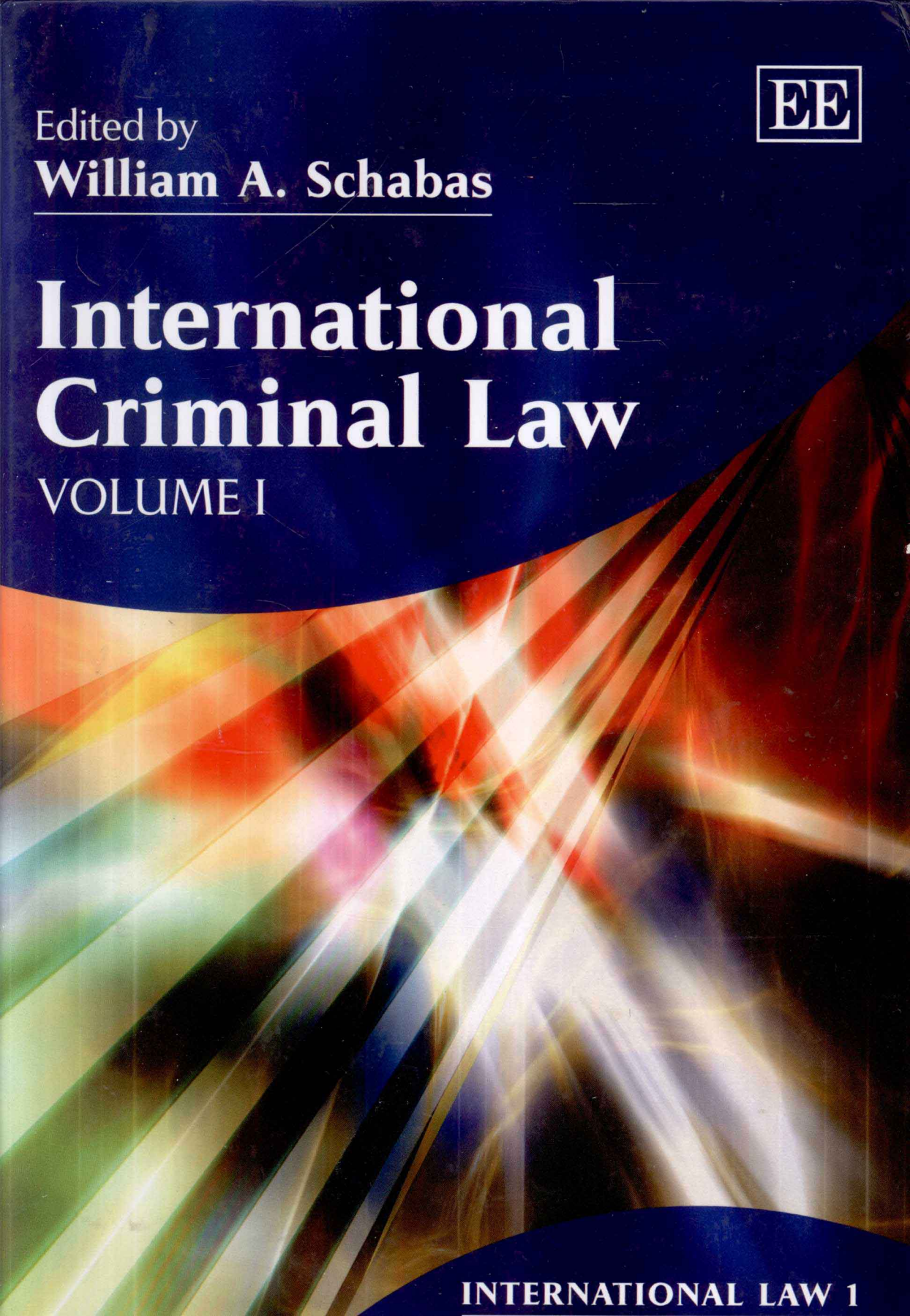
Edited by
William A. Schabas

International Criminal Law

VOLUME I



INTERNATIONAL LAW 1

International Criminal Law
Volume I

Edited by

William A. Schabas

Professor of International Law, Middlesex University, London
Emeritus Professor of Human Rights Law
National University of Ireland Galway
Chairman, Irish Centre for Human Rights

INTERNATIONAL LAW

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Introduction

William A. Schabas

International law is generally thought to begin with the Treaty of Westphalia of 1648, because that is when modern nation states began constructing rules to govern their reciprocal rights and obligations. It concerned itself primarily with maritime boundaries, diplomatic immunities, the protection of religious and national minorities, the beginning and end of armed conflict and even the conduct of combatants during wars. At the time, writers spoke of 'the law of nations' or *jus gentium* and it was only later, at the end of the eighteenth century, that Jeremy Bentham seems to have proposed the term 'international law'. From the beginnings, criminal justice had its place within international law. Hugo Grotius and others wrote on related issues, and there is evidence that issues of jurisdiction were a concern with respect to the suppression of piracy and, somewhat later, the slave trade. Enemies of mankind were labelled *hostis humani generis*, and they were subject to universal punishment regardless of any jurisdictional link with the state that was actually enforcing the law.

The term 'international criminal law' began to be employed in the middle of the nineteenth century. Possibly the first reference is in a paper published in the *Law Review and Quarterly Journal of British and Foreign Jurisprudence* in 1854, in an obituary of Jean Jacques Gaspard Foelix.[1] Foelix was a French jurist known mainly for his expertise in comparative law. Indeed, especially in its early days much of 'international' criminal law was really closer to what today we would consider to be comparative law. It is also used in documents of the United States Congress in 1874, where again it seems to mean comparative criminal law.[2] But in these early years, 'international criminal law' was also used to address issues of cooperation and mutual legal assistance between states. An early reference appears in 1860, in the *Solicitors' Journal and Reporter*, where extradition proceedings in the Netherlands are discussed.[3] The subject also appeared on the agenda of the founding conference of the International Law Association in 1873, where it was used to address 'principles of extradition'.

In 1874, the *Irish Law Times and Solicitors' Journal* published a syllabus of international law that contained the following, under the heading 'The Administration of International Justice',

> The administration of International Criminal Law will relate partly to infractions of a possessive character, and partly to those of an organic nature. The former consist of offences or acts of violence against the territory and property of a nation. The latter include offences against the subjects of a State and outrages against the general dignity and conscience of humanity, as, for example, the encouragement or sanction of slavery, or public religious persecution.[4]

This early discussion of the substance of international criminal law identifies two categories within the discipline. The first relates essentially to the interests of states themselves, and directs our attention to the bilateral dimension of the subject. The second suggests a more universal vocation for international criminal law as a source of norms dealing with 'outrages against the general dignity and conscience of humanity'.

This division into two broad facets of the subject remains central to our modern understanding of the field. In the English language, that part of international criminal law that addresses the specific interests of individual states and focuses on the bilateral is often labelled 'transnational criminal law'. When criminal activity takes on cross-border dimensions, there must be rules to determine which state may punish the crime and the extent to which a state that cannot or does not intend to punish the crime will assist another in bringing the suspect to justice. The French language distinguishes between *droit international pénal* and *droit pénal international*, and there are similar formulations in other languages (*Völkerstrafrecht* and *Internationales Strafrecht*; *derecho internacional penal* and *derecho penal internacional*). Thus, *droit international pénal* refers to a body of norms governing relationships between states in the suppression of so-called 'ordinary' crimes, such as murder and rape. By contrast, *droit pénal international* is focused on crimes 'of concern to the international community', something that cannot be said, it seems, of 'ordinary' murder and rape, not to mention impaired driving and shoplifting.

The essays and articles in these three volumes belong primarily to the international criminal law field rather than that of transnational criminal law. But like all attempts at classification, there are grey areas on the boundaries and some clear points of overlap. For example, although such international crimes as the disruption of undersea telecommunications cables, counterfeiting of currency and smuggling of elephant ivory seem to sit clearly within the transnational, while genocide and crimes against humanity are at the other end of the spectrum among indubitably international crimes, there is difficulty and indeed debate about the place of terrorism. Many terrorist crimes are the subject matter of international conventions, but these are known as 'suppression treaties'. The obligations they set out refer primarily to international cooperation in order to assist the state that is the victim of the crime in law enforcement. To that extent, crimes of terrorism belong in the transnational category. But it is also argued that they concern fundamental values of humanity as a whole, and therefore should be included within the jurisdiction of bodies like the International Criminal Court.

Only in the twentieth century did the field that these volumes are concerned with – that we today label 'international criminal law' – really begin to take shape. Relatively vague references to 'outrages against the general dignity and conscience of humanity' were replaced with more precise terms and detailed definitions. Today, four categories of crimes are central to this discipline: genocide, crimes against humanity, war crimes and the crime of aggression. The twentieth century also saw the establishment of international criminal courts and tribunals. As a general rule, but one subject to some exceptions, international criminal justice institutions concern themselves with some or all of the four types of international crime. These offences comprise the subject matter jurisdiction of the International Criminal Court.

Thus, at the core of international criminal law the substantive and institutional are aligned, with international criminal tribunals prosecuting international crimes. But around this core, there is a very important periphery: crimes like terrorism that seem to lie between the international and the transnational, and hybrid institutions that have international dimensions to their composition and that prosecute a mixture of international and so-called 'ordinary' crimes. Finally, international crimes are also prosecuted by national courts following national procedures and this activity, too, belongs within the discipline of international criminal law.

Probably more than most areas of international law, or of law in general, an historical perspective is especially pertinent. The four categories of crimes emerged in very precise

contexts, conditioned by the great conflicts of the twentieth century. Their definitions reflect important debates of the time. They can best be understood with an appreciation of the circumstances of their original codification. To a lesser extent, the same may be true for the international criminal law institutions. Our contemporary courts frequently turn back to the early experiments for guidance, especially the Nuremberg trial of the major Nazi war criminals and the internationalized thematic trials that followed.

The retroactivity complaint has always been one of the classic issues in international criminal law. The problem arises in prosecutions before international courts but also in those at the domestic level. At the former, typically the institutions are established after the crimes have been committed. They are a response to atrocities, and out of a sense that justice has to be delivered even in the absence of a pre-existing institutional and normative framework comparable to what would be expected in a national system. This was the case at Nuremberg and Tokyo, in the aftermath of the Second World War, but also more recently when the ad hoc tribunals for the former Yugoslavia, Rwanda and Sierra Leone were constituted.

When such 'retroactive' prosecutions are undertaken, it is necessary to demonstrate that the crimes to be punished already exist as a matter of international law. But the lack of an international legislator has made this difficult. At the domestic level, the courts almost always existed when the crimes were committed, but the acts often have had to be defined as crimes because they were actually perpetrated under the cover of repressive laws enacted by a brutal regime, or because so much time had elapsed that they were subject to statutes of limitation.

The retroactivity argument was first invoked at the very dawn of international criminal justice, in 1919, when the Allies asked the Dutch government to transfer the German emperor for trial pursuant to article 227 of the Treaty of Versailles. After the war the Kaiser fled to neutral Holland, where he was given asylum. Its government answered an extradition request with the objection that crimes against 'international morality and the sanctity of treaties' had not previously been defined and could not be prosecuted without offending the principle of legality.

At Nuremberg, the Nazi defendants raised the same point in answer to charges of crimes against peace. They were bolstered by a legal opinion from the pro-Nazi jurist Carl Schmitt who challenged the analogy that appeared, and that continues to appear, in academic writing between the international crime of piracy and the criminalization of aggressive war. Schmitt was prepared to acknowledge, however, that 'equal treatment of pirate and war criminal is easily made propagandistically comprehensible to public opinion'.[5] The judges of the International Military Tribunal dismissed the argument of the Nazi defendants, although they essentially acknowledged the validity of the retroactivity claim. They took the view that the rule against retroactivity was not absolute, and that it might give way under special circumstances to the interests of justice. A similar idea can be found in modern human rights treaties, like the European Convention on Human Rights and the International Covenant on Civil and Political Rights.

Certainly the most famous and probably the greatest of the national prosecutions employing international criminal law was that of Adolf Eichmann in Israel in 1961. Eichmann's lawyer raised all of the big challenges, including retroactivity. The judges concurred with what had been said at Nuremberg. They also affirmed that Eichmann could be judged for international crimes, including genocide, before courts that had no direct jurisdictional link with the place where the crime was committed. Retroactivity debates continue, to the extent that national

justice systems deal with atrocities perpetrated in their own countries but often in the distant past. It seems likely that these difficulties will become less and less important. Permanent institutions like the International Criminal Court operate only on the basis of prospective jurisdiction. At the national level, gaps in the law are increasingly being filled as a result of greater vigilance by civil society and progressive legislators.

Part of the problem is the sources of international law. International law is derived from both custom and treaty. International criminal law is no exception here. At Nuremberg, the judges turned to treaties like the Kellogg–Briand Pact of 1928 and the fourth Hague Convention of 1907 as evidence that aggression and violations of the laws and customs of war were already condemned by international law. That was true, of course, except that these two well-accepted treaties did not contemplate crimes that could be perpetrated by individuals. Only with the 1948 Genocide Convention do we have a treaty of general application setting out crimes under international law. A year later, the 1949 Geneva Conventions established the concept of 'grave breaches', which is a category of war crime. One would hope that these issues are now behind us. But they seem to return inexorably to the extent that international criminal law continues to deal not only with the present and the future, but also with the past: the Armenian genocide, the Spanish Civil War, the Katyn massacre, the Khmer Rouge atrocities.

Recourse to customary international law is the standard way of dealing with this conundrum. Customary international law is an enigmatic concept, and the term is often used imprecisely. Sometimes it is confused with judge-made common law, a notion familiar to jurists in the United Kingdom. There are resemblances, but also important distinctions. Customary international law must be created by states, and it must be rooted in their practice rather than in morality. In principle, judges do no more than acknowledge the existence of a customary norm based upon evidence of a consistent practice by states and their conviction that they are acting out of a sense of legal obligation. This works effectively in such areas as diplomatic immunities and fishing zones, where traditions have been respected for centuries and it is unthinkable that they not be honoured. But it is not the same when we turn to atrocity crimes, especially because they are generally perpetrated by the state or its agents rather than by outlaws. Moreover, in contrast with the typical examples of customary international law, there is little if any significance to reciprocity. State A may treat State B's diplomat with deference because it expects the same for its own diplomats who are located in State B. But State A will not consider that it should refrain from torturing political prisoners because State B does the same, nor will it feel entitled to torture political prisoners because State B does this.

However uncertain its theoretical foundations in the context of international criminal law, there is no question that custom plays a very important role. The American Prosecutor at the International Military Tribunal, Robert Jackson, explained that 'every custom has its origin in some single act'. Although judges do not make custom, probably no field is so susceptible to judicial creativity. International magistrates seem to understand that even if the evidence of custom may be flimsy, a judicial pronouncement from an international tribunal can move the goalposts. That is what the judges in the Eichmann trial did when they declared that there was universal jurisdiction over the crime of genocide, even though the United Nations General Assembly had expressly rejected the idea little more than a decade earlier. Today, everyone cites the judgment in Eichmann as authority for universal jurisdiction over genocide. The vote in the General Assembly in 1948 is ignored, if not forgotten.

International criminal law has developed in cycles. Intensive periods of dynamic activity have been followed by decades of inertia, when the flame was barely kept alive by small numbers of academics and activists. The initial phase began during the First World War. In May 1915, upon reliable reports from diplomats and other sources that the Armenian population in the Ottoman empire was being massacred, Britain, France and Russia issued a warning:

> In view of these new crimes of Turkey against humanity and civilization, the allied Governments announce publicly to the Sublime Porte that they will hold personally responsible [for] these crimes all members of the Ottoman Government and those of their agents who are implicated in such massacres.

Although the term 'crimes against humanity' had been in common use for more than a century, used to describe slavery and the slave trade and other atrocities, it had never figured in a document of international significance. When the war was over, the victorious allies dictated a treaty to Turkey that envisaged prosecution of the Armenian genocide by an international criminal court to be established under the League of Nations. At the same time, in the Treaty of Versailles an international court was also proposed for the trial of the German Emperor. He was charged with 'a supreme offence against international morality and the sanctity of treaties'.

None of this came to pass. During the Second World War, the aborted efforts of two decades earlier were invoked by those who were opposed to prosecution of Nazi war criminals. It seems that elements within Britain, the United States and the Soviet Union all toyed with the idea of the summary execution of thousands rather than trial in a court of law. But in a sense, the unfinished efforts of 1919 meant that the die was cast. This time, trials were held successfully in both of the main theatres of the conflict, in Nuremberg and Tokyo. Many national trials were also conducted by various parties to the conflict. A rich body of jurisprudence emerged from these initial efforts at international criminal justice. The four categories that we know today were all codified for the first time in the aftermath of the Second World War. The success of the trials nourished proposals for the establishment of a permanent international criminal court.

But just as it had done following the flurry of activity generated by the First World War, international criminal law went into its second period of hibernation in the early 1950s. Probably the Cold War was largely responsible. The polarized environment made it difficult for either side to consider the creation of an international body charged with applying objective standards in a judicial manner. Without the engagement of the two big powers and their close allies, it would have been impossible for smaller states to take the initiative, however attractive they might have found this.

International criminal law began to revive in the 1980s, inspired largely by developments in the emerging field of international human rights law, to which it is closely related. In its early days, human rights law had been at best relatively indifferent and often quite hostile to criminal law, which was viewed as a mechanism of repression by harsh regimes. Gradually, human rights experts began to understand the importance of the enforcement of criminal law for the promotion and protection of fundamental rights. Then, with the fall of the Berlin Wall and the break-up of the Soviet Union and the former Yugoslavia, a window of opportunity opened for the establishment of new institutions. The great powers were deeply engaged in

this process, but to an extent they were overtaken by a large group of small and middle-sized nations who welcomed the new tribunals with enthusiasm.

This third phase of international criminal law continues without any end in sight. It has seen the establishment of several United Nations ad hoc tribunals, many initiatives at the national level and – the crowning achievement – the creation of the International Criminal Court. The ad hoc tribunals for the former Yugoslavia, Rwanda and Sierra Leone are well into their completion phase, although it is acknowledged that residual institutions to deal with their legacies will remain important for decades to come. The International Criminal Court had a somewhat disappointing first decade, as it struggled to bring suspects into custody, to complete trials and to clarify its own methodology on the identification of situations deserving of its attention. The problem was not so much one of selecting targets – regrettably the world continues to offer abundant possibilities – as picking the few among many worthy candidates. The Court, at least as it is now constituted, can only deal with a few cases at a time.

As the end of the Court's first decade approached, a remarkable success was achieved at the Kampala Review Conference of June 2010. Delegates were able to reach consensus on amendments to the Rome Statute that will enable it to prosecute the crime of aggression. Although included in the list of crimes when the Rome Statute was adopted, in 1998, the crime of aggression required subsequent agreement on its definition and – the more difficult matter – the conditions under which jurisdiction could be exercised. The difficulties struck at the heart of the political tensions generated by the Court's uneasy relationship with the United Nations Security Council.

Not only is international criminal law a branch or subdivision of international law in general, it is also a specialized area of criminal law. Article 36 of the Rome Statute of the International Criminal Court recognizes this diversity by requiring that a certain number of judges have established competence in criminal law and procedure, while others should show expertise in relevant areas of international law, such as international humanitarian law and the law of human rights. As far as judicial work is concerned, criminal trial experience seems to be more important than international law expertise. The daily workload of an international judge closely resembles that of trial judges at the national level dealing with ordinary crimes. Genuine calls for specialized knowledge in public international law are a rare occurrence in international criminal proceedings.

But that observation does not mean that international criminal law is not profoundly different from criminal justice at the national level. This is because international criminal justice is not employed systematically, as is the case at the national level where all serious crimes against the person require investigation. Rather, international justice is targeted at specific crises and situations whose designation is a matter of international politics. This is very evident when the prosecutions take place before international courts, because resources inevitably limit them to the possibility of dealing with only a handful of cases. But it is also true when international crimes are prosecuted at the national level pursuant to universal jurisdiction. As a general rule, national prosecutors attend to cases when particular interests of the state are concerned. In both contexts, trials are related to policy agendas in a manner that we do not encounter when criminal justice deals with murder and rape in the ordinary course of its work.

Criminal justice is at its best and most effective when it enjoys the confidence of the public. If it appears to lack impartiality, or to apply inconsistently, the integrity of the project is

weakened. The selectivity, and the politicization, of international criminal justice generate perhaps the greatest challenges to its credibility. For some, the emphasis of the International Criminal Court on crises in Africa, and its neglect of atrocities committed in places like Sri Lanka, Afghanistan and Gaza, is an inexcusable shortcoming. Noam Chomsky suggests we are better to put international criminal justice aside until such time as it can be applied to the strong as well as the weak.[6] But while this is desirable, it is presently unattainable. Does that mean the benefits of this noble experiment should be dispensed with? Is it not preferable to encourage the continued development of the system of international criminal justice, with the aspiration that over time the double standards will continually diminish in importance and universality will come to prevail? In this case, the best may be the enemy of the good.

Notes

1. *Law Review and Quarterly Journal of British and Foreign Jurisprudence*, Vol. XX, p. 37.
2. Executive Documents, House of Representatives, 1873–1874, p. 54.
3. *Solicitors' Journal and Reporter*, 10 November 1860, p. 11.
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5. Carl Schmitt, *Writings on War*, Cambridge: Polity, 2011, pp. 123–97.
6. See: Noam Chomsky, 'Foreword', in Edward S. Herman and David Petersen, *The Politics of Genocide*, New York: Monthly Review Press, 2010, pp. 7–12, at p. 12.

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Part I
Origins and Development of International Criminal Law