International Criminal Jurisprudence Comes of Age: The Substance and Procedure of an Emerging Discipline

Nancy Amoury Combs
William & Mary Law School, ncombs@wm.edu

Copyright © 2001 by the authors. This article is brought to you by the William & Mary Law School Scholarship Repository.
http://scholarship.law.wm.edu/facpubs

Reviewed by Nancy Amoury Combs*

I. INTRODUCTION

After decades in which international criminal law seemed a forgotten field, two ad hoc international tribunals are now prosecuting those accused of committing international crimes in the former Yugoslavia1 and Rwanda,2 and each ratification of the Rome Statute3 brings closer the creation of a permanent international criminal court. After a century in which approximately 250 conflicts around the world led to an estimated 70 to 170 million deaths, through genocide, crimes against humanity, and war crimes with virtually none of the perpetrators brought to justice,4 the development of international criminal law comes none too soon. Fortunately, following on


its heels is a spate of scholarly and practical literature to guide those seeking to navigate a field that is still in its nascent stages and consequently lacking the precision and depth common to most municipal criminal law. 5 Substantive and Procedural Aspects of International Criminal Law, 6 a two-volume set of commentaries and documents edited by Gabrielle Kirk McDonald, the former president of the International Criminal Tribunal for the former Yugoslavia (ICTY), and Olivia Swaak-Goldman, a former legal assistant at the ICTY, must be considered among the most comprehensive of these efforts. Containing eighteen scholarly commentaries and a voluminous collection of treaties, cases, and documents, the volumes make an important contribution to this growing and necessary literature.

II. THE HISTORY AND DEVELOPMENT OF INTERNATIONAL CRIMINAL LAW

Substantive and Procedural Aspects of International Criminal Law contains more than 3000 pages of documents and commentary. That at least half of that material was prepared during, or addresses events occurring in, the last ten years is a telling testament to the rapid and recent development of the field. However, if the jurisprudential field known as international criminal law may be considered new, the conduct that it seeks to punish and prevent is anything but. Atrocities that we would now label war crimes, crimes against humanity, and genocide have been committed since ancient times. 7


7. See Ball, supra note 5, at 11 (“Whether it was the poisoning of springs and wells to kill the enemy, showing no quarter to a defeated enemy in the field, mistreating prisoners of war, laying siege to undefended towns populated by civilians, or intentionally killing groups of people, young and old alike, because of race,
Humanitarian principles attempting to regulate such conduct are also of ancient origin. However, only in the mid-nineteenth century did states begin to articulate, codify, and attempt to apply these principles universally. Beginning with the Geneva Convention of 1864, and followed by the 1868 St. Petersburg Declaration and the 1874 Declaration of Brussels, states primarily of the Western Hemisphere began to regulate the conduct of armed conflict. The Hague Peace Conferences of 1899 and 1907 advanced this movement by further developing and codifying the principles previously articulated.

These early efforts to reduce the suffering attendant upon armed conflict were aimed at the conduct of states. In response to the horrors of the Second World War, however, the victorious allies established international tribunals at Nuremberg and Tokyo to try the leaders of the defeated Axis powers. The charters for the Nuremberg and Tokyo tribunals gave the tribunals jurisdiction over three crimes: crimes against the peace, war crimes, and crimes against humanity. The subsequent Nuremberg and Tokyo judgments both

---

color, religion, or ethnicity, the world has for centuries experienced war, war crimes, and acts of brutality that violated the customs and conventions of war and the 'conscience' of humanity."); Jean Graven, Les crimes contre l'humanité, 76 Recueil Des Cours, 427, 433 (1950) (noting that crimes against humanity are as old as humanity); Daniel D. Nanda Nserako, Genocide: A Crime Against Mankind, in 1 SUBSTANTIVE AND PROcedural ASPECTS OF International CRIMINAL LAW, supra note 1, at 113, 116–18 (noting that "[t]he history of the human race abounds with episodes of genocide" and chronicling some of them); Patricia Viseur Sellers, The Context of Sexual Violence: Sexual Violence as Violations of International Humanitarian Law, in 1 Substantive and procedural aspects of International Criminal Law, supra note 1, at 263, 265 (stating that "[w]hile armies employed sexual violence as a standard armament for two thousand of the past twenty-five hundred years."); Theodor Meron, The Humanization of Humanitarian Law, 94 Am. J. Int'l L. 239, 243 (2000) (commenting that "there is unfortunately nothing new in atrocities").


10. Declaration Renouncing the Use, in Time of War, of Explosive Projectiles under 400 Grammes Weight, Dec. 11, 1868, 18 Martens Nouveau Recueil (ser. 1) 474, translated and reprinted in The Laws of Armed Conflicts, supra note 9, at 101.

11. Project of an International Declaration Concerning the Laws and Customs of War, Aug. 27, 1874, 4 Martens Nouveau Recueil (ser. 2) 219, reprinted in The Laws of Armed Conflicts, supra note 9, at 25.

12. Also influential during this period was Francis Lieber's INSTRUCTIONS FOR THE GOVERNMENT OF ARMIES OF THE UNITED STATES IN THE FIELD, reprinted in 2 Substantive and procedural aspects of International Criminal Law, supra note 1, at 359, written in 1863 and now known as the "Lieber Code." See generally Theodor Meron, Francis Lieber's Code and Principles of Humanity, 36 Colum. J. Transnat'l L. 269 (1997).

13. See e.g., Convention (No. IV) Respecting the Laws and Customs of War on Land, with Annex of Regulations, Oct. 18, 1907, 36 Stat. 2277, T.S. No. 539, excerpts reprinted in 2 Substantive and procedural aspects of International Criminal Law, supra note 1, at 25. For insightful analyses of the developments since the Hague Peace Conferences in each of the areas addressed by the Conferences, see Symposium, The Hague Peace Conferences, 94 Am. J. Int'l L. 1 (2000).

14. Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis
sketched the contours of these previously unelaborated crimes and established that individuals can be held criminally responsible for their violation.

Efforts were made to consolidate these advances following the Nuremberg and Tokyo trials. In 1946, the United Nations (UN) asked the International Law Commission (ILC) to begin work on a Code of Offenses Against the Peace and Security of Mankind, and a draft was completed in 1954. In 1949, four Geneva Conventions were concluded, which contain “grave breaches” provisions that effectively criminalize certain conduct during armed conflict. These Conventions require states parties to enact legisl-
tion providing penal sanctions for the violation of the grave breaches provisions and require them to search for alleged violators and bring them, regardless of their nationality, before the states' courts. The conclusion of the Genocide Convention in 1948 clarified what has been described as "the most heinous international crime," while helping to develop the emerging field of human rights law.

Despite these advances, interest in the development of international criminal law soon waned in the face of increased concerns over security and sovereignty brought on by the Cold War. The field rapidly reemerged in the 1990s, however, in the wake of the brutal conflicts in the former Yugoslavia and Rwanda. The UN Security Council, freed from its Cold War paralysis, established the ICTY and the International Criminal Tribunal for Rwanda (ICTR) (collectively, the Tribunals) to try those accused of international crimes in those locations. The establishment of these ad hoc tribunals marked a watershed in the short history of international criminal law and gave momentum to calls for a permanent international criminal court.

---

20. Geneva Convention I, supra note 19, art. 49; Geneva Convention II, supra note 19, art. 50; Geneva Convention III, supra note 19, art. 129; Geneva Convention IV, supra note 19, art. 146.


25. See ICTY Statute, supra note 1.

26. See ICTR Statute, supra note 2.


28. See George H. Aldrich & Christine M. Chinkin, A Century of Achievement and Unfinished Work, 94 AM. J. INT'L L. 90, 95 (2000); M. Cherif Bassiouni, Observations Concerning the 1997–98 Preparatory Com-
In July 1998, 120 states voted to adopt the Rome Statute of the International Criminal Court ("Rome Statute"). The Rome Statute will come into force once it has been ratified by sixty states. As of this writing, the Rome Statute has been signed by 139 states and ratified by twenty-nine.

The ICTY and the ICTR have jurisdiction over genocide, crimes against humanity, and certain classes of war crimes. Although the Tribunals have conducted relatively few trials, they have already had a tremendous impact on the developing doctrine of international criminal law. The ICTY has clarified various aspects of crimes against humanity. For instance, the Appeals Chamber held it to be a "settled rule of customary law that crimes against humanity do not require a connection to international armed conflict." It further held that acts committed for purely personal motives can be crimes against humanity when committed in the context of widespread or systematic crimes, and that discriminatory intent is not required for all crimes against humanity. The ICTY also substantially expanded the protections afforded civilians by international humanitarian law. Among other significant holdings, the ICTY expanded the traditional definition of the "laws and customs of war" by holding that they include serious violations of international humanitarian law committed in non-international armed conflicts. And the ICTR, by rendering the first international court

mitte's Work, 13 NOUVELLES ÉTUDES PÉNALES 5, 5–8 (1997); Press Release SC/6956, Security Council Meets to Discuss International Tribunals for former Yugoslavia and Rwanda (Nov. 21, 2000) (Luis Enrique Cappaglia of Argentina stating that "the advent of the two Criminal Tribunals had directly resulted in the creation of the International Criminal Court," and Jean-David Levitte of France stating that "[the two Tribunals had played a pioneering role in the work leading to the Statute of the International Criminal Court"). The consideration of an international criminal court dates back at least to the Hague Peace Conventions. See Ball, supra note 5, at 16.

29. See Rome Statute, supra note 3.
30. See http://www.un.org/law/icc/iccstatute/status.htm (visited Apr. 21, 2001) (listing nations that have signed, or signed and ratified, the Statute); see also Steven Lee Myers, Clinton Approves War Crimes Court, INT'L HERALD THB., Jan. 2, 2001, at 1, 5.
31. Meron, supra note 5, at 210–27; Simonovic, supra note 8, at 454. Although in the past the Tribunals have not been as successful at "showing their efforts off to Bosnians and Rwandans," Gary Jonathan Bass, War Crimes and the Limits of Legalism, 97 Mich. L. Rev. 2103, 2112 (1999), the ICTY recently created an outreach program "to find creative ways of communicating the work of the Tribunal to the peoples of the former Yugoslavia," Richard May, Judge of the ICTY, Remarks to the Fourth Session of the Preparatory Commission for the International Criminal Court (Mar. 20, 2000), http://www.un.org/icty/pressrel/p479-e.htm (visited Apr. 21, 2001).
34. See id. paras. 283–305. See also Beth van Schaack, The Definition of Crimes Against Humanity: Resolving the Incoherence, 37 Colum. J. Transnat’l L. 787, 826–40 (1999) (discussing the ICTY’s treatment of crimes against humanity).
judgments on genocide, has greatly enhanced understanding of the elements of that crime.

These important advances notwithstanding, much remains in flux. At the theoretical level, the former ICTY prosecutor Louise Arbour has noted the difficulty of merging the doctrines of public international law with those of criminal law to create a coherent jurisprudence that reflects the fundamental values common to both branches of the law. At the more pressing practical level, the elements of even the core international crimes—genocide, crimes against humanity, and war crimes—are not entirely free from doubt, and more controversial offenses, such as aggression, are even less well-defined. Further, procedures applicable in international tribunals are in their earliest stages of development; thus, questions relating to the protection of victims and witnesses, the admission of evidence, and the length of pre-trial detention are frequently raised in the Tribunals' trials. In such...
a young and rapidly developing field, there is a great need both for access to primary sources and scholarly discussion of those sources, a need that Substantive and Procedural Aspects of International Criminal Law seeks to fill.

II. SUBSTANTIVE AND PROCEDURAL ASPECTS OF INTERNATIONAL CRIMINAL LAW

Substantive and Procedural Aspects of International Criminal Law comprises two volumes: the first contains eighteen commentaries, written by seventeen authors, and it addresses the issues relevant to both the field’s historical development and the myriad questions currently under debate. The commentaries are about equally split between substantive and procedural topics. The second volume is divided into two parts and contains a comprehensive set of relevant documents. Part 1 of Volume II contains pertinent international and regional conventions, General Assembly resolutions, and the documents relevant to the establishment and functioning of the ICTY, the ICTR, and the permanent International Criminal Court (ICC). Part 2 of Volume II, which spans nearly two thousand pages, features lengthy excerpts from international criminal law judgments. More than 850 pages are devoted to the decisions and indictments of the ICTY and ICTR, but the volume also contains excerpts from the Second World War prosecutions, and from the judgments of the European Court of Human Rights, the Inter-American Commission of Human Rights, and various domestic courts.

A. Volume I: Commentaries

In selecting the commentary topics, the editors decided to exclude issues that they “considered unlikely to be the subject of international adjudication in the near future.”43 Indeed, the commentary topics generally track the issues that are currently being adjudicated in the ICTY and ICTR. This focus seems appropriate because it is primarily in these tribunals that the development of international criminal law is presently taking place. Further, the continued relevance at least of the commentaries on substantive law is assured because they concern the core international crimes, which will also fall within the ICC’s jurisdiction. The volume of commentaries arguably lacks comprehensiveness because it excludes topics such as drug offenses, terrorism, and offenses against the environment, which some believe should be considered international crimes.44 However, its more selective focus on the

44. For example, the 1991 Draft Code of Crimes Against the Peace and Security of Mankind provides that illicit trafficking in narcotic drugs, international terrorism, and willful and severe damage to the environment are crimes against the peace and security of mankind resulting in individual criminal liability. Draft Code of Crimes Against the Peace and Security of Mankind, supra note 27, arts. 24–26; see also International Convention for the Suppression of Terrorist Bombings, G.A. Res. 164, U.N. GAOR,
issues actually raised in current prosecutions gives it a contemporary, real-world feel. This is particularly refreshing in a field that historically has been long on theoretical and scholarly analysis and short on the practical application of that analysis.

In the main, the commentaries present detailed and sophisticated discussions of the selected topics, and, in the editors’ words, are intended “to assist practitioners, scholars and students in moving beyond the broad conceptions of these crimes to arrive at a clear understanding of the parameters of the substantive offenses and procedural requirements.”45 The commentaries achieve this goal, particularly since many of them are written by acknowledged experts in the fields in which they write. George Aldrich, for example, explicates the laws and customs of war; Benjamin Ferencz writes on aggression; Yoram Dinstein discusses defenses; Ruth Wedgewood examines the various fora for the prosecution of war crimes; and Christine Chinkin explores relatively new issues concerning the protection of victims and witnesses, especially in the practice of the ICTY and ICTR.

The commentaries on substantive law typically trace the historical background of the crimes under consideration, discuss the current contours of the crimes, and highlight controversial features or open questions. Some of the commentary topics prove more amenable to summary than others. For instance, genocide has been little prosecuted, but its legal contours became reasonably well-settled following the conclusion of the Genocide Convention of 1948.46 Consequently, in his commentary on genocide, Daniel Ntanda Nsereko provides a clear, straightforward description of the crime’s elements. However, his treatment of the topic would have substantially benefitted from a discussion of the ICTR’s Akayesu judgment,47 the first in-


46. Genocide Convention, supra note 21. Article II of the Genocide Convention defines “genocide” as: any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:
(a) Killing members of the group;
(b) Causing serious bodily or mental harm to members of the group;
(c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
(d) Imposing measures intended to prevent births within the group;
(e) Forcibly transferring children of the group to another group. . .

This definition has been reproduced in the Statutes of the ICTY, ICTR, and Rome Statute. See ICTY Statute, supra note 1, art. 4; ICTR Statute, supra note 2, art. 2; Rome Statute, supra note 3, art. 6.

47. Prosecutor v. Akayesu (Judgement, Sept. 2, 1998), supra note 36, at 1573. Other commentaries discuss the case. See Olivia Swaak-Goldman, Crimes Against Humanity, in 1 Substantive and Procedural Aspects of International Criminal Law, supra note 1, at 141; Sellers, supra note 7 (discussing sexual
ternational court judgment on genocide, and one that comprehensively addresses the elements of that crime. Of particular importance is Akayesu’s conceptualization of rape and other forms of sexual violence as acts of genocide and its expansion of the groups protected against genocide, a controversial holding that is in tension with a more recent ICTR decision by a different trial chamber.

In contrast to genocide, the norm prohibiting crimes against humanity has developed primarily through custom, and its elements are consequently less certain. Although crimes against humanity have been defined in several instruments during the last fifty years, no two definitions are alike. Olivia Swaak-Goldman, in her thorough commentary on the subject, takes pains to reconcile the various definitions and to explore the many questions that they raise. She concludes with an interesting, critical examination of the ICTY’s and ICTR’s recent intimations that, all things being equal, crimes against humanity are more serious than war crimes.

49. The Trial Chamber held that the groups protected by the Genocide Convention are not limited to the four groups expressly mentioned but also include “any group which is stable and permanent like the said four groups.” Prosecutor v. Akayesu (Judgement, Sept. 2, 1998) supra note 36, at para. 516, at 1633.
50. In Prosecutor v. Kayishema and Ruzindana (Judgement, May 21, 1999), supra note 36, paras. 522–26, the Trial Chamber held the Tutsis to be an ethnic group not because they met the definition of such a group in any objective sense but because Rwandan laws defined them as such. See also William A. Schabas, Groups Protected by the Genocide Convention: Conflicting Interpretations from the International Criminal Tribunal for Rwanda, 6 IILSA J. OF INT’L. & COMP. L. 375 (2000).
51. See Leila Nadya Sadat & S. Richard Carden, The New International Criminal Court: An Ugly Revolution, 88 Geo. L.J. 361, 427 (2000) (detailing the different definitions); van Schaack, supra note 34, at 792 (“Since its inception, the definition of crimes against humanity has been plagued by incoherence.”).
The commentaries on procedure primarily address the practice of the ICTY and ICTR, a focus that seems appropriate under the circumstances. Although most of the international criminal prosecutions that occurred prior to the establishment of the Tribunals took place in domestic military and civilian courts, they were conducted pursuant to well-established domestic rules of criminal procedure that have no particular relevance to the prosecution of international crimes. Thus, it is not surprising that the book's procedural commentaries concern themselves almost exclusively with procedures before international tribunals. And since the Nuremberg and Tokyo tribunals utilized only a few, basic procedures, the commentaries focus on the more sophisticated and complex procedures of the ICTY and ICTR. Specifically, they provide detailed descriptions of, inter alia, the Tribunals' pre-trial, trial, and appellate procedures, as articulated in the Tribunals' Rules of Procedure and Evidence and case law.

The commentaries' thorough and careful descriptions should be of considerable use to uninitiated criminal defense lawyers practicing before the Tribunals. However, their long-term value, is somewhat diminished because they are based on a version of the ICTY's Rules of Procedure and Evidence

53. Some of the most famous of these national prosecutions include Cr.C. (Jm.) 40/61, Attorney General v Eichmann, 1965(45) P.M. 3, 36 I.L.R. 5, 18 (1968), excerpts reprinted in 2 SUBSTANTIVE AND PROCEDURAL ASPECTS OF INTERNATIONAL CRIMINAL LAW, supra note 1, at 2329, aff'd, C.E.A. 336/61, Eichmann v. Attorney General 16(3) P.D. 2033, 36 I.L.R. 5, 277 (1968), excerpts reprinted in 2 SUBSTANTIVE AND PROCEDURAL ASPECTS OF INTERNATIONAL CRIMINAL LAW, supra note 1, at 2364; Fédération Nationale des Déportés et Internés Résistants et Patriotes and Others v. Barbie, Cass crim. December 20, 1985, JCP 1986, II G, No. 20, 655; 78 I.L.R. 125, 132-141 (1988), excerpts reprinted in 2 SUBSTANTIVE AND PROCEDURAL ASPECTS OF INTERNATIONAL CRIMINAL LAW, supra note 1, at 2395; C.E.A. 347/88, Demjanjuk v. State of Israel, 47(4) P.D. 221. There are thousands of less well-known Second World War prosecutions that were brought in national courts, including those brought pursuant to Control Council Law No. 10. See Axel Marschik, The Politics of Prosecution: European National Approaches to War Crimes, in THE LAW OF WAR CRIMES, supra note 5, at 65, 74 (noting that "as of 1988 over ninety-one thousand persons had been tried in [the domestic courts of] the Federal Republic of Germany for war crimes"); id. at 78 (noting that Austria convicted more than 13,000 persons for war crimes, crimes against humanity, or participation in or collaboration with the Nazi regime between 1945 and 1955); McCormack, supra note 8, at 62 (noting that the "responsibility for applying the law [for war crimes] lay almost exclusively with domestic jurisdictions prior to the establishment of the Nuremberg and Tokyo tribunals"); Gillian Triggs, Australia's War Crimes Trials: All Pity Choked, in THE LAW OF WAR CRIMES, supra note 5, at 123 (chronicling Australia's history of prosecuting war crimes); Sharon A. Williams, Landable Principles Lacking Application: The Prosecution of War Criminals in Canada, in THE LAW OF WAR CRIMES, supra note 5, at 151 (chronicling Canada's history of prosecuting war crimes).

54. Ruth Wedgewood's commentary describes the complementary roles of national and international courts in prosecuting war crimes but does not discuss the procedures utilized in national courts. See Ruth Wedgewood, National Courts and the Prosecution of War Crimes, in 1 SUBSTANTIVE AND PROCEDURAL ASPECTS OF INTERNATIONAL CRIMINAL LAW, supra note 1, at 389.


56. The ICTY's and ICTR's Rules of Procedure and Evidence are "virtually identical." Gabrielle Kirk McDonald, Trial Procedures and Practice, in 1 SUBSTANTIVE AND PROCEDURAL ASPECTS OF INTERNATIONAL CRIMINAL LAW, supra note 1, at 547, 552 n.6.
that already has been amended six times since the commentaries were written. The commentaries would have provided a more lasting scholarly contribution had they addressed some of the interesting theoretical issues raised by the Tribunal’s procedures. The Tribunals’ Rules of Procedure and Evidence amalgamate procedures common to a variety of legal systems. Most notably, they combine adversarial procedures, typically utilized in Anglo-

57. One might also question the editors’ decision to devote nearly 40% of the volume of commentaries to the procedures of two ad hoc tribunals. Although domestic courts have been severely underutilized for the prosecution of international crimes, John Dugard, Bridging the Gap Between Human Rights and Humanitarian Law: The Punishment of Offenders, 38 Int’l Rev. Red Cross 445, 453 (1998) (noting that “[n]ational courts have a poor record when it comes to the prosecution of war crimes and other international crimes arising out of armed conflicts”); Marschik, supra note 53, at 84 (noting that there have been no war crimes trials in the United Kingdom since the 1950s); Douglas Cassell, The ICC’s New Legal Landscape: The Need to Expand U.S. Domestic Jurisdiction to Prosecute Genocide, War Crimes, and Crimes Against Humanity, 23 Fordham Int’l L.J. 378, 381–87 (1999) (discussing the inability of United States courts to prosecute many instances of genocide, crimes against humanity, and war crimes for lack of appropriate domestic jurisdictional and substantive legislation), under the Rome Statute, domestic courts are the presumptive fora for the prosecution of international crimes. See Ruth Wedgewood, supra note 54, at 404. Procedural precedents are also likely to be less influential than substantive precedents. See Natasha A. Afzolder, Tadić, The Anonymous Witness and the Sources of International Procedural Law, 19 Mich. J. Int’l L. 445, 448 (1998) (noting that “[p]rocedural rulings at the international level generally receive less attention than substantive ones”). Whereas substantive law must be sufficiently clear and well-established at the time of the crime so as not to violate the principle rreple crimes sine leges (no crime without law), specific procedural rules need not be known in advance so long as certain minimum standards are met. See, e.g., International Covenant on Civil and Political Rights, Dec. 16, 1966, arts. 9–10, 14–15, 999 U.N.T.S. 171, S. Exec. Doc. No. D 95-2, reprinted in 2 Substantive and Procedural Aspects of International Criminal Law, supra note 1, at 193, 196, 197–98 (providing certain minimum procedures to be followed during the arrest, detention, and prosecution of those accused of crimes). Indeed, the ICTY’s initial Rules of Procedure and Evidence were drafted in a very general way, and, as a consequence, many procedural issues were settled only through adjudication in the Tribunal’s early trials and the subsequent amendments of the Rules of Procedure and Evidence. See Schrag, supra note 39, at 18 (“The [ICTY] judges deliberately left many procedural questions to be decided on a case-by-case basis, and as a result prosecutors and defense counsel alike have acted in many instances without knowing exactly what rules will govern.”); MINOW, supra note 5, at 35–36 (describing the resolution of procedural issues during the Enderomović case); Daryl A. Mundis, Improving the Operation and Functioning of the International Criminal Tribunals, 94 Am. J. Int’l L. 759, 763 (2000) (quoting an expert report that stated “in the early stages of the work of the Tribunals, a large number of motions was to be expected since many questions of procedure and practice had to be settled”); ICTY’s Rules of Procedure and Evidence, http://www.un.org/icty/basic/rpe/IT32_rev19con.htm (visited Apr. 21, 2001) (indicating that the Rules of Procedure and Evidence have been amended nineteen times). Finally, the Tribunals’ precedents need not influence the development of procedures in the ICC or any other international tribunal. Although the judges of the ICTY presented papers describing the ICTY’s experience with its procedural rules for the benefit of the drafters of the ICC’s Rules of Procedure and Evidence, May, supra note 31; Her Excellency, Judge Gabrielle Kirk McDonald, President of the ICTY, Remarks to the Preparatory Commission for the International Criminal Court (July 30, 1999), http://www.un.org/law/icc/pepcmom/july01/speech.htm (visited Apr. 21, 2001), the final draft of the ICC’s rules, ICC Rules of Procedure and Evidence, http://www.un.org/law/icc/statute/rules/rulemain.htm (visited Apr. 21, 2001), does not overlap with those of the ICTY and ICTR to a considerable degree.

Those considerations notwithstanding, procedure must be considered a vitally important component of any system of criminal justice, national or international. On the international plane, because the Nuremberg and Tokyo tribunals paid so little attention to procedure, the ICTY’s Rules of Procedure and Evidence constitute the first attempt by an international tribunal to develop a sophisticated and comprehensive system of criminal procedure, and significantly, to develop one that incorporates the modern procedural safeguards that have been enumerated in leading human rights treaties. See Prosecutor v. Tadić (Decision on the Prosecutor’s Motion Requesting Protective Measures for Victims and Witnesses, Aug. 10, 1995), supra note 42, at 839 (noting that “[i]n drafting the Statute and the Rules every attempt was made to comply with internationally recognized standards of fundamental human rights”).
American common-law jurisdictions, and inquisitorial procedures, associated with Continental European civil-law states. For instance, the presentation of evidence at trial largely follows the common-law model, with lawyers calling, examining, and cross-examining witnesses. But, as in civil-law jurisdictions, guilt is determined by professional judges, rather than lay jurors, and these judges frequently question witnesses and order the production of evidence. Defendants can plead guilty, as in common-law jurisdictions, while prosecutors can appeal acquittals, as in most civil-law jurisdictions.

Judge McDonald deems the ICTY's Rules of Procedure and Evidence to be "unique" and "not simply a hybrid of the civil and common law systems." Whatever terms one uses, the amalgam comprising the Tribunals' procedural system raises interesting questions about the nature of international criminal justice and the relationship between the individual accused and the international community. Domestic rules of criminal procedure are typically seen as reflecting not only the state's history and traditions, but its structure of authority and its social and political philosophy. For instance, adversarial methods of adjudication are typically found in states that take a laissez-faire approach to social and civic matters and consequently placing a high value on lay participation and citizen autonomy. Such states, then, conceive of adjudication primarily as a method of private conflict
resolution and limit government involvement therein. Inquisitorial methods of adjudication, by contrast, are typically associated with hierarchically organized, bureaucratic criminal justice systems that place greater trust in state officials and authorize them actively to seek accurate outcomes that advance the common good. No domestic system of criminal procedure contains purely adversarial or purely inquisitorial forms; every system is something of a blend. But Judge McDonald is correct that the Tribunals' Rules of Procedure and Evidence are a “unique” blend, and one that deserves considerable study.

Unfortunately, such broader questions are rarely addressed in the procedural commentaries in *Substantive and Procedural Aspects of International Criminal Law*. With the exception of Christine Chinkin's commentary on the protection of victims and witnesses, the procedural commentaries largely limit their focus to the minutiae of the Tribunals' procedures, describing their nuts and bolts while rarely placing them in a comparative perspective. Occasional comparisons and contrasts between this Tribunal procedure and that domestic analogue do appear, but the discussion typically ends there. And at least some normative assertions are stated as self-evident propositions without consideration of the procedural system as a whole. For instance, Michał Wladimiroff, in his commentary on the rights of suspects and accused, confidently states that:

> [t]he defence counsel exclusively defends the interests of his client; he is not to defend any other interests which may conflict with his client's interests. He fights any and all infringements of the defendant's rights and will always strive to achieve the most favourable outcome for his client. He is obliged to employ his juridical expertise unreservedly for the benefit of the defendant.

Although this description accurately portrays criminal defense lawyers who practice in an adversary system, it bears little resemblance to lawyers func-

---

70. McDonald goes on to praise the ICTY's Rules of Procedure and Evidence as "striking a balance between the common law and civil law systems," McDonald, *Trial Procedures and Practices*, *supra* note 56, at 558, but it is by no means clear that any such "balance" is desirable. See Nico Jörg et al., *supra* note 68, at 41 (inquiring as to whether the civil-law and common-law systems "are the embodiment of such divergent norms and values in the field of criminal justice, in their turn reflecting profound societal values, that they can never be brought together entirely").
73. See, e.g., Monroe H. Freedman, *Lawyers’ Ethics in an Adversary System* 9 (1975); Cnaig
tioning in an inquisitorial system. Lawyers in Germany, for instance, are viewed not as agents exclusively defending their clients' interests, but as "independent organ[s] of the administration of justice." The larger point is that one cannot describe, let alone evaluate, the role of the lawyer without considering that role in the context of the overall system of procedure in which it is expected to function.

Before leaving the volume of commentaries, a final question remains concerning its overall readability. There is a fair amount of overlap in the subject matter of the commentaries. Much of this overlap is unavoidable, resulting from the blending of the various disciplines that give content to international criminal law. International criminal law draws, *inter alia*, from age-old prescriptions of international humanitarian law, from more recent human rights principles, and from the domestic criminal codes of countries having a variety of legal traditions. Consequently, certain principles, such as individual responsibility, recur in a variety of contexts, and the emerging state of the field makes inevitable a certain amount of overlap in the scholarly discussion. Indeed, the editors were well aware of the problem of overlap and included a chapter entitled "Overlapping Crimes" to address "certain subclasses of crimes . . . [that] tend to fall under more than one general heading."

Much of the remaining overlap appears in the commentaries on procedure and results primarily from the fact that, as noted above, those commentaries focus almost exclusively on the practice of the ICTY and ICTR. Christine Chinkin's commentary addresses the protection afforded victims and witnesses, and Gabrielle Kirk McDonald's commentary addresses trial procedures, but since both commentaries discuss those issues in the context of the ICTY and ICTR, some of Chinkin's description is repeated in McDonald-


74. Wladimiroff also states that "proper preparation of a case is not possible without an adequate disclosure mechanism, on the basis of which the prosecutor is obliged to disclose all relevant information to the defence." Wladimiroff, *supra* note 72, at 440. But what constitutes optimal disclosure can be evaluated only in light of the total procedural system in which the parties make their disclosures. See Damaška, *supra* note 68, at 131–52 & n.64.


76 See id. at 267.


79 McDonald, *supra* note 56.
ald's commentary. For the same reason, Michail Wladimiroff's commentary on the rights of suspects and accused\textsuperscript{80} overlaps to a considerable extent with Lal Chand Vohrah's commentary on pre-trial procedures\textsuperscript{81} and to a lesser extent with McDonald's commentary on trial procedures\textsuperscript{82} and with Adolphus Karibi-Whyte's commentary on appellate procedures.\textsuperscript{83}

This overlap is only troubling if one approaches the volume as a unified treatise to be read from cover to cover. The volume is better appreciated, however, as a series of essays on discrete topics, each of which forms an independent whole. As noted above, the editors made no attempt to address all of the topics that could fall under the rubric "international criminal law" but instead included very thorough and detailed commentaries on the most important of the field's topics. Consequently, the volume will be of most use to readers who are looking not for an overview of the entire field, but for a series of extensive discussions on particular subjects.

\section*{B. Volume II: Documents and Cases}

The volume of documents and cases provides either the full text or lengthy excerpts of numerous resolutions, conventions, and judgments relevant to international criminal law. Generally speaking, the conventions included are those pertaining to the core international crimes and the procedures discussed in the commentaries; thus, conventions addressing aircraft hijacking, drug offenses, and apartheid, among others, are not included. However, the editors have addressed their chosen topics extensively, particularly in comparison to a recent similar work—\textit{International Criminal Law: A Collection of International and European Instruments}\textsuperscript{84}—which reproduces a much broader range of conventions but provides far less material from each. For instance, whereas McDonald and Swaak-Goldman include the full text of Geneva Convention I\textsuperscript{85} and omit only those provisions of the remaining three Geneva Conventions that are identical to Geneva Convention I, Van den Wyngaert and Stessens include little more of all four conventions than Common Article 3 and the provisions concerning grave breaches.\textsuperscript{86} Indeed, as a general matter, McDonald and Swaak-Goldman omit little that could be considered relevant to the topic at hand. Their excerpt of Protocol I to the Geneva Conventions, for example, omits five articles out of 102, and their excerpt of the International Covenant on Civil and

\begin{footnotesize}
\begin{enumerate}
\item Wladimiroff, \textit{supra} note 72.
\item Vohrah, \textit{supra} note 71.
\item McDonald, \textit{supra} note 56.
\item Adolphus G. Karibi-Whyte, \textit{Appeal Procedures and Practices, in 1 Substantive and Procedural Aspects of International Criminal Law, supra note 1}, at 623.
\item Geneva Convention I, \textit{supra} note 19. McDonald and Swaak-Goldman list Geneva Convention I as an excerpt, but this is a mistake. They actually have included the full text.
\item Van den Wyngaert & Stessens, \textit{supra} note 84, at 5–16.
\end{enumerate}
\end{footnotesize}
Political Rights\textsuperscript{87} omits only those provisions addressing the establishment and functioning of the Human Rights Committee. They also include the full text of the Rome Statute, the 1996 Draft Code of Crimes Against the Peace and Security of Mankind, and the ICTY’s Rules of Procedure and Evidence.

Part 2 of Volume II, which reproduces relevant international criminal cases, is perhaps even more thorough. It includes either the full text or lengthy excerpts from such difficult to locate materials as the Control Council Law No. 10 cases,\textsuperscript{88} and it brings together several of the better known international criminal prosecutions that have taken place in domestic fora, such as \textit{Eichmann} in Israel and \textit{Barbie} and \textit{Touvier} in France. The editors note their decision to give “more attention . . . to international prosecutions;”\textsuperscript{89} consequently, they do not include some of the better-known domestic prosecutions such as \textit{Demjanjuk}.\textsuperscript{90} Their excerpts of the domestic cases they do include are also more limited, but they are nonetheless readable and informative. As for the cases in international tribunals, the editors include either the full text or very extensive excerpts. They reproduce the full text of several lengthy ICTY decisions, including the Tadić decision on the protection of victims and witnesses,\textsuperscript{91} the Tadić decision on the production of defence witness statements,\textsuperscript{92} and the Appeals Chambers’ decision regarding Croatia’s challenge to the trial chamber’s issuance of a \textit{subpoena duces tecum}.\textsuperscript{93} And they very lightly excerpt the Nuremberg Judgment and other lengthy ICTY and ICTR cases, including the trial chambers’ decisions in Tadić and Akayesu.

Indeed, because the editors omit so little, it is easy to find fault with what they do choose to exclude. In particular, they often omit background information to the conflict in question,\textsuperscript{94} the inclusion of some of which might

\begin{itemize}
  \item \textsuperscript{87} International Covenant on Civil and Political Rights, Dec. 16, 1966, \textit{supra} note 57.
  \item \textsuperscript{88} Law No. 10 of the Control Council for Germany was adopted by the four occupying powers in Germany after the Second World War as a charter for war crimes trials in their own courts in Germany. See Control Council Law No. 10, Dec. 20, 1945, \textit{reprinted in} \textit{2 Substantive and Procedural Aspects of International Criminal Law, supra} note 1, at 69.
  \item \textsuperscript{89} McDonald \& Swaak-Goldman, \textit{Introduction to} \textit{2 Substantive and Procedural Aspects of International Criminal Law, supra} note 1, at ix.
  \item \textsuperscript{90} See Cr.A 347/88, Demjanjuk v. State of Israel, \textit{supra} note 53.
  \item \textsuperscript{91} Prosecutor v. Tadić, (Decision on the Prosecutor’s Motion Requesting Protective Measures for Victims and Witnesses, Aug. 10, 1995), \textit{supra} note 42.
  \item \textsuperscript{92} Prosecutor v. Tadić, ICTY, Case No. IT-94-1 (Decision on the Prosecution Motion for the Production of Defence Witness Statements, Nov. 27, 1996), \texttt{http://www.un.org/icry/ind-e.htm} (visited Apr. 21, 2001), \textit{reprinted in} \textit{2 Substantive and Procedural Aspects of International Criminal Law, supra} note 1, at 965.
  \item \textsuperscript{94} For instance, they omit from the Tokyo Judgment the discussion of Japanese history leading to the war in China and in the Pacific; from the Tadić decision, the discussion of the disintegration of the Socialist Federal Republic of Yugoslavia and the events taking place in Bosnia Herzegovina in the two years prior to the conflict; and from Akayesu, the discussion of Rwandan history prior to 1994.
\end{itemize}
help to contextualize the horrific and almost mind-numbing events thereafter described. On the other hand, the editors' inclusion of certain ICTY cases addressing the protection of specific witnesses seems unnecessary, since the cases either apply the standards set forth in the seminal case or involve motions that were unopposed.

These criticisms, however, are merely nitpicks. In the main, the documents were carefully selected and excerpted, and the resulting compilation is extraordinarily impressive in both its depth and breadth. It is no exaggeration to say that the volume brings together all of the documents relevant to the aspects of international criminal law currently being developed through the ICTY and ICTR, and in the Rome Statute. In this, the volume is a unique and tremendously valuable research tool for any student, practitioner, or scholar in the field.

One question, however, is whether the book is perhaps too valuable to be accessible. Its $742 price reflects its more than 3000 pages of intellectual and physical heft and the editors' admirable inclination toward inclusiveness, but it may place the book out of the purchasing range of many who would gain the most from it.

---


96. Prosecutor v Tadić, ICTY, Case No. IT-94-1 (Decision on the Prosecutor's Motion Requesting Protective Measures for Witness L, Nov. 14, 1995), reprinted in 2 SUBSTANTIVE AND PROCEDURAL ASPECTS OF INTERNATIONAL CRIMINAL LAW, supra note 1, at 935 (applying the standards set forth in the seminal case).

97. Many of the documents pertaining to the laws of war are reproduced in other works, see, e.g., DOCUMENTS ON THE LAWS OF WAR (Adam Roberts & Richard Guelff eds., 3d ed. 2000); THE LAWS OF ARMED CONFLICTS, supra note 9, which is not surprising since the laws of war is the most established of the disciplines from which international criminal law draws. Brief excerpts of documents also appear in case books such as INTERNATIONAL CRIMINAL LAW, CASES AND MATERIALS, Paust supra note 5. However, I know of no other work that brings together such a thorough compilation of conventions relevant to international criminal law as a whole, let alone one that also reproduces relevant judgments.

98. In their introduction, the editors state that the book is intended to assist "practitioners, scholars and students," McDonald & Swaal-Goldman, INTRODUCTION TO 1 SUBSTANTIVE AND PROCEDURAL ASPECTS OF INTERNATIONAL CRIMINAL LAW, supra note 43, at xiii, but one must question whether many criminal defense attorneys—presumably the "practitioners" in question—let alone students will be able to afford the book. Of course, most comprehensive research tools are expensive, but SUBSTANTIVE AND PROCEDURAL ASPECTS OF INTERNATIONAL CRIMINAL LAW presents something of an extreme case by any standard. For instance, the three-volume INTERNATIONAL CRIMINAL LAW (M. Cherif Basseiouni ed., 2d. 1999), supra note 5, which contains just over 2600 pages of commentaries on international crimes, procedures, and enforcement mechanisms, runs an expensive but more manageable $355. Books specifically targeted at student readers cost even less, with the 1140-page casebook, INTERNATIONAL CRIMINAL LAW, CASES AND MATERIALS (Jordan J. Paust et al. eds., 2d. ed, 2000), supra note 5, priced at a mere $80. See http://amazon.com.
The question of price also raises more difficult questions regarding the ultimate value of such a comprehensive work in a field as rapidly evolving as international criminal law. By the time the book was published, some of its reproduced documents were already out of date. For instance, as noted above, the version of the ICTY’s Rules of Procedure and Evidence appearing in the book has already been amended six times since, and several of the trial chamber’s holdings in Tadić were reversed by a subsequent Appeals Chamber’s decision. Most of the included treaties and cases do boast a longer life-span. However, the ICTY and ICTR are continually handing down judgments that build upon and refine the principles set forth in the cases appearing in the book. Consequently, many of the unsettled issues that the commentaries highlight have now been addressed, at least by one international tribunal. The value of the collected documents is arguably further diminished by the current availability of much ICTY, ICTR, and ICC material on their respective Web sites.

These limitations, although not trivial, do not substantially impair the book’s usefulness. The book is intended for the serious student of international criminal law, and its comprehensive treatment of the field comes precisely when it is most needed: when the broad outlines of international criminal law have largely taken their shape but the specifics are still quite murky. In providing careful, detailed commentaries and access to documentation, the book provides the foundation necessary for a sophisticated understanding of the field, an understanding that is an indispensable basis for appreciating the more recent developments that have occurred since the book’s publication.


100. The Appeals Chamber reversed the Trial Chamber’s holdings (1) that Tadić’s Bosnian Muslim victims are not “protected persons” under Geneva Convention IV; (2) that crimes against humanity cannot be committed for purely personal motives; and (3) that discriminatory intent is an element of all crimes against humanity. Prosecutor v. Tadić (Judgement, July 15, 1999), supra note 33, paras. 163–70, 268–72 and 283–305.

101. For instance, Patricia Viseur Sellers examines whether sexually violent conduct can constitute, among other things, torture and enslavement, Sellers, supra note 7, at 305, issues which the ICTY has now addressed, see Prosecutor v. Kunarac, Kovač and Vuković, Case No. IT-96-23 and IT-96-25/1 (Judgement, Feb. 22, 2001), paras. 465–97, 515–43, 656, 670, 687, 742, 745, 782, 822 (on file with the Harvard International Law Journal).

102. For the ICTY, see http://www.un.org/icty (visited Apr. 21, 2001); for the ICTR, see http://www.ictr.org (last modified Apr. 17, 2001); for the ICC, see http://www.un.org/law/icc/index.htm (last modified Jan. 11, 2001). See http://www.icrc.org/eng/ilc (visited Apr. 21, 2001) for treaties prepared by the International Committee of the Red Cross, such as the 1949 Geneva Conventions and Protocols I and II thereto. The ICTY’s Web site, however, has proven a temerarious source of materials. At times the site has been unavailable for several consecutive days.

ICTY decisions are now also published in print form in the ICTY Judicial Reports, but this reporter is currently four years behind.
III. Conclusion

Substantive and Procedural Aspects of International Criminal Law has about it an air of optimism. It comes in the midst of an explosion of activity in a field once thought dead,103 and the commentary authors, for the most part, are exuberant in their approval of the rapid doctrinal expansion that is now taking place.104 The ICTY and ICTR are not only engaging in the first international criminal prosecutions since the Nuremberg and Tokyo trials, they are applying the precepts of international criminal law to people and in contexts never before imagined. This is all to the good, but it should not obscure the fact that the establishment of those two tribunals came in the context of a world unable, or more accurately unwilling, to put an end to the atrocities that were contemporaneously taking place.105 Creating mechanisms to punish those who commit international crimes is a worthy, if limited, goal, and even that goal, until recently, seemed unattainable. The ultimate goal, however, must be to prevent international crimes, and that goal, if attainable, will require more than the clear exposition of legal

103. See Crawford, supra note 24, at xiii (noting that by the early 1980s international criminal law lacked potential and relevance); Timothy L.H. McCormack & Gerry Simpson, Preface to This Law of War Crimes, supra note 5, at xviii (stating that the book, if published a decade before, "could plausibly have been dismissed as arcane or of purely commemorative interest" because "[t]he war crimes field was in recess.").

104. See, e.g., Sellers, supra note 7, at 322 (noting, with approval, that the trial chamber's decision in Tadić "contributes a remarkable examination of sexual violence evidence"); id. at 331–32 (labeling as "understatement" that Akayev is a "historic decision for jurisprudence on sexual violence under international law" and describing the decision as "overwhelming"). Although approving of the ICTY's efforts to expand the law applicable to non-international armed conflicts, at least one of the commentary authors has suggested in another article that

a note of caution seems appropriate, both because of their unprecedented character, which could be seen as judicial legislation, and because of their uncertain scope, which, when clarified only case by case, may give the impression that criminal convictions are being made for acts committed in noninternational armed conflict on the basis of crimes that, when committed, would generally have been thought actionable only in international armed conflicts.


105. Well-known examples include the massacre of approximately eight thousand Bosnians in Srebrenica who were under UN protection, see generally Ján Wilim Honig & Norbert Both, Srebrenica: Record of a War Crime (1996); David Rohde, Endgame: The Betrayal and Fall of Srebrenica, Europe's Worst Massacre Since World War II (1997); Robert O. Wein & Fiomuala Ni Aolain, Beyond the Laws of War Peacekeeping in Search of a Legal Framework, 27 Colum. Hum. Rts. L. Rev. 293, 312–14 (1996), and the genocide in Rwanda where it has been estimated that approximately a thousand troops could have stopped the violence. See Ruth Wedgewood, The Evolution of United Nations Peacekeeping, 28 CORNELL INT'L L.J. 631, 638 (1995); Louise Arbour, History and Future of the International Criminal Tribunals for the Former Yugoslavia and Rwanda, 13 Am. U. Int'l L. Rev. 1495, 1499 (1998) (quoting Romeo Dallaire, UN Commander in Rwanda, testifying in Akayev that it "seems to me unimaginable that every day in the media, we see people being massacred, and yet we fold our arms, we remain unperturbed, we remain isolated, without wanting to come to aid, without wanting to come to their assistance"); Payam Akhavan, Book Review, 93 Am. J. Int'l L. 253, 255 (1999) (reviewing Ratner & Abrams, supra note 5, and asserting that many believe "the international community was a spectator to a 'preventable' genocide" in Rwanda); Ratner & Abrams, supra note 5, at 174 (noting that the UN Security Council took "remarkably little action to halt the massive atrocities" in Rwanda).
rules. Substantive and Procedural Aspects of International Criminal Law makes a valuable contribution to the emerging literature in the field of international criminal law. Let us hope that the field of international criminal law makes such a valuable contribution to the emergence of a world in which such law is unnecessary.

106. See David J. Scheffer, War Crimes and Crimes Against Humanity, 11 Pace Int'l L. Rev. 319, 320 (1999) ("As I walk through one massacre site after another in distant reaches of the globe, I have to ponder whether the laws of war have been of any relevance at all to this insanity."); MINOW, supra note 5, at 49 ("I do not think it wise to claim that international and domestic prosecutions for war crimes and other horrors themselves create an international moral and legal order, prevent genocides, or forge the political transformation of previously oppressive regimes."); RATNER & ABRAMS, supra note 5, at 303 ("But however significant further elaboration of international criminal law concerning human rights atrocities will be, it cannot substitute for other forms of action; and it would indeed be a serious error for the international human rights and humanitarian community to focus all its attention on this enterprise."). Cf. LAWRENCE L. LANDER, ADMITTING THE HOLOCAUST 171 (1995) ("The logic of law can never make sense of the illogic of extermination.").

107. Cf. Crawford, supra note 24, at xv ("If for every ten articles or monographs on the subject a person accused of a grave breach of the Geneva Conventions had actually been arraigned and tried before an independent tribunal, the gap between projection and reality in this field would be much less.").