief: The Story of the Man who Sent Charles I to the Scaffold, 2005, Chatto & Windus, London, p. 12.

33 Wedgwood, 1964, pp. 137–38, see *supra* note 9.

34 *Ibid*., p. 9.

35 *Ibid*., pp. 12–13.

36 *Ibid*., p. 219.

37 Robertson, 2005, p. 13, see *supra* note 32.

was a redefinition of sovereignty and the laws of England, and arguably sovereignty and law more generally. The objection to Charles I was rooted in clause 29 of the Magna Carta:

> No free man shall be taken or imprisoned, or be deprived of his freehold, or liberties, or free customs, or be detained, or exiled, or any otherwise destroyed; nor will we pass upon him, or condemn him, but by the lawful judgment of his peers, or by the law of the land. To no man will we sell, to no man will we deny or delay, justice or right.[38]

Because Charles I was seen to have violated this principle, in the Five Knights' case[39] among others, he went from being the source of law and liberty to an individual criminally culpable under the law. He then called upon these ideals of liberty in his defence. While it is anachronistic to imagine this fitting too neatly into the modern framework of human rights, it is not wrong to imagine the connection between rights of the individual and the ideal of sovereignty was felt as keenly then as it is felt today.

The question remains, however, why discussions of international criminal law are highly unlikely to mention the trial of Charles I. One of the most dramatic events in English history is relegated to that history, and not incorporated as part of the discussion of where international criminal law came from, what it is, and what it does. In section 5.3. the question why this trial, as well as other trials, are not remembered as part of international criminal law is dealt with in more detail. In short, the trial of Charles I is often forgotten not because it is intrinsically uninteresting to international criminal law scholars and practitioners, but because of the contemporaneously contested nature of each trial, the domestic nature of the forum and the utility of a post-Second World War narrative. This, in turn, informs the discussion in section 5.4., which further examines the tensions of international criminal law in relation to forgetting, particularly allegations of politicisation and the distrust of domestic authority. But first, additional trials should be examined to provide material for further analysis.

[38] Magna Carta, cited in Robertson, 2005, p. 33, see *supra* note 32.

[39] Also known as Darnel's or Darnell's case.

5.2.3. The Trial of Henry Wirz

5.2.3.1. The Context

The trial of Henry (Heinrich) Wirz took place after a public parade of fresh horrors, from the all-encompassing barbarity of the US Civil War, to the widely reported atrocities of the conditions of prisoner of war camps,[40] to the assassination of President Abraham Lincoln. Between February 1864 and May 1865 approximately 13,000 prisoners of war died horribly at Camp Sumter, commonly known as Andersonville prison.[41] Another 2,000 would die after the liberation of the camp before they could return home.[42] These 15,000 were a small fraction of those killed in the Civil War. In terms of American nationals killed, the Civil War remains the deadliest in US history.[43] Despite this, as the war drew to a close, Lincoln's planned post-war policies towards the South were lenient – asking only that citizens pledge not to rebel, that legislatures repudiate Confederate debt and that Southern states ratify the fourteenth amendment.[44] Eight persons were convicted of aiding John Wilkes Booth's assassination of Lincoln.[45] Only three individuals were convicted of war crimes and executed after the Civil War after Lincoln's assassination.[46] Henry Wirz, in charge of the 45,000 prisoners of war in the Andersonville prison camp, was by far the most notorious.[47]

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40 Lewis L. Laska and James M. Smith, "'Hell and the Devil': Andersonville and the Trial of Captain Henry Wirz, C.S.A, 1865", in *Military Law Review*, 1975, vol. 68, p. 78, reporting that between 1862 and 1901, over 180 publications discussed the conditions of Southern prisons during the war.

41 *Ibid.*, p. 78.

42 *Ibid*.

43 "U.S. Civil War Took Bigger Toll than Previously Estimated, New Analysis Suggests", in *Science Daily*, 22 September 2011, estimating 750,000 dead, with a margin of 100,000. See also J. David Hacker, "A Census-Based Count of the Civil War Dead", in *Civil War History*, 2011, vol. 57, no. 4, p. 4.

44 Laska and Smith, 1975, p. 77, see *supra* note 40.

45 *Ibid.*, p. 84.

46 The others were Champ Ferguson, see "CHAMP FERGUSON.; Confession of the Culprit", in *New York Times*, 29 October 29, 1865; and Robert Cobb Kennedy, see O. Edward Cunningham, "'In Violation of the Laws of War': The Execution of Robert Cobb Kennedy", in *Louisiana History: The Journal of the Louisiana Historical Association*, 1977, vol. 18, no. 2, pp. 189–201.

47 Laska and Smith, 1975, p. 84, see *supra* note 40.

5.2.3.2. The Accused

Wirz had a colourful, unsuccessful life before enlisting in the Fourth Louisiana Regiment on 16 June 1861 and eventually becoming responsible for the Civil War's infamous prison camp. He was born in Zurich, Switzerland on 25 November 1823. When he sailed for the United States in 1849 he had already experienced conviction (possibly for embezzlement), divorce and banishment from his native country.[48] As far as can be ascertained, he was an unsuccessful and uncredentialled medical practitioner, reduced to working as a 'doctor' for plantation slaves.[49] Once he joined the Confederate army he was promoted rapidly, and on 27 March 1864 he received the fateful order to Fort Sumter, where he was assigned to command the prison, including supply, physical facilities and prisoner discipline.[50]

5.2.3.3 The Prosecution

The head of the Adjutant General's office and the Bureau of Military Justice was Brigadier General Joseph Holt, Judge Advocate General of the Union army. Holt believed that the deaths at Andersonville were the result of Confederate policy, implemented by Wirz.[51] Witnesses would testify that Wirz had declared, "I'm building a pen here that will kill more damned Yankees than can be destroyed at the front".[52] The alleged nexus to the armed conflict provided the rationale for the trial to be held in a military tribunal. The Judge Advocate General's Office likely relied upon Francis Lieber and the Instructions for the Government of the Armies of the United States in the Field,[53] popularly called the Lieber Code, to frame the charges.[54]

48 *Ibid.*, p. 85.

49 *Ibid.*

50 *Ibid.*, p. 86.

51 *Ibid.*, pp. 88, 90.

52 *Ibid.*, p. 90. One witness attributed this quote to another individual.

53 General Order No. 100, 24 April 1863.

54 Laska and Smith, 1975, p. 99, see *supra* note 40.

5.2.3.4. The Trial

Wirz faced two charges: conspiracy and murder. The allegation that Wirz conspired with Confederate President Jefferson Davis and General Robert E. Lee (along with eight others) was the more explosive charge. The Secretary of War, Edwin Stanton, read the charges in the dramatic setting of the Capitol building, in the spotlight of the national media. Wirz entered a plea of not guilty.[55]

The offences were not against a specific statute or uniform code, but rather committed in "violation of the laws and customs of war".[56] In the history of international criminal law, this is surely worthy of note. The United States was directly incorporating what was held to be effectively customary international law into its criminal jurisdiction. The role of customary international law in the law of the United States is of enduring interest, from the 1789 Alien Tort Statute,[57] to the trial of Wirz, to the (subsequent) decision in the *Paquete Habana*[58], in which the Supreme Court clarified that customary international law was part of the law of the United States to be administered by the courts, "where there is no treaty and no controlling executive or legislative act or judicial decision"[59] to current disputes.

Further, the standard narrative of international humanitarian law holds that it governed international armed conflicts first and foremost with the regulations of non-international armed conflicts coming only with Common Article 3 of the Geneva Conventions of 1949[60] and Addi-

55 *Ibid.*, pp. 97, 100–1.

56 *Ibid.*, p. 98.

57 28 U.S.C. § 1350. Also called the Alien Tort Claims Act. The text simply reads: "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States".

58 175 U.S. 677, 1900.

59 *Ibid.*, p. 700.

60 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (First Geneva Convention), 12 August 1949, 75 UNTS 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Second Geneva Convention), 12 August 1949, 75 UNTS 85; Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention), 12 August 1949, 75 UNTS 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention), 12 August 1949, 75 UNTS 287.

tional Protocol II.[61] But the Lieber Code[62] was rooted in customary international law as applied to what would now be called a non-international armed conflict – the US Civil War.

5.2.3.5. The Verdict

Wirz was convicted on both charges.[63] Holt and President Andrew Johnson approved the record of the trial, and Wirz was executed on 10 February 1865.[64] The government issued 250 tickets for spectators, although more viewed the execution from rooftops surrounding the scaffold, within easy sight of the Capitol.[65] Four companies of soldiers chanted "Wirz, remember Andersonville" as Wirz was hung by the neck until dead.[66] Perhaps surprisingly, given the bloodiness of the war and the conviction of Wirz for a conspiracy with Confederate leaders, the leadership of the Confederacy was eventually released without trial.

5.2.3.6. The History

Henry Wirz became a hero to neo-Confederates, as exemplified by the 1908 monument to Wirz by the United Daughters of the Confederacy and continuing memorialisation.[67] The misplaced valorisation of Wirz is often within the context of the denial of Confederate crimes and defence of the Confederate cause. The singular nature of the trial also makes it the subject of reasoned historical treatment, but what was once the most notorious and singular war crimes trial has mostly been forgotten by the general public and ignored outside the community with a specific interest in the Civil War.

The shadow of the Civil War dominates popular and scholarly American history. But like the trial of Charles I, the trial of Wirz is usual-

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61 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977, 1125 UNTS 609.

62 General Order No. 100, 24 April 1863.

63 Laska and Smith, 1975, p. 126, see *supra* note 40.

64 *Ibid*., pp. 127–28.

65 *Ibid*., p. 129.

66 *Ibid*., p. 129.

67 Glen W. LaForce, "The Trial of Major Henry Wirz – A National Disgrace", in *The Army Lawyer*, 1988, Department of the Army Pamphlet 27-50-186, p. 3.

ly relegated to an isolated national history, and not incorporated into a broader history of international criminal law. Before turning to the reasons for this lack of incorporation in section 5.3. and an examination of what this forgetting indicates about the tensions within international criminal law in section 5.4., one more example of a forgotten trial will be examined: the trial of Pol Pot.

5.2.4. The Trial of Pol Pot (Saloth Sar)

5.2.4.1. The Context

Between 1975 and early 1979 the Democratic Kampuchea regime – controlled by the Khmer Rouge – murdered millions through forced labour, starvation and execution. Among many others, the jurists of Cambodia were killed. An estimated six to ten legal professionals survived.[68] The Khmer Rouge regime's crimes eradicated the institutions and people who could normally attempt to address those injustices through criminal law. Cities were emptied. Individuals with any type of education were likely targets of persecution, as were ethnic and religious minorities. A nationwide system of imprisonment, torture and murder resulted in over 20,000 mass graves. Economic mismanagement caused widespread starvation and disease. A series of military attacks in southern Vietnam eventually roused Vietnam's ire. Khmer Rouge massacres in Vietnam triggered Vietnam's invasion and occupation of Cambodia, establishing a new regime to administer the devastated country. The new regime held a trial *in absentia* for the top Khmer Rouge leaders, Pol Pot and Ieng Sary.

In August 1979 the People's Revolutionary Tribunal tried Pol Pot and Ieng Sary *in absentia* for genocide.[69] It took place in Phnom Penh, which was virtually a ghost town – emptied by the Khmer Rouge in 1975.[70] It was not a regularly functioning court, but rather a trial specially convened in Chaktomuk Hall to try Khmer Rouge leaders.[71] This theatri-

[68] Dolores A. Donovan, Sidney Jones, Dinah PoKempner and Robert J. Muscat, *Rebuilding Cambodia: Human Resources, Human Rights, and Law: Three Essays*, Foreign Policy Institute, Johns Hopkins University, Baltimore, 1993, p. 69.

[69] Howard J. De Nike, John Quigley and Kenneth J. Robinson (eds.), *Genocide in Cambodia: Documents from the trial of Pol Pot and Ieng Sary*, University of Pennsylvania Press, Philadelphia, 2011.

[70] John Quigley, "Introduction", in Nike *et al*., 2011. p. 1, see *supra* note 69.

[71] *Ibid.*, pp. 1–2.

cal setting would not be equalled until the establishment of the Extraordinary Chambers in the Courts of Cambodia decades later, where Ieng Sary would be retried on similar charges.

A new government was set up by 1981, but the international community largely refused to recognise it. Cambodia remained plagued by guerrilla warfare. Hundreds of thousands of people became refugees. The mass movement represented by the Kampuchean United Front for National Salvation (Renakse) included mass membership organisations of Buddhist monks, nuns, women, youth, workers and other categories. Renakse organised the petitions or 'million documents' which remains the only nationwide opportunity for survivors of the Khmer Rouge regime to describe atrocities they suffered. The million documents were the result of the Renakse research committee that interviewed survivors throughout the country. Various efforts at memorialisation occurred, including famously at Tuol Sleng, Choeung Ek and the annual Day of Remembrance activities on 20 May formerly known as the National Day of Hatred.

5.2.4.2. The Accused

Pol Pot and Ieng Sary were both born in 1925. They studied together in Paris in the early 1950s, met with French communist intellectuals and became dedicated Marxists. Pol Pot became Prime Minister of the Democratic Kampuchea regime as well as the General Secretary of the Central Committee of the Communist Party of Kampuchea, and Ieng Sary became Deputy Prime Minister. They were also brothers-in-law. They were both in hiding at the time of the People's Revolutionary Tribunal. The trial was held *in absentia*.

5.2.4.3. The Prosecution

The trial was not supported by the international community aside from Vietnam, whose army was responsible for the ending of the Khmer Rouge regime. Many participants in the trial focused on China's alleged role in the atrocities of the Khmer Rouge. No one practised law in the country in August 1979, few professional police remained and there were no regular courts.[72] The People's Revolutionary Tribunal relied in part upon foreign lawyers to proceed.

[72] *Ibid*., pp. 7–8.

5.2.4.4. The Trial

The appointed defence attorneys had no contact with the (*in absentia*) accused. The defence did not substantively contest the crime base, instead arguing that China's alleged ultimate responsibility was exculpatory for the accused. There was little cross-examination of prosecution witnesses.[73] Ieng Sary, in an interview in *Le Monde*, acknowledged "excesses" but minimised the role of the Khmer Rouge leadership, denying that atrocities were centrally ordered and instead blaming the Vietnamese.[74] This was the first trial under the Genocide Convention.[75]

5.2.4.5. The Verdict

The Council of Judges of the Revolutionary People's Tribunal ruled that Pol Pot and Ieng Sary were guilty of genocide.[76] It condemned them to death *in absentia*, ruled that all of their properties be confiscated, held that all evidence be handed over to the Ministries of Internal Affairs and National Defence, and allowed the accused to appeal for leniency within seven days of the posting of a public notice.[77] The judgment emphasised the alleged role of China, specifically that "the crime of genocide perpetrated by the Pol Pot-Ieng Sary clique against the Kampuchean people is masterminded by the Peking reactionaries".[78] It based the judgment both on the 1948 Convention on the Prevention and Punishment of the Crime of Genocide and the Decree-Law No. 1 of 15 July 1979 of the Revolutionary People's Council.[79] It found that the consequence of the accused acts was that about 3 million people were killed and the 4 million survivors suffered from physical and "moral" injury.[80] The problem of the specific intent requirement (that an accused must intend to destroy a protected group) was not seriously grappled with in the judgment.

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73 *Ibid*., pp. 12, 14–15.

74 *Le Monde*, 2 June 1979, p. 3.

75 Quigley, 2011, p. 17, see *supra* note 70.

76 Letter dated 17 September 1979 from the permanent Representative of Viet Nam to the United Nations addressed to the Secretary-General, UN doc. A/34/491, 20 September 1979, Annex, pp. 29–30.

77 *Ibid*.

78 *Ibid*., p. 27.

79 *Ibid*.

80 *Ibid*., p. 28.

5.2.4.6. The History

The tribunal's judgment was circulated as a UN document,[81] but the trial was largely ignored. The UN General Assembly accepted the Khmer Rouge as the government of Cambodia as of August 1979, despite their loss of territorial control through almost all of the country.[82] Despite the infamy of the crimes and the high-profile subsequent 'hybrid' tribunal on the same subject matter (the Extraordinary Chambers in the Courts of Cambodia), the Revolutionary People's Tribunal has largely been forgotten.

5.2.5. Conclusion

The trials described above deserve a greater place in the history of international criminal law. With the trial of Charles I we see the introduction of several historical themes that continue to resonate: protection for prisoners of war, criminal responsibility for making war, the tension between sovereignty and impunity for the sovereign, and the urge to cast regime change as wholly legitimate and even conservative. The trial of Wirz demonstrated the application of the customary law of armed conflict, as reflected in the Lieber Code, as a criminal code binding upon both parties in a non-international armed conflict. It focused on the protection of prisoners of war and was an interesting application of conspiracy as a substantive crime. It also was an interesting example of the arguably political tactic of prosecuting mid-level commanders while listing the leadership as unindicted co-conspirators. The Revolutionary People's Tribunal may have been the first trial to convict on the basis of the Convention on the Prevention and Punishment of the Crime of Genocide, and was a crucial example of the politically charged nature of international criminal law in a context where the government managing the trial is not widely recognised by other states.

The trials themselves also cannot be properly understood without some concept of international criminal law and the broad issues that inform it. This is perhaps obvious with the genocide trial of Pol Pot and Ieng Sary and the war crimes trial of Wirz. With the trial of Charles I, this connection to international criminal law is perhaps less obvious but argu-

[81] *Ibid*.

[82] Quigley, 2011, p. 9, see *supra* note 70.

ably more important. The subject matter included what were even then seen as violations of the laws and customs of war, notably mistreatment of prisoners of war. More powerfully, the connection between sovereignty, immunity, the use of state power and the protection of individual liberty were all at play in the trial of Charles I. While he was no longer the head of government, Charles remained the king, the sovereign, the head of state. This afforded him no protection at court. The trial was, in the end, not mainly about the accused but about the nature of the authority of the state, the independence of the law and whether individuals' liberties were protected from the state.

5.3. Why Are These Trials Not Remembered as Part of International Criminal Law?

5.3.1. Introduction

This section suggests three reasons why the trials discussed are frequently, but wrongly, neglected in histories of international criminal law. First, the contested nature of each of the trials is analysed. Second, the domestic nature of the forum for each trial is discussed. Third, the utility of a triumphant narrative rooted in the post-Second World War order is explained. While the previous sections were more objective, the following sections are somewhat prescriptive.

5.3.2. The Contemporaneously Contested Nature of Each Trial

While the trial of Charles I proceeded, the country was far from acquiescent. Presbyterian ministers throughout London denounced the not only the trial, but the army, the House of Commons and Cromwell.[83] Eventually the regicides would themselves be tried and executed when Charles II restored the monarchy. Wirz was executed on 10 February 1865, but President Johnson did not proclaim the final suppression of the rebellion in all Southern states except Texas until 2 April 1866, with Texas following in August.[84] The 1908 monument to Wirz by the United Daughters of the Confederacy and continuing memorialisation and valorisation of Wirz[85] demonstrate the continuing contestation of the trial. The People's Revolu-

[83] Wedgwood, 1964, p. 111, see *supra* note 9.

[84] Laska and Smith, 1975, p. 96, see *supra* note 40.

[85] LaForce, 1988, p. 3, see *supra* note 67.

tionary Tribunal was not only widely dismissed and ignored, but the government that staged the People's Revolutionary Tribunal was denied a seat at the United Nations, which was instead given to the Khmer Rouge. The civil war in Cambodia would continue until the Paris Peace Accords in 1991. The continued contestation of these trials is part of what has been termed the "meta-conflict"[86] or "the conflict about what the conflict is about". Because the role of the British monarchy, the nature of the US Civil War, and the role of Vietnam and China in Cambodian history and politics continue to be live political issues, the nature of the trials is not settled.

Contrast this with the canonical trials and tribunals celebrated in the normal, triumphal history of international criminal law. Germany and Japan were utterly defeated and (particularly with respect to the Nazi government) discredited before the post-Second World War tribunals. The IMT, tribunals pursuant to Control Council Law No. 10 and the International Military Tribunal for the Far East ('IMTFE') may have been resented by some, but they had nothing like the contemporary and ongoing contested nature of the trials discussed above. The International Criminal Tribunal for the former Yugoslavia ('ICTY') and International Criminal Tribunal for Rwanda ('ICTR') have been canonised with the imprimatur of the UN, together with the defeat of the pre-Kagame regime in Rwanda and the Milošević regime in Serbia, including independence for former Yugoslav Republics and *de facto* Kosovo secession from Serbia. The International Criminal Court ('ICC') is not an *ad hoc* tribunal in the manner that the IMT, IMTFE, ICTY and ICTR were, but nonetheless has enjoyed far less contestation of the legitimacy of its trials when the sovereign power was not subject to its scrutiny.

5.3.3. The Domestic Nature of the Forum

All three trials discussed in this chapter were held in domestic fora. Unlike the IMT, the IMTFE, the ICTY, the ICTR and the ICC, these trials were the projects of single sovereigns. They were of international interest, and with respect to Charles I, Pol Pot and Ieng Sary involved allegations of betrayal or foreign interference. Wirz and Ieng Sary were born outside the territory of the country putting them on trial. With the trial of Ieng

[86] Christine Bell, *Peace Agreements and Human Rights*, 2000, Oxford University Press, Oxford, p. 15.

Sary and Pol Pot foreign lawyers played a critical role. They came after civil wars and regime changes. But the forum was nonetheless clearly domestic in each case.

Of course, a domestic forum is not a bar for the application of international criminal law. The Istanbul and Leipzig trials after the First World War were the projects of single sovereigns, as were the trials under US auspices pursuant to Control Council Law No. 10 after the Second World War. It is difficult to determine whether a forum is domestic or not in the case of many 'hybrid' tribunals. Even the IMT has been characterised as a domestic trial, in that it was the sovereign power of the Allies exhibiting a domestic jurisdiction through condominium over Germany. The great hope for an effective system of international criminal law enforcement rests on domestic enforcement, as exemplified in the system of complementarity with the ICC. This of course precedes the ICC Statute, notably in the obligation to prosecute or extradite in the Geneva Conventions of 1949 and the Convention on the Prevention and Punishment of the Crime of Genocide.[87]

With the creation of the ICTY, ICTR and ICC, it was perhaps normal for the focus to be on the particularities of fora created by multiple states. The creation of these institutions was important and their jurisprudence is valuable. But as modern international criminal law loses the glow of novelty, renewed attention to the sources of international criminal law and the long history of proceedings in domestic fora is merited.

5.3.4. The Utility of Rooting the History of International Criminal Law in the Post-Second World War Order

There is an extremely compelling pull towards beginning the narrative of international criminal law with the defeat of Nazi Germany and the prosecution of Nazi officials. Not only are the crimes of Nazi officials of unequalled infamy, but there is a real sense in which the international system was reforged after the Second World War. As argued by William Schabas in his inaugural lecture at the University of Leiden, the Charter of the

[87] See also, for example, the Draft Code of Crimes against the Peace and Security of Mankind with Commentaries, 1996, which states in Article 8: "Without prejudice to the jurisdiction of an international criminal court, each State Party shall take such measures as may be necessary to establish its jurisdiction over the crimes set out in articles 17, 18, 19 and 20", that is, genocide, crimes against humanity, crimes against United Nations and associated personnel, and war crimes (https://www.legal-tools.org/doc/5e4532/).

United Nations, Charter of the IMT and the Universal Declaration of Human Rights redefined the association between human rights, justice and peace.[88] The IMT was famously self-promoted by the lead prosecutor, Robert Jackson, as "one of the most significant tributes that Power ever has paid to Reason", which seems like a noble place to start a 'new' area of law.

5.3.5. Conclusion

Despite the appeal of a triumphant, bowdlerised history of international criminal law, the best approach to the history of international criminal law is a broad, humble one. While a compelling history can be crafted by largely focusing on post-Second World War international institutions, and avoiding domestic tribunals that carry historical 'baggage', it is inadvisable. For the objective scholar, a triumphant approach unnecessarily foreshortens the history of the field. For the practitioner, advocate or policy-maker, the triumphant approach robs them of perspective. Writing out flawed or contested trials from the history of international criminal law may tend to build unrealistic expectations, leading to inevitable disappointment. If international criminal law is seen as something with a long history, even if that history is somewhat troubled, the disappointments of the day are less likely to be given disproportionate weight. Additionally, the possibility of politicised or otherwise flawed prosecutions may be guarded against with greater vigour.

5.4. The Tensions Within International Criminal Law

5.4.1. Introduction

The author submits that the trials discussed above deserve attention on their own merits. Their absence in standard studies of international criminal law was formed in part because they do not rest easily within a confident, utopian narrative of international criminal law overall. Each trial throws light on two tensions within international criminal law – tensions that may be reduced or managed, but rarely eliminated. First, the allegation of politicisation is never entirely avoidable when dealing with politi-

[88] William Schabas, "The Three Charters: Making International Law in the Post-war Crucible", Inaugural Lecture, Leiden University, 25 January 2013 (https://www.legal-tools.org/doc/c3e5cf/).

cally charged subjects. Second, the tension between the independence of international law and the need for domestic judiciaries and authorities is a continuing issue. In order for the potential of international criminal law to be fully realised, particularly in domestic trials, the (sometimes cautionary) history of domestic criminal prosecutions with international law character must be more carefully considered.

5.4.2. Allegations of Politicisation and Politically Charged Subjects

The trials discussed in this chapter were (and for some are) inherently politically charged. Allegations that the trials were wholly political, mere predetermined 'show trials' devoid of actual legal substance inherently diminish their legitimacy. But this is not a problem that will only strike the occasional international criminal law trial. The subject matter of international criminal law is conduct that has so offended international public order[89] and the public conscience[90] that it is prohibited not merely domestically but at the international level. Virtually all trials that deal with such conduct are going to have implications for governmental and public affairs, that is, they have political implications and are inherently politically charged. That does not mean that the trial must be political, but it likely means that the suspicion that the prosecution and the bench are politicised should not simply be ignored. The claims that the prosecution or the bench are acting for 'the people', for 'civilisation' or even for 'humankind' are unlikely to convince sceptical observers.

Those designing, prosecuting and managing international criminal law trials will inevitably be tempted to claim that politics have no influence over their purely professional motivations.[91] This chapter does not seek to follow the common 'critical' approach in which, in the name of truth telling, the hidden politics of a seemingly apolitical framework is cleverly revealed. If anything, this chapter suggests an 'anti-critical' approach – rather than seek to expand the realm of politics to cover the entire field, the author suggests it would be helpful for those practising and analysing international criminal law to attempt to keep politics and law in

89 To use the language of criminal law theory.

90 To use the language of the Martens Clause.

91 This section is informed by Jens Iverson, "Springing the Trap: Prosecutorial Discretion Beyond Politics and Law", available at http://dovjacobs.com/2012/12/20/guest-post-springing-the-trap-prosecutorial-discretion-beyond-politics-and-law/, last accessed on 25 November 2014.

their respective corners when possible, and instead admit other explanations and criteria for the choices made. Those designing trials and prosecutions are often caught in a rhetorical trap. No one realistically expects that these actors behave as creatures of pure logic, able to rationalise all choices available to them into the single choice they make. When a choice is made, it is easy to portray that decision not as a wholly professional or legal choice but rather a political choice. If the only possible descriptions are legal or political, and the law is not conclusive, the politics will inevitably appear to be (at least to many) the prime mover.

What alternative is there to this dilemma, to this rhetorical trap? How can politics be defined so it does not occupy the field to the detriment of legal processes? The issue of politics as power relations is particularly heated in the context of armed conflict, and indeed has haunted international criminal law in the wake of armed conflict. When Robert Jackson described the IMT as "one of the most significant tributes that Power has ever paid to Reason", he spoke not only to pride in the law but also the concern over victor's justice as a particular politicisation of law that lies at the nexus of international criminal law and international humanitarian law.

If the practice of international criminal law is not to be reduced to mere power relations, it may be helpful to be more overt about the performative, didactic aspects about choices made. It is obvious that some are charged and some are not, some charges are lodged and some are not, not only due to the application of the law to the evidence produced in an unbiased investigation but also due to the economic constraints and policy choices of the state. This need not be wholly an issue of power relations – it also can reflect the prioritisation of contested and colliding values. As stated in Isaiah Berlin's analysis of different choices made by cultures, "[C]ollisions of values are the essence of what they are and what we are".[92] When managing allegations of politicisation, collisions of values should be openly and explicitly addressed, not wished away.

[92] Isaiah Berlin, "On the Pursuit of the Ideal", *New York Review of Books*, 17 March 1988, available at http://www.nybooks.com/articles/archives/1988/mar/17/on-the-pursuit-of-the-ideal/, last accessed on 25 November 2014.

5.4.3. International Law and Domestic Authority

Certain specified atrocities are the subject matter of international criminal law. Periods in which these atrocities occur tend to produce social upheaval that can undermine domestic authority. In all of the trials discussed in this chapter, the imprimatur and apparent independence of law beyond the immediate domestic authority was of use to that authority. In the trial of Charles I there was a clear need to appeal to an authority beyond the king himself. For Wirz the Union relied upon the concept that his conduct amounted to a "violation of the laws and customs of war", laws and customs that went beyond domestic statute. For Pol Pot and Ieng Sary the prohibition against genocide was the pivotal basis of an otherwise widely questioned authority.

This willingness of domestic authorities to seek the imprimatur and apparent independence of international law when faced with society-shaking atrocities should be welcome news for those who wish international criminal law to develop. Maximising the use of domestic judiciaries and municipal authority is widely seen as critical for the functioning of international criminal law. But there is a tension inherent in this bargain. International law, translated into domestic judicial systems, may gain local biases and lose the very independence that makes it appealing to local authorities. The more local authorities are used, the greater the potential for international law to be seen as lacking independence, and the weaker its potential imprimatur.

The trials examined in this chapter are important moments in the history of international criminal law. But if the entire history of international criminal law resembled these trials, the imprimatur of international criminal law would be lessened. The ease with which these trials are excluded from the history of international criminal law indicates an uncertainty towards domestic authority among international criminal law scholars, which should be fully reckoned with.

If domestic authorities are increasingly going to take a leading role in the investigation and prosecution of international crimes, some investigations and prosecutions will be less than independent. In addition, as discussed above, different choices will be made in terms of prosecutorial discretion and the emphasis chosen by special tribunal and institutions. The habit of referring almost entirely to the jurisprudence of post-Second World War international institutions is understandable. But a more holis-

tic approach that acknowledges a greater universe of jurisprudence with varying degrees of persuasive authority is more likely to maximise the potential of international criminal law than selective blindness. Even flawed tribunals with poorly reasoned judgments are important in that they show the ways in which international criminal law can be poorly applied. The history of international criminal law should include cautionary tales as well as notes of triumph, just as other areas of legal history allow for noting error and correction.

5.4.4. Conclusion

The trials discussed in this chapter are noteworthy, not only for British, American or Cambodian historians but also for historians of international law. More attention should be paid, both to the particulars of the trials and how they were remembered and interpreted. The trials themselves can only be fully understood within a narrative that includes international law. They are largely ignored as a subject of international criminal law not because they are irrelevant but because they are contested. The further examination of contested trials in domestic fora that do not serve a triumphant narrative should be extremely useful in understanding the field of international law. At worst, the history of international criminal law can devolve to a hagiography of a limited set of post-Second World War institutions. This serves no one well. Broadening the field of analysis is vital both to understand the long-term past developments in international criminal law and to shape them going forward.

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Historical Origins of International Criminal Law: Volume 3

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

This volume carries on the "comprehensive and critical mapping of international criminal law's origins" started by the previous two volumes. Twenty-seven authors investigate the evolution of legal doctrines and pertinent historical events, many in an attempt to inform contemporary theory and practice. Contributors include Narinder Singh, Eivind S. Homme, Manoj Kumar Sinha, Emiliano J. Buis, Shavana Musa, Jens Iverson, Gregory S. Gordon, Benjamin E. Brockman-Hawe, William Schabas, Patryk I. Labuda, GUO Yang, Philipp Ambach, Helen Brady, Ryan Liss, Sheila Paylan, Agnieszka Klonowiecka-Milart, Meagan Wong, Marina Aksenova, Zahra Kesmati, Chantal Meloni, Hitomi Takemura, Hae Kyung Kim, ZHANG Binxin, Morten Bergsmo, CHEAH Wui Ling, SONG Tianying and YI Ping.

Part 1 of the book further expands the landscape of international criminal law in terms of geography, time and diversity of legal concepts in their early forms. Parts 2 and 3 turn to the origins and evolution of specific doctrines of international criminal law. Part 2 explores four core international crimes: war crimes, crimes against humanity, genocide, and aggression. Part 3 examines doctrines on individual criminal responsibility: modes of liability, grounds of criminal defence, and sentencing criteria. The doctrine-based approach allows vertical consolidation within a concept. The chapters also identify common and timeless tensions in international criminal law, symptomatic of ongoing struggles, offering parameters for assessment and action.

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