

DEFEATING IMPUNITY

*Attempts at International Justice
in Europe since 1914*

Edited by Ornella Rovetta and Pieter Lagrou



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ABBREVIATIONS



AAG	Archives of the Auditorat Général
ABMFA	Archives of the Belgian Ministry of Foreign Affairs
AGR	State Archives of Belgium
AID	Agency for Information and Documentation
CAS	Close Air Support
CEGES	Centre d'Etude et de Documentation Guerre et Société
CROWCASS	Central Registry of War Criminals and Security Suspects
DGJM	Directorate General Legal Support and Mediation of the Ministry of Defence
EU	European Union
GB MAT	German-Belgian Mixed Arbitral Tribunal
GBA	Federal Attorney General
GC	Geneva Conventions
ICJ	International Court of Justice
ICMP	International Commission for Missing Persons
ICRC	International Committee of the Red Cross
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
ICWC	Internationales Forschungs- und Dokumentationszentrum Kriegsverbrecherprozesse (International Research and Documentation Centre for War Crimes Trials)
IHL	international humanitarian law
IHRL	international human rights law

IMT	International Military Tribunal
JTAC	Joint Terminal Attack Controllers
IMTFE	International Military Tribunal for the Far East
LEGAD	Legal Advisor
LIA	London International Assembly
LOAC	law of armed conflict
LPC	Legal Publications Committee
MAT	Mixed Arbitral Tribunal
MOD	Ministry of Defence
NAA	National Archives of Australia
NAACP	National Association for the Advancement of Colored People
NAB	National Archives of Belgium
NARA	US National Archives and Records Administration
NATO	North Atlantic Treaty Organisation
NFD	National Federation of Deportees of Belgium
NIOD	Nederlands Instituut voor Oorlogsdocumentatie (NIOD Institute for War, Holocaust and Genocide Studies)
NKVD	People's Commissariat for Internal Affairs
OLG	High State Court
POW	prisoners of war
RAF	Rote Armee Fraktion
ROE	Rules of Engagement
StGB	German Criminal Code
StPO	Procedural Criminal Law (Germany)
SVG	Service Victimes de Guerre
TNA	The National Archives
ULB	Université libre de Bruxelles
UN	United Nations
UNHCR	United Nations High Commissioner for Refugees
UNWCC	United Nations War Crimes Commission
WJC	World Jewish Congress
ZAB	Zivil Arbeiter Bataillonen
ZdL	Zentrale Stelle der Landesjustizverwaltung zur Aufklärung nationalsozialistischer Verbrechen

CHRONOLOGY



- | | |
|-----------|---|
| 1899 | First Hague Peace Conference |
| 1907 | Second Hague Peace Conference |
| 1919 | Peace Treaty of Versailles |
| 1919–20 | Istanbul trials |
| 1920 | Peace Treaty of Sèvres |
| 1920 | Publication of the Allied Extradition List |
| 1921–22 | Leipzig trials |
| 1923 | Peace Treaty of Lausanne |
| 1923–25 | <i>In absentia</i> trials in France and Belgium |
| 1924 | Case of Belgian deportees before the German-Belgian Mixed Arbitral Tribunal |
| 1943–53 | Soviet war crimes trials |
| 1945 | Charter of the International Military Tribunal |
| 1945–46 | Nuremberg trial |
| 1946–47 | Tokyo trial |
| 1946–1949 | Nuremberg successor trials |
| 1947 | Belgian Law on War Crimes |
| 1948 | Genocide Convention |
| 1948–52 | Belgian war crimes trials |
| 1949 | Geneva Conventions |
| 1961 | Eichmann trial |

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- | | |
|---------|---|
| 1963–64 | Frankfurt Auschwitz trial |
| 1975 | Majdanek trial |
| 1993 | Creation of the International Criminal Tribunal for the Former Yugoslavia |
| 1993 | Belgian law on universal jurisdiction |
| 1994 | Creation of the International Criminal Tribunal for Rwanda (ICTR) |
| 1997 | Extraordinary Chambers in the Courts of Cambodia |
| 1998 | Rome Statute (creating the International Criminal Court (ICC)) |
| 1998 | First international decision based on the Genocide Convention (ICTR) |
| 2000 | Special Court for Sierra Leone |
| 2002 | Rome Statute (ICC) entry into force |
| 2015 | Closure of the ICTR |
| 2019 | Trial of Fabien Neretse before the Assizes Court in Brussels |

INTRODUCTION

DEFEATING IMPUNITY IN TWENTIETH-CENTURY EUROPE

Ornella Rovetta and Pieter Lagrou



In his documentary novel *The Seven Roses of Tokyo* relating everyday life in Tokyo during and immediately after the Second World War, Hisashi Inoue tells the story of the creation on 8 October 1945 of an ‘Association to claim reparations from the United States, author of blind and massive barbaric bombings, including atomic bombs’.¹ The ‘association’ was the initiative of no more than ten middle-aged men who had lost family members in aerial bombing campaigns, some in Hiroshima, but mostly as a result of the incendiary bombs that reduced entire residential areas of Tokyo to ashes over the last months of the war. The association had conducted erudite discussions before the drafting of the protest motion it sent to General Douglas MacArthur, referring to the plenary session of the Geneva Disarmament Conference of July 1932, to the discussions in the British House of Commons on the shelling of Kagoshima by the Royal Navy in August 1863, and to Articles 22 and 23 of the annexe to the 1907 Hague Convention Respecting the Laws and Customs of War on Land. The association used strong wording, stating that the bombings constituted ‘an unprecedented degree of atrocity’, ‘blind cruelty’ and ‘a new crime against civilization’. Usurping the voice of the Japanese government, it stated that: ‘The imperial government, in its own name,

in the name of the entire humankind and in the name of civilization, solemnly condemns the government of the United States and requests with the most vigorous determination that it instantly renounces to the further use of this barbaric weapon.²

In a narrative oscillating between fiction and rigorous documentation, Inoue poignantly describes the distress and sorrow of bereaved fathers and husbands in postwar Tokyo and their thirst for justice. In the wake of the total and unconditional defeat, they seek to identify an authority to which they could address their claims: the imperial government that had initiated this war and kept on fighting beyond any reasonable hope for victory, the neutral countries, humankind, civilization and, probably most importantly, General MacArthur, head of the occupying forces. Amid utter destruction and mass death, they adhered to the language of international law and held the occupier up to its standards. Inoue even makes the Legal Service of the General Headquarters of the occupying forces respond to the motion of the association. In its reply, the Legal Service recalls, first, that only states can file a legal appeal under international law; second, that private persons, such as the members of the association, should address themselves exclusively to their national government; third, that even if the Japanese government would recognize the claims by private parties and even if it would have disposed of full sovereignty, no Japanese court could ever have jurisdiction over the actions of the US government; and, fourth, that the only option left open would be that of civil litigation over reparation before an American court. However, it is a fundamental principle of American law that the state cannot be legally challenged over the actions of its agents in the exercise of their functions.³ The ten signatories ended up in an American military prison, having been charged with subversion.

Inoue's story is that of the discrepancy between the steady progress of the formulation of international law since the late nineteenth century, covering ever more areas of what constitutes lawful behaviour of states in times of war and peace, and the very unsteady trajectory of the attempts to make these new rules legally enforceable.⁴ While it became increasingly clear between 1860 and 1949 what constitutes an international crime, it remained very unclear who is qualified to sue the offender, which jurisdiction is competent to investigate and judge the crime, how international rules translate into the language of national legal categories and which penalties apply. And yet, answers to these questions are crucial to any project of international justice. The cases under investigation in this volume explore this recurring debate in the European context after war and mass violence.

There is probably no storyline more universal than that of how an offender cannot, ultimately, escape some form of retribution for his or her offence. *Fiat Justitia, ruat Caelum* or, more prosaically, in the end, the chickens come home to roost. However, as Inoue suggests, the story of international justice in the twentieth century is where history parts ways with the morality tale implicit in many fictional narratives. When it comes to cynicism, reality usually beats fiction. In the image of the pilots of the *Enola Gay* and the command structures reaching to the Oval Office that decided on its mortal mission, the vast majority of offenders escaped trial, and even the court of history often fails to reach a final verdict.

From the vantage point of the incipient twenty-first century, international justice might appear as a high-spirited and mostly delusive project of the twentieth century. The overwhelming majority of war criminals never stood trial and, on average, they enjoyed more support from their national state authorities than the victims of their crimes ever did. If the yardstick by which to measure the success of attempts at international justice is the ratio of convicted criminals to the total number of offenders, the final score is dismal for every war and conflict that took place between 1900 and 2000. If the criterion is caring for victims, penal justice, be it national or international, is the wrong place to look for answers. Penal justice punishes the guilt of the offender; it does not compensate the damage suffered by the victim. The victim can then sue the offender under civil law, but Hisashi Inoue already warned us of the difficulty of holding an agent of the state accountable before a court of justice. Even the ad hoc international tribunals established for Rwanda and the former Yugoslavia in the 1990s did not provide for compensation to victims. The reparations programme of the International Criminal Court (ICC) is in its infancy and the large number of victims when it comes to international crimes is not the least of the challenges.⁵ If the balance sheet comprises overall evaluations of the restoration of the rule of law, the promotion of peace and democracy, or the failure or success of coming to terms with a criminal past, so many other factors come into play that it is problematic to isolate penal justice as a variable. If the German and Spanish cases are anything to go by, they suggest the opposite: the less a postwar state is committed to judging past crimes, the better it manages its democratic transition.

In September 1918, the French Prime Minister Georges Clémenceau declared that ‘no victory could justify an amnesty for so many crimes’.⁶ The First World War ushered in the idea that impunity for war crimes (and for waging war) was not self-evident. However, the understanding

of what role justice should play in rebuilding the postwar Europe was very divergent, even among the Allies. At stake was the sovereignty of nation states, typically by organizing international trials or prosecuting heads of State.⁷ As this book will illustrate, despite an unprecedented political and legal arsenal written into the peace treaty, almost no war criminal ever stood trial after the First World War. In Belgium, France and Istanbul, most of the couple of hundred trials were held *in absentia*, while the Leipzig trials in 1921 ended in much-contested acquittals or lenient sentences in the eyes of the Allies. The interwar episode produced disappointment at the time and was remembered only for the failure it stood for. It was therefore ever-present in the minds of the designers of the Nuremberg trials: this time, the defendants would be present. Yet, only a few thousand Nazi war criminals stood trial after the Second World War, in addition to the twenty-one in Nuremberg, which amounts numerically to a disappointment of comparable scale. Attempts at legal innovation were cautious and curtailed by the fear to create universal standards applicable to the victors as well as the vanquished. The *raison d'état* or higher interest of the state took primacy over considerations of historical redress, in the Roosevelt and Truman Administrations no less than in the postwar German Federal Republic. In this context, relief for the victims of egregious violations of international law could only ever come from the national welfare states, in Belgium after 1918 no less than in Japan after 1945, regardless of what the international law conventions, peace treaties or the absence thereof had to say on the criminal nature of the offence they had suffered.

By 1948, the major Allies had dismantled their war crime trials and by 1956, all but a handful of Nazi criminals had been set free, even those in Soviet captivity. A 'second wave' of trials started with the Adolf Eichmann trial in Jerusalem in 1961 and, for instance, the Klaus Barbie trial in Lyon in 1987, challenging the postwar record of impunity and oblivion. The end of the Cold War opened up a new chapter of twenty-five years of long-running ad hoc tribunals for the crimes committed in the former Yugoslavia and Rwanda, which were very different from the intense but short judicial aftermaths of both world wars. The International Criminal Tribunal for Rwanda (ICTR) and the International Criminal Tribunal for the Former Yugoslavia (ICTY) have not escaped criticism either and were blamed for their slowness, high cost, limited attention paid to victims and alleged partiality (especially in the case of Rwanda). The permanent members of the United Nations Security Council, who quite surprisingly agreed on the creation of these two institutions, entrusted the ICTR and the

ICTY not only with stopping violations and prosecuting those responsible, but also with contributing to the restoration of peace (the ICTY) and reconciliation (the ICTR). Fifty years after Nuremberg, international criminal justice had to be rethought, and for the first time since then, the ICTR and the ICTY applied, interpreted and adapted the offences defined directly after the Second World War. This reinvention, which is discussed by Isabelle Delpla in Chapter 9, took place at the same moment as the adoption by several states of laws of universal jurisdiction. In Belgium, the 1990s and early 2000s finally saw the inclusion of war crimes, crimes against humanity and genocide in its Penal Code, fifty years after the Belgian judiciary struggled with the absence thereof, as Marie-Anne Weisers shows in Chapter 6.

The project of international justice does not need renewed deprecation under the form of a collective volume. The Geneva Conventions command us to treat the sick and wounded humanely. So what can this book contribute to our understanding of international justice? As the title indicates, with this volume, we aim to downsize the ambition that the project of international justice has harboured at various points in its history to just one issue: defeating impunity. Trying to make sure that no crime remains unpunished is a self-defeating project. Trying to make sure that not all crimes remain unpunished is a goal that has been attained several times during the twentieth century. We can draw some hope from this record. Its history does not read as the Gospel of the advent of universal justice. It is a story of many failures and some successes, one that can only provide a useful record for the future if it is told critically. This should also take the form of an exercise of self-criticism by the disciplines of history, law and social sciences, which have over the last couple of decades significantly contributed to the inflation of expectations driven by the mantra of *transitology*. *Transitology* has too often claimed to dispense universal cures for the curses of conflict and dictatorship in inconsistent, patronizing and condescendingly normative ways, confounding the registers of morality, politics, economy and penal justice.

The texts assembled in this volume point to the experimental nature of international justice in twentieth-century Europe. Based on original archival material, they tell an alternative tale of international justice, discussing minor successes and major failures, episodes remembered and forgotten since 1914. There is obviously nothing inherently 'European' in the project of international justice. Much of twentieth-century history instead reads as the story of the systematic injustice done by European nations to much of the rest of the world. At a time when international justice is criticized as a neocolonial tool

of European interference in its former colonies, it might be useful and timely to focus on the hurdles that the project to bring egregious violations of humanitarian law to justice encountered in Europe itself. This volume is focused on Europe, not because European successes contain lessons to teach to the rest of planet, but because the failures, the stalemates and the systematic diversions of the course of international justice at the heart of the European experience in the twentieth century constitute an ideal fieldwork for the critical approach we advocate. By downsizing its ambitions to the minor successes in defeating absolute impunity, there is even some positive inspiration to draw from this experience. But international justice is obviously a universal language and a genuinely global project that calls for many more collective volumes paying tribute to the full diversity of geographical settings across the globe. It seems only appropriate for a volume that pleads against overstretching the ambitions for international justice to formulate modest ambitions for its own geographical span. The global dimensions of international justice deserve better than one volume pretending to cover it all.

The conventional chronology indeed starts with ‘the road to Nuremberg’⁸ and ends in The Hague. The history of international criminal justice is certainly much more diverse in time and space. For instance, the Istanbul trials from 1919 to 1920, the Tokyo trial and the Allied trials in the Pacific (1946–54) all provide fascinating case studies on the pursuit of justice. The exceptionally long and multinational judicial process after the genocide perpetrated against the Tutsi in Rwanda in 1994 also constitutes a case study that adds to our understanding of what it means to seek to ‘defeat impunity’ in the aftermath of genocide.⁹ However, we are convinced that a closer look at forgotten European precedents and modest attempts that failed to make legal history allow us to tell a different story in a different timeframe. We propose to look closer rather than looking elsewhere. In the Conclusion, we will return to this point of departure, asking whether this new timeframe and these new case studies can indeed provide inspiration for the challenges that international justice faces today.

In revisiting the traditional chronology of ‘Nuremberg to The Hague’, this volume starts with the First World War. It is not surprising that Belgium occupies a special position in this narrative. The Belgian case indeed provides contrasting insights into a cumulative but also fragmented process. Throughout the First World War, the Allies massively referred to Belgium, a small neutral country both invaded and occupied, in their statements on justice as a war aim – and later a peace aim. Crimes committed against Belgian civilians

and villages (murder, arson, deportation and looting) were understood at the time as clear and *prima facie* breaches of the rules of warfare.¹⁰ Belgium and Germany had signed the Hague Conventions. During the course of the war, Belgian authorities prepared for postwar justice at the local, national and international levels. However, Belgium did not, of course, play alone in the emerging field of international justice. The first postwar justice efforts thus led to a hybrid model: first, trials were held before a German court under the scrutinizing eye of the Allies in Leipzig in 1921; and, second, trials *in absentia* were organized before French and Belgian military courts from 1923 to 1925. The latter were based on the offences defined in the Hague Conventions and on the Belgian Penal Code. For the first time, national courts interpreted internationally defined offences and structured their inquiries based on this Convention.¹¹ Unlike most post-Second World War trials that came to a close by the end of the 1940s, in the 1920s, France and Belgium reclaimed the right to judge (based on the Treaty of Versailles) five years after the war had ended and ten years after the crimes had been committed (at least for crimes committed during the invasion). This decision is as forgotten as it is surprising. What led the French and Belgians to put hundreds of German military officers on trial before their courts? Public opinion? Political strategy? A commitment to not leave crimes unpunished, as a statement of a military prosecutor to the Auditorat Général (General Military Prosecutor's Office) might suggest?:

A conviction in absentia would, it is true, be a weak remedy to appease the public conscience, but it could, however, if necessary in the more or less near future, allow the prosecution of this crime, whose impunity would constitute an attack on the principles of justice.¹²

In recent years, records of early interwar trials have been the subject of renewed attention and led researchers to rethink these 'preludes' to the Nuremberg trial moment. This is true for the Belgian trials,¹³ but also for the Armenian genocide trials.¹⁴ The French case law (more than 1,000 trials) is still totally unexplored. After the mid-1920s, the First World War atrocities were not forgotten, but the trials *in absentia* were erased from legal history. The fact that the records were lost for over sixty years because they were seized by the Germans in 1940 and then by the Red Army in 1945 certainly explains this oblivion in part.

The symbolic and pioneering role Belgium played in the First World War was not repeated during the Second World War. However, once again, it was invaded and occupied by Germany. Thus, twice in a

row, Belgium had to frame postwar responses to international crimes. Twice it participated in the international discussions too. In this sense, the Belgian case is compelling because it reveals how, with an interval of twenty-five years, justice was designed and implemented outside of the circle of the 'Big Three' (France, the United Kingdom and the United States).

The first two chapters look at the German occupation of Belgium from 1914 to 1918, a major early test case for the enforceability of international law. The brutal invasion of 1914 had triggered a wealth of commissions of investigation gathering judicial evidence, from the local level to the international level. National authorities coordinated a massive effort to document violations of the Hague Convention in every single invaded and occupied town and village. While the Commission of Inquiry was proceeding with its investigations and ordinary jurisdictions initiated prosecutions, in June 1919 a peace treaty was signed at Versailles. Article 228 of the Treaty stipulated that the Allied nations had the right to prosecute enemy war criminals before their national military tribunals. The Treaty also foresaw the prosecution of the Kaiser before an international court. It was unprecedented for a peace treaty to include such provisions. However, their botched implementation explains why Versailles is often referred to as the failed inaugural act in the history of international criminal justice.

In Chapter 1, Thomas Graditzky shows how the Hague Convention of 1907 constituted the central frame of reference for both the German occupier and the Belgian local authorities between 1914 and 1918. Germany's manifest violations of the Law of Military Occupation were constantly denounced and received ample international attention. It was therefore a central aim of the Belgian government to bring high-ranking German officials to trial on precisely this account, as the Treaty of Versailles explicitly authorized it to do. However, Article 43 of the Hague Convention outlines the contours of a balancing act between the sovereign rights of the occupied nation and the operational necessities of the occupier, rather than clearly stating what constitutes a violation, thereby preventing smooth incorporation into domestic law. This made postwar indictments difficult to achieve and open to litigation. Belgian and other allied trials were entirely dependent on the willingness of the sovereign postwar German state to extradite its nationals. Extensive diplomatic negotiations between the Allies forced the Belgian authorities to drastically reduce their part of the Allied extradition list. The German government refused to extradite its soldiers, but offered to organize trials on Allied indictments before its own High Court in Leipzig. After the first acquittal

in June 1921, the Belgian authorities refused further cooperation. Three years later, Belgium launched a series of decentralized and largely haphazard trials *in absentia* in 1924 and 1925. The Belgian cases were last-chance trials and produced pioneering jurisprudence. The protracted process by which extradition lists were cut down and the initiative was ultimately left to local military judges had the effect of eliminating most of the complex cases of violations of the Law of Military Occupation to the benefit of more clear-cut cases of traditional war crimes.

In Chapter 2, Arnaud Charon focuses on one of the most egregious violations of the Law of Military Occupation by the German occupier in Belgium during the First World War: the deportation of Belgian workers to Germany and to the military frontline. Requisitioning civilians for war-related work was explicitly forbidden by Article 52 of the Hague Convention. Starting in October 1916, more than 120,000 Belgian workers were forcefully drafted for front service or to replace German workers in factories in Germany. They proved to be a recalcitrant workforce, showing a massive reluctance to work for their enemy. Miserable housing, heating and food further weakened their productivity, causing widespread illness. It is estimated that close to 6,000 workers died during or as a consequence of their deportation. In June 1919, the Belgian Parliament adopted a law organizing the compensation of deported workers for the losses suffered, largely based on the legal framework for veteran soldiers, but with considerably lower entitlements. The National Federation of Deported Workers never stopped campaigning for a more favourable legal compensation scheme. With this legislation, the nascent Belgian welfare state had anticipated the reparation payments that the Treaty of Versailles imposed upon Germany, including explicitly for the deportation of Belgian workers. Faced with the double frustration of reparation payments by the Belgian state it deemed insufficient and the absence of criminal prosecution of those responsible for the deportation within the German government and administration, the national federation decided to file a class action suit before the German-Belgian Mixed Arbitral Tribunal. This jurisdiction was created under the provisions of the Treaty of Versailles to deal with private litigation over outstanding debt resulting from private contracts concluded during the war between German and Belgian parties. The Tribunal was established in Paris and was presided over by a Swiss judge. The case opened in January 1924 and resulted in a major defeat for the claimants. The Tribunal decided that by claiming compensation from Germany, the Belgian state had substituted itself for the deportees, who could no longer file a second

claim in their own name. At most, the Tribunal awarded the deportees compensation for food parcels sent from Belgium to the work camps and never delivered. Even if this had been a Pyrrhic victory at best, an important but overlooked precedent had been set. Private litigation against an occupying state had made it possible to obtain recognition for a tort, where state-to-state reparation under international treaty law or criminal trials under public law had failed. Crucially, however, the efforts of the Belgian Federation of Deported Workers underlined a truth that would only be confirmed by later conflicts of the twentieth century, namely that, mostly, victims of war can only ever count on recognition and reparation from their own national welfare states.

It was in the heart of wartime London and in the summer of 1945 that the modern definitions of international crimes – as we still know them to a large extent today – took shape. Chapters 3, 4, 5 and 6 offer four complementary perspectives on legal innovation during the Second World War. They resonate with the rivalry between ‘crimes against humanity’ and ‘genocide’ pictured in Philippe Sands’ work and the eventual ‘victory’ of the concept of ‘crimes against humanity’ in the Charter of the International Military Tribunal.¹⁵ In Chapter 3, Kerstin von Lingen analyses the intense brainstorming that took place in London, starting in 1941. Long before the punishment of Nazi crimes and criminals became a major preoccupation of the Big Three, exile lawyers from occupied Europe took the lead in intellectual debates in rather undefined fora situated at the intersection of academia and informal diplomacy, such as the International Commission for Penal Reconstruction and Development at the University of Cambridge, and the London International Assembly. Both can be considered as forerunners providing the intellectual armour to the United Nations War Crimes Commission, which was created in October 1943. Emigré jurists such as Marcel de Baer and his Czech colleagues Bohuslav Ečer and Egon Schwelb were the driving forces of legal activism and innovation, militating against the legal formalism of many of their British and later American colleagues, for whom the punishment of Nazi offenders was secondary to the defence of their domestic legal order. They were especially worried that some of the most characteristic crimes of Nazi rule in occupied Europe would remain blind spots, uncovered by current definitions of war crimes. The notion of ‘crimes against humanity’ was central in their strategy to include massive and systematic crimes against civilians into the allied war crimes programme. It is striking to notice how their pioneering part in the early planning phase of the war crimes programme did not provide them with a leading role in the war crimes trials themselves,

once the major Allies took control. Their brainchild, ‘crimes against humanity’, was also considerably downsized in its scope. De Baer and Schwelb later pursued international careers rather than taking a leading role in the domestic courts of their countries of origin. Ečer, who did make the choice to return to Czechoslovakia and took part in the Czechoslovak delegation at the International Military Tribunal (IMT) in Nuremberg, would fall victim to the political purges after 1948, being suspected of excessive cosmopolitanism.

In Chapter 4, Wolfgang Form takes a very different look at the United Nations War Crimes Commission (UNWCC) not as a cradle of legal innovation, but as a testing ground of judicial cooperation. In October 1943, the seventeen founding members charged the organization with overseeing a global war crimes programme covering both the European and Pacific theatres of war. A couple of days later, at the Moscow Conference, it was agreed that Nazi criminals had to be sent back to the country where the alleged crimes had been committed to stand trial before national courts. These postwar plans implied intense cooperation on the gathering of judicial evidence and identification of suspects. Substantial efforts were made to standardize criminal charges, implement mechanisms to exchange information, agree on procedures and extradition issues, and organize trials. It is in this context that the discussion on the criminal categories covered by the Allied War Crimes Programme had huge technical implications: would the information gathering be limited to classical war crimes or would it also include ‘crimes against humanity’, the legal innovation promoted especially by exile lawyers? The UNWCC thus became the clearing house of investigations conducted by national states and Allied military from Norway to New Zealand and from China to Canada. The central tool of the information-sharing platform was the Central Registry of War Criminals and Security Suspects (CROWCASS), containing index cards of about 39,000 individuals. Until its dissolution in 1949, the UNWCC developed a multilayered system of indexes and cross-references, turning its archive into a central depository of war crimes during the Second World War on a global scale. Its value for historians is manifest, but its contribution to the creation of standards and routines of judicial cooperation in a complex international setting is of no less durable significance.

In Chapter 5, Guillaume Mouralis offers a radically new perspective on the role of US lawyers in the formulation of the category of ‘crimes against humanity’ in the run-up to the proceedings of the IMT in Nuremberg. Since November 1941, the US government had been very reticent to go beyond a restrictive definition of war crimes

in international law. However, by the end of 1944, the outlining of a US policy on the postwar treatment of Germany became subject to rivalries of different kinds: between the Department of State and the War Department on the one hand, and between academic lawyers (experts on ‘law in the books’) and corporate lawyers (experts of ‘law in action’) on the other hand. Corporate lawyers had extensive experience of bringing complex trials to a good end and direct access to policy makers. In the 1930s antitrust trials, East Coast law firms had played a central role in enforcing governmental economic policies by charging private corporations with the crime of ‘conspiracy’. They served as a model for the charges of ‘conspiracy to wage aggressive war’ that stood at the heart of the US judicial strategy against the Nazi elite in Nuremberg. Placing aggressive war centre stage as the main offence was difficult to square with the aim of the proponents of the new concept of ‘crimes against humanity’, which covered crimes committed by the Nazi state against its own nationals, including in times of peace. This crucially concerned the crimes against the Jews. Mouralis demonstrates that the relentlessness with which US representatives sought to limit the scope of the category of ‘crimes against humanity’ to crimes committed in wartime against enemy citizens was motivated by the unconditional defence of sovereignty. Even though explicit expressions of this rationale are rare, US lawyers were first and foremost concerned that an international endorsement of racist crime as a legal category would expose the United States to international scrutiny over its legal system of segregation and the state-endorsed impunity of racist lynchings. They were very effective in avoiding this risk. Civil rights activists in the United States from the 1940s to the 1960s were reduced to recourse to human rights law rather than international criminal law in order to justify their campaigns.

In Chapter 6, Marie-Anne Weisers takes this analysis one step further to the level of national jurisdictions. As Chapters 1 and 2 suggest, Belgium had an extensive, though essentially frustrating experience with German war crimes and the challenge to bring them to justice. In the interwar years, precious time was wasted, and Belgian law was caught every bit as much unprepared for the prosecution of war crimes in 1940 as it had been in 1914. Like all other nations occupied by Nazi Germany, it could hardly be criticized for having failed to anticipate the unprecedented crimes of this second occupation, especially the persecution, deportation and extermination of its Jewish population. The acrimonious diplomatic tensions between Belgium and Germany over war crimes trials¹⁶ – the Leipzig trials

and later the trials *in absentia* in Belgium – had produced a rather unexpected effect, whereby the Belgian authorities wanted to show the example with an unassailable jurisprudence, built on legal orthodoxy and ruling out any form of retroactive legislation. It was thus with very inadequate legal tools that Belgian judges had to try to bring to justice the members of the occupation apparatus in charge of organizing the deportation to the centres of mass death of over 25,000 Jews from Belgium. It proved excruciatingly arduous to bring serious criminal charges against the architects of genocide in Belgium, except for arbitrary arrest, for instance, which carried minimal penalties. In the end, almost none of Eichmann's men in Belgium ever stood trial. Weisers shows that this disappointing outcome was not due to a lack of motivation or inventiveness on behalf of the Belgian judiciary. The trial of Otto Sieburg in particular shows the obstinacy with which the prosecutor tried to corner the defendant and managed to get witnesses to testify in relation to a racist murder he committed while on his daily duties as a Jew hunter. The chapter also documents the legal inventiveness of the judges at the trial to qualify Sieburg's act as a 'crime against humanity'. This was a sensational legal decision, but it failed to make legal history, being overturned on appeal by a more conservative legal interpretation. Weisers shows that the record of international justice cannot be reduced to published case law. She also tells the story of local judges fighting impunity against all odds and against legal orthodoxy.

In Chapter 7, Vanessa Voisin turns our gaze eastwards after four Western contributions. The Soviet Union took part in the preparation of the Allied war crimes programme, but Allied cooperation suffered from mutual mistrust. The territory of the Soviet Union was where the vast majority of victims of Nazi crimes were killed. However, the distrust resulted in limited attention in Western European public opinion and historiography for the Nazi crimes on the Eastern Front for the duration of the Cold War. Voisin shows that the Soviet authorities never tried to hide Nazi atrocities from view, but on the contrary very early on understood the power of filmed footage of crime scenes: mass graves, destroyed villages and witness testimony. Atrocity footage was used as a tool to mobilize the Soviet population for the war effort, as proof of Nazi criminality for global opinion and as a record for posterity of the Great Patriotic War. Camera operators were incorporated in army units, and instructions to film atrocities became increasingly scripted and standardized throughout the war. The documentary value of Soviet footage of Nazi atrocities faced the challenge of redemption from its original sin, namely the blatantly

falsified images of the Katyn massacre, where the Soviets tried to blame the Germans for a mass crime perpetrated by the People's Commissariat for Internal Affairs (NKVD). It is therefore essential to understand the logic behind the production, conservation and selection of Soviet atrocity footage. Documentary, aesthetic and political considerations guided the instructions. The footage, which was widely circulated through Soviet and international cinema newsreels, was supposed to trigger strong emotional identification with the victims, which also implied representing them as Soviet citizens first and foremost, and only rarely as Jews or Ukrainians. Great care was taken to authenticate the footage. However, the screening of documentary films in the Kharkov and Krasnodar trials (1943), and later at the IMT in Nuremberg (1945–46) performed an illustrative rather than forensic function. Still, crucial Soviet footage of Babi Yar, Majdanek and Auschwitz are the first and often only images available of these crucial sites of Nazi crime liberated by the Red Army. They constitute unique historical records if carefully interpreted according to the context of their production.

In Chapter 8, Rebecca Wittmann takes stock of judicial efforts to bring Nazi criminals to justice in the German Federal Republic after 1945. The central prosecution office initiated over 100,000 investigations and organized 13,000 trials, but German tribunals convicted no more than 6,500 defendants, less than 7 per cent of whom for their participation in the genocide of the Jews. This dismal record has its roots in the legal orthodoxy of the West German judiciary, ruling out any form of recourse to retroactive legislation, much like the Belgian judiciary studied in Chapter 6 by Weisers. Rigorously sticking to the Penal Code of 1870 meant that Nazi offenders were most often found guilty of breaching Nazi orders rather than of applying them. The reluctance to bring Nazi offenders to trial was in turn linked to the personal trajectories of postwar magistrates, who had often started their careers as zealous Nazi judges. The contrasting and contemporary proceedings in 1975 of the trial of Nazi guards of the Majdanek extermination camp and of the left-wing terrorists of the Rote Armee Fraktion (RAF) show the manifest double standards at work between legalist clemency for the former and judicial ruthlessness in prosecuting the latter. The German Demjanjuk trial in 2009 is another striking example of how a Ukrainian prisoner of war (POW) drafted into the Nazi auxiliary forces was held up to judicial standards never applied to German SS volunteers earlier on. If the way in which the Federal Republic of Germany dealt with its Nazi past can be considered a success, this is not in the first place due to the work of German

tribunals, which guaranteed impunity for several generations of Nazi criminals.

For the reader reaching Chapter 9, undeterred by the accumulation of misfortunes of international justice over the century, some solace is in view. In this chapter, Isabelle Delpla analyses the astounding – in the light of what came before and after – success of the International Criminal Tribunal for the Former Yugoslavia. Created while the Yugoslav wars were still raging in 1993 and dissolved almost a quarter of a century later in 2017, the ICTY built up a record of establishing a judicial and historical truth that even its detractors were forced to recognize. The Tribunal combined the best of several worlds, staging documentary trials modelled on Nuremberg while benefiting from the orality of witness accounts beyond the theatrical value they held in the Eichmann trial. The recourse (unprecedented in international justice) to guilty pleas provided the Tribunal with a wealth of judicial evidence. The dissolution of the Yugoslav federation motivated several of the successor states to proactively cooperate judicially, supplying the court with their wartime intelligence and eavesdropping on their enemies, and more crucially still by mandating their local police forces to harvest witness accounts during or very shortly after the commission of the crimes. The prospect of entry negotiations into the European Union constituted a powerful incentive, which was very explicitly used as leverage to obtain information and the extradition of suspects. Extensive recourse to forensic science also contributed to an unprecedented degree of precision in the identification of the victims, despite systematic efforts by the perpetrators to destroy evidence, as occurred in the Srebrenica case. The construction of high-tech mortuaries and the development of a comprehensive DNA database required huge investments, but also benefited from the spontaneous cooperation of the families of victims and their associations. The cooperation of victim associations with the judicial authorities, both at a local level and in The Hague, proved to be exceptionally beneficial. Delpla describes the emergence of a culture of proof, whereby it became more important for the victim associations to establish unassailable figures, identifying each victim by his or her name, than to enter into a competition of victimhood by inflating the figures. The success of the ICTY therefore lies in the successful cooperation between local and international authorities, public and private actors, and probably most of all by its imposition of very high standards of evidence. That the achievement of the ICTY cannot easily be repeated has unfortunately been illustrated by the ICC, which has had to cope with difficult judicial cooperation, the

remoteness and inaccessibility of investigation areas, the selectivity of prosecution choices and slowness.

In Chapter 10, Chris De Cock introduces us to one of the ways in which the prevention of crimes and violations of international law has become an integral part of the *modus operandi* of armed forces in the twenty-first century. The legal advisor in operations is embedded with frontline troops to provide advice in real time on the conformity of operational orders with international law. Contemporary armed forces operate on very different missions such as peacekeeping, counterterrorism, counterinsurgency and law enforcement under the authority of national governments, but more often under that of international organizations such as the United Nations or the North Atlantic Treaty Organization. Depending on the scope and mission, different operations are regulated by different bodies of international law and regulations, most prominently international human rights law and the law of armed conflict. The context and the mission of each operation determine what constitutes a legitimate target, a proportionate response, and the authorized or unauthorized arrest of armed or unarmed opponents. More than ever, contemporary armed forces operate under the scrutiny of local and global public opinions, nongovernmental organizations, national and international judges. Crucially, legal advisors in operations have to look to recent jurisprudence for guidance for what constitutes lawful or unlawful behaviour in any given situation. Chapter 10 therefore allows this volume to come full circle. Despite the considerable development of international law, at the start of the twenty-first century, armed forces depend on 'law in action' as defined by case law more than on 'law in the books' to make crucial decisions in the field and in the heat of action. It is what has been punished that draws the line between the law and a crime. Defeating impunity is therefore more than a moral imperative; it is what makes it possible to transpose rules into acts. It stands at the heart of any attempt to build a world based on law and justice rather than lawlessness and violence.

This volume offers no triumphant narrative of the unrelenting march of international justice in holding criminals to account. The ten chapters offer more information on the stumbling blocks on that road than on decisive strides forward. The story of international justice is very much an unfinished, incomplete story, finding itself at a difficult crossroads. It is also a global one, reaching far beyond Europe. The time is not for celebration, but for reflection on the pitfalls met, the errors made and, especially, the adversity and outright hostility encountered. As such, the chapters in this book offer

glimmers of hope. Not all crimes have remained unpunished over a long and violent century. International law has provided a language to formulate claims – for instance, in Paris in 1924, in London and Krasnodar in 1943, in Düsseldorf in 1975, and in Srebrenica and The Hague in 2004. All that the Belgian workers obtained through civil litigation was the reimbursement of the food parcels their hungry relatives had sent and that never reached their stomachs. The Soviet trials, the IMT in Nuremberg, the Belgian military courts and the tribunals of the German Federal Republic did not live up to the hopes of exile lawyers and victims of racist violence that a court decision would label the crimes of which they had been a victim for what they were. However, the fact that they formulated this hope is probably more important than the fact that their hopes were not met. This volume helps to illustrate that the language of law and the horizon of justice it drew were international. We hope that the reader will have the experience that it somehow makes sense to navigate from occupied Belgium in 1914 to Katyn and New York in the 1940s, Biljani in 1992 or Somalia in 2008. The accumulation of attempts to defeat impunity constitutes a record of crime, but also a record of courage, determination and inventiveness to bring justice. This is a record to cherish, as this book does.

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Notes

1. Inoue, *The Seven Roses of Tokyo*. We used the French translation by J. Lalloz (*Les 7 Roses de Tôkyô*. Arles: Editions Picquier, paperback edition, 2014, 441–70 and 566–71).
2. *Ibid.*, 464–65.
3. *Ibid.*, 570–71.
4. Lagrou, “‘Historical Trials’”; Lagrou, ‘Ce que le jugement ne dit pas’; Koskenniemi, *The Gentle Civilizer of Nations*.
5. Janssen and Kool, ‘Recognising Victimhood’, 237–57.
6. Quoted in Hankel, *The Leipzig Trials*, 15.
7. Lewis, *The Birth of the New Justice*, 27–49.
8. In reference to Bradley F. Smith’s book: Smith, *The Road to Nuremberg*.
9. Rovetta, *Un génocide au tribunal*.
10. Horne and Kramer, *German Atrocities, 1914*.
11. As appears from the Archives of the Belgian Commission of Inquiry created a couple of days after the invasion. Many of the Commission’s documents can be found in the trial records. See Vannerus and Tallier, *Inventaire des archives de la commission d’enquête*.
12. ‘Une condamnation par défaut serait il est vrai un palliatif assez faible pour apaiser la conscience publique, mais qui pourrait cependant le cas échéant dans un avenir plus ou moins rapproché, permettre la répression de ce crime, dont l’impunité constituerait une atteinte aux principes de la justice.’ Letter from the auditeur militaire of East Flanders to the auditeur général, 8 March 1924, in AGR (Belgian State Archives), Auditorat militaire de la Flandre orientale, Dossier Rohlenger, 601/1923, p. 3.
13. See the chapters by Thomas Graditzky and Arnaud Charon in this volume; Lauwers, ‘From Belgium to The Hague via Berlin and Moscow’, 216–236; Rovetta et al., ‘Jusinbellgium, A Century of Pioneering Case-Law’. On interwar justice in general, see Lewis, *The Birth of the New Justice*.
14. See in particular the work of Taner Akçam on the Armenian genocide trials: Dadrian and Akçam. *Judgment at Istanbul*; Akçam, *A Shameful Act*.
15. Sands, *East West Street*.
16. Clappaert and Kohlrausch, ‘Between the Lines’.

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