This is the first of two volumes devoted to the themes of how international and national criminal justice systems have responded, and should be responding, to the ‘crime of all crimes’; namely, the systematic killing of members of groups as such, which constitutes the international crime of genocide. All too often traditional legal analysis, focusing largely upon the meaning(s), scope and implications of court judgements, addresses the outcomes of the selective prosecution of alleged war criminals, but not the underlying institutional process of selectivity itself. This one-sided focus glosses over the various factors that shape the inherent exercise of discretion and selectivity within the prosecution process. These can include the pragmatic exercise of discretion in the case of plea-bargaining (and associated practices), through which either charges or sentences are reduced. Alternatively, as a reward for a guilty plea, the offence and its impact upon victims can be recast by the prosecutors in a light that is less damning for the defendant.

These aspects of the morally questionable exercise of discretion and selectivity, often guided more by pragmatism than clear principles of justice and peaceful reconciliation, are the main focus of Professor Ralph Henham’s critique. This addresses recent case law before the ICTY and ICTR, the ad hoc UN tribunals created to hear cases stemming from the genocides in the former Yugoslavia and Rwanda respectively. Henham’s article effectively combines a close reading of detailed arguments drawn from relevant case law with moral and philosophical argumentation relating to the requirements of a justifiable model of justice within the sentencing practices of international criminal law.

Another factor that is typically glossed over by mainstream doctrinal analysis within international and national law, relates to the impact of various institutional and geo-political factors. These factors can pre-empt a prosecution from even being considered as a realistic possibility in the first place. The second article, by Dr Kerstin von Lingen and Professor Michael Salter, considers the different ways in which these so-called ‘extra-legal factors’, stemming from
international relations and internal political pressures, shaped and explain the apparent discrepancy in the postwar treatment of two prominent Nazi war criminals: SS General Karl Wolff and Field Marshal Albert Kesselring. This article, which synthesises aspects of international criminal law with both intelligence studies and military history, displays a close reading of archival sources, including interrogation reports and recently declassified intelligence files. It thereby reconstructs how the ‘lesser’ war criminal, Kesselring, was tried as such in 1947, and then received the most serious sentence, namely the death penalty; whilst Wolff, who arguably was far more complicit in systematic atrocities against civilians, escaped prosecution within the Allied war crimes programme altogether. The authors argue that the explanation for this apparent discrepancy was due to various political and geo-political factors, including the intervention of US intelligence officials, such as Allen Dulles, later Director of the CIA (1953–1961).

The final article, from Susan Twist, further exemplifies interdisciplinary scholarship. Her analysis focuses upon one aspect of the Nuremberg war crimes trials before the International Military Tribunal (1945–1946) which also largely escapes the notice of doctrinal analysis: the legal implications raised by the rhetorical power of atrocity film evidence. She shows how rules of evidence, particularly the hearsay rule, have struggled to come to terms with the highly prejudicial, but also desperately incriminating, implications of atrocity films. This author discusses the example of the powerful impact on the Tribunal, defendants and lawyers of the Nazi Concentration Camp film, showing the sufferings of concentration camp inmates, which had been shot by Allied Army photographers as these camps were liberated in the closing months of WWII. She questions whether recent liberalisations of evidential rules, permitting such evidence, will be able to effectively tackle these and related issues of prejudicial effect. Arguably, such prejudicial effect, which strikes directly at the emotions and which rarely connects specific defendants to the images portrayed, is inherent in the prosecutors’ deployment of atrocity films portraying the impact of genocidal policies and extreme examples of institutional racism.

The second volume, will further develop a number of these and related themes concerning the selective legal responses to genocide. It will combine theoretical analysis of questions of justice and retrospective criminalisation, with an empirical study concerned with the gathering of evidence of systematic wartime atrocities against civilian populations. Together the aim of these two volumes is to