The history of attempts to create international criminal tribunals for prosecution of international crimes includes attention to the responsibility of heads of state, other public officials, and private persons for violations of treaties and customary international law and, thus, nonimmunity of heads of state and other governmental actors. One of the early prosecutions of a public official for an international crime occurred in a domestic tribunal in Naples in 1268 when Conradin von Hohenstafen, Duke of Suabia, was tried for initiating an unjust war or what we term an offense against peace or war of aggression. Von Hohenstafen was later executed for his misdeeds on October 29, 1268.¹

In 1474, the Burgundian Peter von Hagenbach, who served as Governor of territory under Duke Charles of Burgundy, was tried before what can be termed an international tribunal for the oppression of persons under his charge and for actions against the “laws of God and man,” including responsibility for murder, rape and pillage.² The trial of von Hagenbach for the improper administration of pledged territories on the Upper Rhine had occurred at Breisach at the order of the Archduke of Austria and was presided over by twenty-eight judges from allied towns. It should also be noted that von Hagenbach was tried before actual war in 1476, so it would not be proper to label the case a normal “war crimes” trial. He raised a defense of obedience to superior orders and asked for adjournment to obtain confirmation of such orders, but the defense was denied as being contrary to the law of God.

¹. See, e.g., JORDAN J. PAUST, M. CHERIF BASSIOUNI ET AL., INTERNATIONAL CRIMINAL LAW 621 (2d ed. 2000).
². Id. at 622.
More generally during the Middle Ages, the Holy Roman Emperor failed to obtain sufficient authority to enforce the law of arms. Such application occurred in the councils and courts of the major sovereigns in Europe. Further, the Papacy had attempted to establish a right to hear claims concerning violations of the law of arms, but to no avail.3

During the U.S. Revolutionary War, there were suggestions that the King of England and others be prosecuted for their “War against the natural rights of all Mankind,”4 but there had been no capture of the King of England by the Americans and no such trials took place. Although the British war against human rights and crimes of political oppression led to no criminal sanctions, in view of the trial of von Hagenbach an international trial would not have been completely unprecedented.

One of the early recognitions of criminal responsibility of a head of state occurred at the Congress at Aix-La-Chapelle in 1818 when the Congress, without formal trial, found Napoleon guilty of waging wars against peace.5 After his capture in 1815, he had been banished to the Island of St. Helena where he died some six years later.

During the 1915 massacres of Armenians by Turks, the governments of Great Britain, France, and Russia had condemned the massacres as “crimes against humanity,”6 but none of the alleged perpetrators were captured abroad and subject to trial in domestic or international fora.

II. THE 1919 PARIS PEACE CONFERENCE AND REPORT

After World War I, there was an important Report of the Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties that was presented to the Preliminary Peace Conference in Paris on March 29, 1919.7 Members of the 1919 Commission were: the United States, the British Empire, France, Italy, Japan, Belgium, Greece, Poland, Romania, and Serbia. The Report identified then current opinio juris concerning “responsibility of the authors of the war”, responsibility for breaches of neutrality (another form of offenses against peace); responsibility for war crimes, including a list of customary crimes under the laws of war;8 responsibility for offenses against “the laws of humanity” (what we term crimes against humanity, which were

3. Id. at 622.
4. Id. at 621-22.
6. See, e.g., PAUST, BASSIOUNI, ET AL., supra note 1, at 857.
7. See, e.g., PAUST, FITZPATRICK & VAN DYKE, supra note 5, at 874. Here, I quote and borrow extensively from the 1919 Report, as reproduced in our casebook.
8. See, e.g., PAUST, BASSIOUNI, ET AL., supra note 1, at 32-33.
recognizable crimes under international law prior to creation of the Charters of the IMTs at Nuremberg and for the Far East); and nonimmunity for heads of state and other public officials (which every 20th Century Charter and Statute with respect to international criminal tribunals has adopted, e.g., those for the IMTN, IMTFE, ICTY, ICTR, and ICC).

Importantly, the Report stated a "desire to state expressly that in the hierarchy of persons in authority, there is no reason why rank, however exalted, should in any circumstances protect the holder of it from responsibility when that responsibility has been established before a properly constituted tribunal. This extends even to the case of heads of states. An argument has been raised to the contrary based upon the alleged immunity, and in particular the alleged inviolability, of a sovereign of a state. But this privilege, where it is recognized, is one of practical expedience in municipal law, and is not fundamental. However, even if, in some countries, a sovereign is exempt from being prosecuted in a national court of his own country the position from an international point of view is quite different.

"We have later on in our Report proposed the establishment of a high tribunal composed of judges drawn from many nations, and included the possibility of the trial before that tribunal of a former head of state with the consent of that state itself secured by articles in the Treaty of Peace. If the immunity of a sovereign is claimed to extend beyond the limits above stated, it would involve laying down the principle that the greatest outrages against the laws and customs of war and the laws of humanity, if proved against him, could in no circumstances be punished. Such a conclusion would shock the conscience of civilized mankind.

"In view of the grave charges which may be preferred against—to take one case—the ex-Kaiser—the vindication of the principles of the laws and customs of war and the laws of humanity which have been violated would be incomplete if he were not brought to trial and if other offenders less highly placed were punished. Moreover, the trial of the offenders might be seriously prejudiced if they attempted and were able to plead the superior orders of a sovereign against whom no steps had been or were being taken.

"There is little doubt that the ex-Kaiser and others in high authority were cognizant of and could at least have mitigated the barbarities committed during the course of the war. A word from them would have brought about a different method in the action of their subordinates on land, at sea and in the air.

"We desire to say that civil and military authorities cannot be relieved from responsibility by the mere fact that a higher authority might have been convicted of the same offence. It will be for the court to decide whether a plea of superior orders is sufficient to acquit the person charged from responsibility.
III. CONCLUSION

"All persons belonging to enemy countries, however high their position may have been, without distinction of rank, including Chiefs of States, who have been guilty of offences against the laws and customs of war or the laws of humanity, are liable to criminal prosecution...."9

However, with respect to an international criminal tribunal, the Report opined:

"Any tribunal appropriate to deal with the other offences to which reference is made [e.g., war crimes and crimes against humanity] might hardly be a good court to discuss and deal decisively with such a subject as the authorship of the war. The proceedings and discussions, charges and counter-charges, if adequately and dispassionately examined, might consume much time, and the result might conceivably confuse the simpler issues into which the tribunal will be charged to inquire. While this prolonged investigation was proceeding some witnesses might disappear, the recollection of others would become fainter and less trustworthy, offenders might escape, and the moral effect of tardily imposed punishment would be much less salutary than if punishment were inflicted while the memory of the wrongs done was still fresh and the demand for punishment was insistent.

"We therefore do not advise that the acts which provoked the war should be charged against their authors and made the subject of proceedings before a tribunal."10

The Report added that "acts which brought about the war should not be charged against their authors or made the subject of proceedings before a tribunal," but that the Conference should condemn them and "it would be right... even to create a special organ in order to deal as they deserve with the authors of such acts."11 Kaiser William II had fled to the Netherlands and was not surrendered for prosecution. No international criminal tribunals were established; but there were several, yet insufficient, domestic prosecutions of persons for war crimes in Germany during the Leipzig Trials of 1921 (involving prosecution of twelve and the conviction of six persons—including a civilian; a private; a sergeant; various lieutenants, captains and majors; and three generals).12 There were also prosecutions of various persons in the United States and in other countries.13

10. Id. at 879.
11. Id. at 880.
13. See, e.g., id. at 278-87.
It should not be forgotten, however, that later that year, on June 28, 1919, the Treaty of Versailles (or Treaty of Peace) with Germany was created and as Article 227 declared:

The Allied and Associated Powers publicly arraign William II of Hohenzollern, formerly German Emperor, for a supreme offence against international morality and the sanctity of treaties.

A special tribunal will be constituted to try the accused, thereby assuring him the guarantees essential to the right of defence. It will be composed of five judges, one appointed by each of the following were: namely the United States of America, Great Britain, France, Italy and Japan. ...

The Allied and Associated Powers will address a request to the Government of the Netherlands for the surrender to them of the ex-Emperor in order that he may be put on trial.¹⁴

The treaty also proclaimed in Article 228 that "[t]he German Government recognizes the right of the Allied and Associated Powers to bring before military tribunals persons accused of having committed acts in violation of the laws and customs of war. Such persons shall, if found guilty, be sentenced to punishments laid down by law. This provision will apply notwithstanding any proceedings or prosecution before a tribunal in Germany or in the territory of her allies," adding: "The German Government shall hand over to the Allied and Associated Powers, or to such one of them as shall so request, all persons accused of having committed an act in violation of the laws and customs of war, who are specified either by name or by the rank, office or employment which they held under the German authorities."¹⁵

German accused were not surrendered, but both the 1919 Report of the Commission on Responsibility and the 1919 Treaty of Versailles demonstrate significant pre-Nuremberg expectations of the international community concerning individual responsibility and nonimmunity for crimes against peace, war crimes, and offenses against the laws of humanity. These patterns of expectation had historical support with respect to trials and condemnations of von Hohenstafen (1268), von Hagenbach (1474), and Napoleon (1818), among others, and in the claims of our Founders concerning offenses against the law of nations allegedly committed by the King of England and his entourage.

¹⁴ Reproduced in PAUST, FITZPATRICK & VAN DYKE, supra note 5, at 880-81.
¹⁵ See id.
Prior to Nuremberg, there had also been many domestic prosecutions for war crimes and breaches of neutrality, especially within the United States. Within the U.S., there had even been recognitions in the Supreme Court when war ships were not immune with respect to breaches of the law of nations that if a Prince "comes personally within our limits, although he generally enjoy a personal immunity, he may become liable to judicial process in the same way, and under the same circumstances, as the public ships of the nation."16 Similar expectations of nonimmunity for heads of state were demonstrated in an 1859 Opinion of the Attorney General: "A sovereign who tramples upon the public law of the world cannot excuse himself by pointing to a provision of his own municipal code."17 Even earlier, Vattel had written in his widely read book in 1758, that "[t]he Prince...who would in his transports of fury take away the life of an innocent person, divests himself of his character, and is no longer to be considered in any other light than that of an unjust and outrageous enemy."18 In 1625, Grotius had also recognized that sovereignty is limited by and all kings are bound to observe the law of nations19 and that a war against an oppressive ruler was a permissible sanction who violated "the right of all human society" to freedom from oppression.20 Other early U.S. cases had also recognized that commissions from foreign governments do not create any immunity with respect violations of international law.21 Further, universal jurisdiction over violations of international law was recognized early in U.S. cases,22 as well as the duty of all states to prosecute customary international crimes.23

Was there precedent for the prosecutions at the IMT at Nuremberg, the IMT for the Far East, and the tens of thousands of convictions in military commissions under Control Council Law No. 10 in occupied territory after World War II? I believe there was significant, if somewhat sparse, precedent

19. HUGO GROTIUS, ON THE LAW OF WAR AND PEACE, bk. I, chpt. 3, §16 (1625).
20. Id. bk. II, chpt. 25, §8.
22. See, e.g., JORDAN J. PAUST, INTERNATIONAL LAW AS LAW OF THE UNITED STATES 421-22 (2 ed. 2003), and the many cases cited. A prominent example was Talbot v. Janson, 3 U.S. (3 Dall.) 159-61 (1795) ("all...trespasses committed against the general law of nations, are enquirable, and may be proceeded against, in any nation....") (emphasis added).
23. See, e.g., id. at 421-22, 443-46, and numerous references cited.
for individual responsibility for crimes against peace, war crimes, and crimes against humanity and for nonimmunity for international crimes.\textsuperscript{24}

\textsuperscript{24} Of particular interest with respect to violations of customary international law is the express recognition of nonimmunity by the International Military Tribunal at Nuremberg: "The principle of international law, which under certain circumstances protects the representatives of a state, cannot be applied to acts which are condemned as criminal by international law. The authors of these acts cannot shelter themselves behind their official position... [and one] cannot claim immunity while acting in pursuance of the authority of the State if the State in authorizing action moves outside its competence under international law." Opinion and Judgment, I.M.T. at Nuremberg (1946).