STUDIES IN INTERCULTURAL HUMAN RIGHTS

Mark D. Kielsgard

Reluctant Engagement

U.S. Policy and the International Criminal Court

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by

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Reluctant Engagement

Studies in Intercultural Human Rights

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This series offers pathbreaking studies in the dynamic field of intercultural human rights. Its primary aim is to publish volumes which offer interdisciplinary analysis of global societal problems, review past legal responses, and develop solutions which maximize access by all to the realization of universal human aspirations. Other original studies in the field of human rights are also considered for inclusion.

Preface

*The Hon. Patricia M. Wald**

Mark Kielsgard makes a powerful and occasionally provocative case in this book for the United States to come to terms with the presence of the International Criminal Court on the international scene and to work cooperatively with it in areas of mutual concern. Yet, the author is both realistic in his portrayal of the varied economic, political and ideological interests that have so far been successful in impeding that coming together and in his pragmatic estimates of the obstacles that remain. Nonetheless, he, like many of us, sees the joinder as inevitable for national as well as international progress. His analysis of the history of the relationship ranging from bitter hostility by the U.S. toward the Court and active efforts to denigrate its status in the rest of the world to a passive toleration of its existence and finally to what we hope is a policy of constructive engagement with it has some fresh, though possibly controversial thoughts on the role of the military-industrial complex and provincial morality in that opposition. There is also some contrast between the visible idealism reflected in the author's introduction and conclusion drawing on the New Haven School's emphasis on dignity and human rights and the pragmatic analysis of the global and national trends that have kept us at such a distance from the Court in the past. The author has high hopes for the Court, especially if the U.S. and many more nations join up to make it a truly universal norm setter. Having spent some time on one of the ad hoc courts which Kielsgard criticizes (sometimes a bit harshly) I can only hope he is right in his optimism; the ICC has had a somewhat rocky infancy but still holds enormous promise.

One of the principal contributions of this book to the ever widening discourse on the U.S. policy toward the ICC is the careful discussion of the undeniable long-term connections between positive economic policies like trade and commerce and strenuous efforts to raise the status of human rights especially in developing countries, in which the ICC could play a major role. This is a long, detailed treatment of the myriad strains that have gone into the U.S.' misconceived policy toward the Court, and the path toward a more enlightened one, well worth reading for those who care not just about international justice and human rights, but about the long-term welfare of the United States.

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* Judge of the UN International Criminal Tribunal for the former Yugoslavia 1999-2001; Judge of the U.S. Court of Appeals for the District of Columbia Circuit 1979-1999, Chief Judge 1986-1991.

Acknowledgements

This second book in the series *Studies in Intercultural Human Rights* is the modified version of my dissertation for the *Doctor of the Science of Law* degree (J.S.D.) in Intercultural Human Rights offered by Saint Thomas University School of Law, Miami, Florida, USA. I am deeply honored to be the first graduate of this unique academic program.

I extend my chief appreciation to Professor Dr. iur Siegfried Wiessner, teacher and scholar, director of the Saint Thomas University Human Rights Program and Editor-in-Chief of this book series. His tireless efforts, comments and critical observations substantially drove this project to conclusion. I also wish to acknowledge the efforts and advice of Dr. Domingo Acevedo, formerly of the InterAmerican Commission of Human Rights, who served as my sponsor and helped review and direct the progress of this book. Additionally, I wish to thank The Honorable Judge Patricia Wald, retired U.S. Federal Judge and Judge at the ICTY, for her thorough evaluation and most helpful suggestions, as well as Professor John Makdisi of Saint Thomas University, who served on my *rigorosum* committee.

In addition to the faculty and staff at the Saint Thomas University Human Rights Department, I would also like to thank the faculties and staff at the Salzburg University Law School, particularly Professor Otto Triffterer, the Grotius Center at Leiden University including Professor Roelof Haveman, and Professor William A. Schabas of the Irish Human Rights Centre at the National University of Ireland, Galway for their expert instruction in international criminal law and to all the friends and colleagues I met at these fine programs.

Finally, special thanks to my wife, Tamara L. Crouch, for the countless hours she spent as a pillar of intellectual inspiration, proofreader and researcher, and family members Evelyn M. Bennet and Remington, whose affection, encouragement and patience helped make this book possible.

Mark D. Kielsgard
Key West, Florida, U.S.A.

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CHAPTER 1 Introduction
A Legal Response to Atrocity

The last half of the 20th century and the beginning of the new millennium have witnessed greater development in international criminal law than all previous epochs combined. Though rudimentary antecedent norms began to take shape in the 18th and 19th centuries it was not until the war crimes tribunals at Nuremberg that binding international criminal norms were developed. Nuremberg created a precedent for international scrutiny of those most heinous atrocities, which has been applied even when committed entirely within the boundaries of a single nation and perpetrated at the behest of the regularly constituted governmental authority. Yet, despite the recent developments in international criminal law, modern atrocities continue to plague humankind's quest for an international order of human rights, human dignity and rule of law.

Indeed, many of the modern acts of genocide, war crimes and crimes against humanity have even taken on signature characteristics and become identified by the particular means used or the peoples targeted. In 1915, hundreds of thousands of Armenian civilians (consisting largely of women, the aged and children) were forced on a death march from present-day Turkey to the Syrian Desert without sufficient food, water or provisions and left in the desert to die of exposure,[1] a death not unlike crucifixion. The Holocaust reflected the extreme adaptation of modern technology to mass killing and the rendering of the physical body into a commodity for financial or scientific gain. From the efficient cataloging and rounding up of victims using the newly developed IBM Hollerith punch card machines (hole 3 indicated homosexual,

1 Christopher J. Walker, *World War I and the Armenian Genocide, in* 2 THE ARMENIAN PEOPLE FROM ANCIENT TO MODERN TIMES 248-9 (Richard G. Hovannisian, ed., 1997). Moreover, Article 6(c) of the Rome Statute and Article 2(c) of the Convention on the Prevention and Punishment of the Crime of Genocide define the substantive offense of genocide to include acts of "deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part." This provision was arguably included in both instruments in order to account for the indirect modality of death inflicted on the Armenians by their persecutors. Rome Statute of the International Criminal Court, July 17, 1998, art. 6(c) U.N. Doc. A/CONF.183/9 (1998) [hereinafter Rome Statute]; Convention on the Prevention and Punishment of the Crime of Genocide, 9December 1948, art. 2 (c), U.N. Doc. 78 U.N.T.S. 277 [hereinafter Genocide Convention].

hole 8 indicated Jew)[2] to the macabre medical experimentation[3] on Jewish and gypsy prisoners and twins perpetrated by Josef Mengele at Auschwitz,[4] to the studied attention put to designing and operating the perfect killing factories powered by ovens or gas, the Nazi genocide machine killed and exploited more people, with greater efficiency than any other genocide in modern history. In the 1970's in Cambodia, Premier Pol Pot targeted the so-called intelligentsia for destruction in order to purge the country of its "decadent colonial influences." People who wore eyeglasses were killed simply because it was suspected that they knew how to read and write. By hatchet blow to the neck or evisceration or by being buried alive, some accounts estimate 2 to 3 million Cambodian deaths.[5] In the former Yugoslavia, the term "ethnic cleansing" was added to the modern lexicon. In addition to the wanton disregard for the generally accepted norms of armed conflict, the Serbian and Yugoslavian forces committed mass rapes, with the knowledge and consent of their superiors, as a deliberate instrument of war to terrorize civilian populations,[6] as a reward to soldiers and in an effort to biologically change the ethnicity of a region.[7] In Rwanda, 800,000 people were killed in approximately 100 days. This genocide was known for its own special brand of brutality as the signature instrument of murder was the machete; immediately prior to the beginning of the hostilities, over 28 tons of machetes, twice the normal annual cargo, had been imported into Rwanda.[8] In the bloody Sierra Leone uprising, the mass dismemberment of civilian's hands, feet and other body parts was orchestrated by Armed Forces Revolutionary Council (AFRC) and Revolutionary United Front

2 *See generally* 3 Raul Hilberg, The Destruction Of The European Jews 50-274 (3d ed. 2003); *See also* Edwin Black, IBM And The Holocaust: The Strategic Alliance Between Nazi Germany And America's Most Powerful Corporation 50, 371-2 (2001).

3 According to the US Holocaust Memorial Museum, Jewish prisoners were victimized as the subjects of "[u]nethical medical experimentation carried out during the Third Reich [which] may be divided into three categories ... experiments aimed at facilitating the survival of Axis military personnel ... [experiments] aimed at developing and testing pharmaceuticals and treatment methods for injuries and illnesses ... encountered in the field ... [and experiments] sought to advance the racial tenets of the Nazi worldview." United States Holocaust Memorial Museum, Holocaust Encyclopedia: Nazi Medical Experiments, 1 http://www.ushmm.org/wlc/article.php?lang=en&ModuleId=10005168.

4 *Id.*

5 *Deathwatch: Cambodia,* Time, Nov. 12, 1979 *at* 5, *available at* http://www.time.com/time/printout/0,8816,946349,00.html.

6 *Federal Republic of Yugoslavia: Kosovo-Rape as a Weapon of "Ethnic Cleansing,"* Human Rights Watch, 2000 *at* 1, *available at* http://www.hrw.org/reports/2000/fry/Kosov003.htm.

7 *Rape as a Weapon of War and a Tool of Political Repression,* Human Rights Watch *at* 2, *available at* http://www.hrw.org/about/projects/womrep/General-21.htm.

8 *Choosing War (HRW Report-Leave None to Tell the Story: Genocide in Rwanda),* Human Rights Watch, Mar. 11, 1999 *at* 16, *available at* http://www.hrw.org/reports/1999/rwanda/Geno1-3-11.htm.

(RUF) forces.[9] In addition, this conflict was known for torture, extra-judicial killing and the widespread use of child soldiers, some no more than 10 to 14 years old. In some regions, the use of child solders has grown in recent years as they have proven easy to manipulate, and can be formidable fighters through the use of psychotropic drugs and light-weight plastic machine guns, particularly the AK-47.

These atrocities are usually committed by entities exercising legitimate or de facto civil authority and often in the context of an armed conflict. They are therefore distinguishable from ordinary domestic criminal behavior in scope and in anticipated impunity for the offenders. Enver Pasha of Turkey, Pol Pot of Cambodia and Augusto Pinochet of Chile, acting under color of law, could order unspeakable horrors with relative impunity because of the control they exercised over the regularly constituted domestic judicial authority. Despite his leadership role in the crimes of Sierra Leone, Charles Taylor of Liberia could successfully negotiate his own safe passage by virtue of his political influence and, but for international intervention, would have enjoyed impunity for his crimes. The question facing all persons of conscience remains: who speaks for these victims? Who takes responsibility for the victims of mass atrocities of the gravest nature when the crimes are perpetrated by the same civil authority that is supposed to protect them or in the context of military conflicts where strict accountability is politically inexpedient for both sides or where larger issues loom, such as the cessation of hostilities conditioned upon blanket immunities? Who speaks for these victims if the domestic authority is unwilling or unable to speak for them?

To fill this "impunity gap," factions of the international community have sought for many years to provide a mechanism, an international sanctioning body with criminal competence not subject to the whim of domestic political authority. Surely a reasonably unbiased international tribunal would be the appropriate forum for atrocities perpetrated by national authorities against their own people. At the heart of the matter is the question of the universal rights of people versus the positive law of a geographical political entity. Should people everywhere be free, as a matter of right and despite domestic law or practices to the contrary, from the machetes of Rwanda, the hatchets of Cambodia or the ovens of Auschwitz? Is international law equipped to address the rights of these individuals or is it a legal order designed only to regulate the conduct between states? To what extent and under what circumstances may the international community interfere in the domestic affairs of a sovereign state?

9 Amnesty International reports that in one area of the Eastern Province "[a]s many as 4,000 men, women and children suffered mutilation, crude amputations of their hands, arms, legs, lips or ears; others suffered lacerations and gunshot wounds. Survivors of the attacks recounted that many others from their villages had been killed or had fled into the bush where many died of their injuries. They reported that villagers had been rounded up and locked in houses which were then set alight. Women and children were systematically raped or subjected to other forms of sexual assault. Men who refused to rape members of their own families had their limbs amputated as punishment. Children were ripped from their mothers' backs and killed with machetes. AMNESTY INTERNATIONAL, 1999 ANNUAL REPORT ON THE REPUBLIC OF SIERRA LEONE 1, 3 (1999) *available at* http://www.amnesty.org/ailib/aireport/ar99/afr51.htm.

In *Human Rights and World Public Order, The Basic Policies of an International Law of Human Dignity*, authors McDougal, Lasswell and Chen describe the philosophical underpinnings of legal positivism, a state-centric legal structure, and its relationship to international law:

> The positivist approach assumes that the most important measure of human rights is to be found in the authoritative enactment of a system of law sustained by organized community coercion. Within this approach authority is found in the perspectives of established officials, and any appeal to a "higher law" for the protection of individual rights is regarded as utopian or at least as a meta-legal aspiration. The explicit emphasis is upon the institutions of the modern state, and it is inspired by and inflated with exaggerated notions of sovereignty. It is this viewpoint whose champions have most strenuously insisted that only nation-states, and not individual human beings, are appropriate subjects of international law.[10]

Historically, states paid little attention to massive human rights violations occurring in foreign jurisdictions, unless they directly impacted their national interests. To interfere in the domestic affairs of sovereign states invites interference into one's own; it sets a precedent nations have traditionally sought to avoid. However, even as early as the 19th century, treaties between nations began to include provisions for the safety and human rights of people in foreign countries. Some of these provisions were included in order to halt a practice, such as slavery, that was condemned in one or more of the contracting countries. Some provisions were insisted upon in order to protect the other nation's minorities who shared a commonality, such as religion or ethnicity, with a politically operative group in the nation(s) insisting on the reform, such as the Christian Armenians. These treaties created a contract interest in another nation's treatment of its own nationals, but they were seldom enforced. In any event, this technique for the promotion of human rights did not contemplate a supra-national morality or *individual* human rights per se, but a positivist treatment because the source of the authority did not come from the universal rights of people but from written agreements between states. Throughout the 20th century public international legal trends dealing with human rights would begin to shift from strict adherence to legal positivism to the universality of human rights and ground the rule of law not just in political/territorial units but in the rights of the individual.

Though distinct, aspects of international criminal law comprise a subset of the larger human rights legal order. International criminal law can be described in two

10 Myres S. Mcdougal, Harold Lasswell & Lung-chu Chen, Human Rights And World Public Order. The Basic Policies Of An International Law Of Human Dignity 73 (1980). For a defense of legal positivism *see also* John Austin, The Province Of Jurisprudence Determined And The Uses Of The Study Of Jurisprudence (1954) (introduction by H.L.A. Hart and bibliographical note); J. Gray, The Nature And Source Of Law (2nd ed. 1931); H. Hart, The Concept Of Law (1961); T. Holland, The Elements Of Jurisprudence 1-13 (13th ed. 1924); Hans Kelsen, General Theory Of Law And State (1945).

ways: one, as the extraterritorial application of domestic criminal law; and two, as the application of international law to individuals.[11] The former, characterized as horizontal international criminal law, contemplates cooperative state action and deals with more common types of domestic crime and issues such as extradition, cooperation in multi-state investigations, exchanging information and freezing suspect bank accounts, stemming the tide of regional or international criminal activity including multi-national criminal organizations, the international drug trade and transnational terrorism.[12] The latter, commonly referred to as vertical international criminal law, expressly calls for the enforcement of individual human rights guaranteed under international treaty and customary law and, whether it utilizes first order jurisdictional priority or default jurisdiction, usually calls for an international sanctioning body and deals with higher order crimes or *jus cogens*[13] offenses, such as genocide.[14] These

11 There is a certain level of academic debate concerning the propriety of the prosecution of states as criminal entities, with collective guilt and sanctions. For a brief discussion on this issue *see generally,* ROBERT CRYER, *Introduction* to PROSECUTING INTERNATIONAL CRIMES, 41 CAMBRIDGE SERIES IN INTERNATIONAL AND COMPARATIVE LAW (2005). The Rome Statute precludes prosecutions of state entities as defendants in article 25 (1) limiting the Court's jurisdiction to "natural persons." Rome Statute, *supra* note 1, art. 25 (1).

12 The extraterritorial application of domestic law serves the purpose of prosecuting persons including non-nationals who are engaged in criminal conduct (outside the territory of the state) which creates a "criminal effect" within the state such as drug trafficking thus triggering objective territorial jurisdictional competence. Extraterritoriality can also include the prosecution of nationals for criminal conduct committed outside the territory of the state even when it has no domestic criminal effect under a theory of nationality jurisdiction. *See* Michael P. Scharf & Melanie K. Corrin, *On Dangerous Ground: Passive Personality Jurisdiction and the Prohibition of Internet Gambling,* 8 NEW ENG. J. INT'L LAW 27-30 (2002).

13 Article 53 of the *Vienna Convention on the Law of Treaties* defines *jus cogens* as "a peremptory norm of general international law [that] is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character." Vienna Convention on the Law of Treaties, art. 53, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention].

14 In its most extreme construction, quasi-extraterritorial application has taken the form of so-called "universal jurisdiction" where certain countries (including Spain, France, Germany and the Netherlands) assume domestic jurisdiction to hear cases without territorial nexus or domestic "criminal effect," but predicated solely upon the nature of the crime and the presence of the defendant in the territory of the state exercising the jurisdiction (or in a country that will extradite to the state exercising jurisdiction). The nature of the crime must be a *jus cogens* offense and while normally this would be a matter of extradition to the affected state, universal jurisdiction becomes operative when the state in which the crimes were allegedly committed refuses to prosecute. Universal jurisdiction is a hybrid jurisdictional basis as it provides for domestic prosecution (of nationals or non-nationals) for foreign conduct that violates the most basic norms of international law. Scharf, *supra* note 12.

international sanctioning bodies can sometimes "pierce the national veil" and hold suspects accountable in an international forum regardless of domestic legal practices, nationally established principles of law and national jurisdictional constraints.[15] Admittedly, with the issue of terrorism there is a blurring of the bright line separation within the arena of international criminal law, except perhaps as to the source of law. The extraterritorial application of domestic law is consistent with the principles of legal positivism, if not sovereignty, as it generally consists of a voluntary intercourse between states and calls for collective action authorized by agreement and grounded in the similarity and mutual benefit amongst two or more domestic legal/political entities. It places primacy on cooperative domestic law for the resolution of criminal behavior of an international character. The latter places primacy on the human rights of the individual, regardless of the domestic law, and is grounded in the principles of Nuremberg and the international human rights treaty regime established in the second half of the 20th century and is thus antithetical to strict state sovereignty and legal positivist theories. This inquiry will deal with the second aspect of international criminal law or vertical international criminal law and address the issues pertinent to the use of international sanctioning bodies for *jus cogens* offenses.

The modern development of international (criminal) sanctioning bodies can be articulated as a response to the 20th century genocides. This innovation in accountability was driven by the necessity of closing the impunity gap and thus international criminal law advances mirrored the conduct of the atrocities themselves; it grew and was fortified by the ever-increasing need to respond to such acts of modern savagery. From the Armenian genocide in 1915 to the Holocaust to the atrocities in the former Yugoslavia, Sierra Leone and the Democratic Republic of Congo, each new atrocity created a greater impetus for more advanced, sophisticated and effective means to punish the perpetrators and deter similar crimes. Yet, innovation in international criminal law has met with unrelenting resistance. The heart of this resistance is founded upon state sovereignty and is seen in the reluctance to adopt a revolutionary new international world order predicated, at least in part, upon rule of law and greater equitable principles, rather than the traditional order predicated upon military and economic might. The challenge of modern international criminal law is to assuage the greater reluctance of those states who occupy a world leadership role, who seek to take full advantage of their superior military and economic resources, and persuade them of the fortuity of mutual and fair international cooperation instead of the unrelenting and non-empathetic pursuit of perceived national self-interest (even

15 The current ability to "pierce the national veil" depends on the international court assuming jurisdiction. The International Criminal Tribunal for former Yugoslavia (ICTY) exercises superior jurisdiction over the domestic courts of the territory and can on its own motion assume jurisdiction over cases pending before the domestic courts without their consent and without any showing grounded in fundamental fairness. Press Release, UN International Criminal Tribunal for the Former Yugoslavia, *Fact Sheet: General Information, at* www.un.org/icty/cases/factsheets/generalinfo-e.htm (last visited Dec. 10, 2004). On the other hand, under the Rome Statute article 17 the International Criminal Court must make a showing that the domestic authority is unable or unwilling to conduct an arms-length tribunal.

in the face of cataclysmic atrocities).[16] The difficulty in building the political will to promulgate an international criminal order has dogged the growth of international criminal sanctioning bodies since World War I.

At the dawn of the last century, when the policy of non-intervention into domestic affairs was encapsulated in international law (except in the case of colonialism), the miscarriage of the international response to the Armenian genocide was predictable. Relative impunity for the perpetrators was politically expedient and despite the international outcry, the "Great Powers" of Europe and the U.S. were unwilling to establish a new retributive order grounded in rule of law or set a precedent for an international criminal sanctioning body. Arguably, this omission may have contributed to the Holocaust and the ease with which Hitler was able to persuade the German High Command of their assumed impunity for taking part in the "Final Solution." Nonetheless, this early failure provided a dry run for the eventual response at Nuremberg. While the supposed commitment to the universality of certain human rights bandied about in the 19th century seemed to have proven little more than a feckless commitment of convenience, it did begin the dialogue and take the first indispensible step to assimilate the requisite political will for eliminating impunity.

The response to the Armenian genocide provides a "before" picture of international criminal law, an order that lacked the political will and, some would say, the legal authority to hold the Kaiser responsible for crimes against peace and the Turkish CUP party officials responsible for genocide/crimes against humanity. However, the Nuremberg Tribunals provide the "after" picture. While the ill-fated struggle for accountability after the First World War may have emboldened the Nazi regime, it is fair to say it also fueled the drive for accountability after the Second World War. Nuremberg ushered in the modern age of international criminal law and provided a legal and historic precedent for many of the subsequent developments in the field. Though the frustration over previous failures surely contributed to the formation of the court, the enormity of the Holocaust and the human suffering engendered by World War II led to a resolve, the development of the political will to set a new course, and to try to put an end to impunity once and for all. This resolve would apply criminal liability even for military and government leaders acting in their official capacity and under color of law.

Yet when assessed from a modern perspective the Nuremberg tribunals themselves may have rested on a problematic (subject-matter) jurisdictional basis by argu-

16 Examples of following perceived political or national self-interest at the cost of human rights can be seen in several U.S. practices in response to modern genocides. Some of these examples include the U.S. refusal to take affirmative steps to halt the bloodshed during the Khmer Rouge genocide and providing limited political support to the Hun Sen Cambodian government after their intervention because it would otherwise be perceived as siding with the Vietnamese government; halting the Iraqi gassing of the Kurds because of official U.S. policy toward Iran; slow U.S. response to the Bosnian and Rwandan atrocities because of political inexpediences. For a more complete discussion of U.S. responses to 20th century genocides, *see generally,* SAMANTHA POWERS, "A PROBLEM FROM HELL": AMERICA AND THE AGE OF GENOCIDE (2002).

ably prosecuting offenses *ex post facto*. Nuremberg possessed significant flaws in due process and fundamental fairness such as arbitrary evidentiary rules, no freedom from self-incrimination and no appeal. Many of the jurisdictional constraints, advanced by the defendants and all but ignored by the Nuremberg tribunals, had been successfully argued by the Americans and others after World War I to refute the sufficiency of the jurisdictional basis for a war crimes tribunal to try the Turks and the Kaiser. Many contend that the real jurisdictional basis for the Nuremberg tribunals was geopolitical and military rather than legal. Chief amongst those critics was Hermann Goering, the most famous Nazi tried at Nuremberg, who characterized the law of Nuremberg as "victors' law." Nuremberg, for all of its efforts to establish rule of law, did possess features of "victors' law." This attribution however, begs the larger question of the de facto biased, possibly fatal role of the political order in parsing out prosecution for massive violations of [internationally recognized] human rights as opposed to the purportedly unbiased process of rule of law.

The advances of Nuremberg were immediately stalled by the political polarization of the Cold War. The newly formed United Nations was contemplated as the operative instrument for future prosecutions but the divided power structure of the UN, especially in the Security Council, precluded meaningful and necessary cooperation. However, other advances in the development and codification of human rights law during the 40-year conflict moved international criminal law forward and laid the foundation for a sophisticated legal system. The Genocide Convention, the Geneva Conventions of 1949, the so-called International Bill of Rights (consisting of the International Convention on Civil and Political Rights, United Nations Declaration of Human Rights and, the International Covenant on Economic, Cultural and Social Rights), other core human rights treaties, the establishment of regional human rights conventions and courts and the scrutiny of the human rights treaty regime and oversight including, in some cases, individual complaint competence all helped cultivate the fledgling principles and jurisprudence of Nuremberg and assisted in eventually providing the basis of a new international criminal law order.

The end of the Cold War saw a de-polarization of world politics and in the spirit of international cooperation, swept in a plethora of international criminal law instrumentalities including a resumption of the use of international criminal sanctioning bodies. The first sanctioning bodies were the ad hoc tribunals for the former Yugoslavia, the International Criminal Tribunal for the former Yugoslavia (ICTY), and Rwanda, the International Criminal Tribunal for Rwanda (ICTR), which were created as subsidiary organs of the United Nations and authorized by the UN Security Council.[17] The ICTY and ICTR differed from Nuremberg in three important aspects: first, they incorporated many modern due process and fundamental fairness protections that were missing in Nuremberg such as the right to an appeal and the protection against self-incrimination,[18] second, they had a legitimate subject-matter

17 S.C. Res 827, U.N. Doc. S/RES/827 (May 25, 1993); S.C. Res. 955, U.N. Doc. S/RES/955 (Nov. 8, 1994).

18 ICTR Statute article 20(g) provides for the accused's right not to be compelled to testify against him/herself. Article 24 provides for appellate review. The ICTY provides for the