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William A. Schabas

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Creation of the Court

War criminals have been prosecuted at least since the time of the ancient Greeks, and probably well before that. The idea that there is some common denominator of behaviour, even in the most extreme circumstances of brutal armed conflict, confirms beliefs drawn from philosophy and religion about some of the fundamental values of the human spirit. The early laws and customs of war can be found in the writings of classical authors and historians. Those who breached them were subject to trial and punishment. Modern codifications of this law, such as the detailed text prepared by Columbia University professor Francis Lieber that was applied by Abraham Lincoln to the Union army during the American Civil War, proscribed inhumane conduct, and set out sanctions, including the death penalty, for pillage, raping civilians, abuse of prisoners and similar atrocities.¹ Prosecution for war crimes, however, was only conducted by national courts, and these were and remain ineffective when those responsible for the crimes are still in power and their victims remain subjugated. Historically, the prosecution of war crimes was generally restricted to the vanquished or to isolated cases of rogue combatants in the victor's army. National justice systems have often proven themselves to be incapable of being balanced and impartial in such cases.

The first genuinely international trial for the perpetration of atrocities was probably that of Peter von Hagenbach, who was tried in 1474 for atrocities committed during the occupation of Breisach. When the town was retaken, von Hagenbach was charged with war crimes, convicted and beheaded.² But what was surely no more than a curious experiment

¹ Instructions for the Government of Armies of the United States in the Field, General Orders No. 100, 24 April 1863.

² Georg Schwarzenberger, *International Law as Applied by International Courts and Tribunals: The Law of Armed Conflict*, vol. II, London: Stevens & Sons Limited, 1968, p. 463; M. Cherif Bassiouni, 'From Versailles to Rwanda in 75 Years: The Need to Establish a Permanent International Court', (1997) 10 *Harvard Human Rights Journal* 11.

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in medieval international justice was soon overtaken by the sanctity of State sovereignty resulting from the Peace of Westphalia of 1648. With the development of the law of armed conflict in the mid-nineteenth century, concepts of international prosecution for humanitarian abuses slowly began to emerge. One of the founders of the Red Cross movement, which grew up in Geneva in the 1860s, urged a draft statute for an international criminal court. Its task would be to prosecute breaches of the Geneva Convention of 1864 and other humanitarian norms. But Gustav Monnier's innovative proposal was much too radical for its time.³

The Hague Conventions of 1899 and 1907 represent the first significant codification of the laws of war in an international treaty. They include an important series of provisions dealing with the protection of civilian populations. Article 46 of the Regulations that are annexed to the Hague Convention IV of 1907 enshrines the respect of '[f]amily honour and rights, the lives of persons, and private property, as well as religious convictions and practice'.⁴ Other provisions of the Regulations protect cultural objects and the private property of civilians. The preamble to the Conventions recognizes that they are incomplete, but promises that, until a more complete code of the laws of war is issued, 'the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience'. This provision is known as the Martens clause, after the Russian diplomat who drafted it.⁵

The Hague Conventions, as international treaties, were meant to impose obligations and duties upon States, and were not intended to create criminal liability for individuals. They declared certain acts to be illegal, but not criminal, as can be seen from the absence of any suggestion that there is a sanction for their violation. Yet, within only a few years, the Hague Conventions were being presented as a source of the law of war crimes. In 1913, a commission of inquiry sent by the Carnegie Foundation to investigate atrocities committed during the

³ Christopher Keith Hall, 'The First Proposal for a Permanent International Criminal Court', (1998) 322 *International Review of the Red Cross* 57.

⁴ Convention Concerning the Laws and Customs of War on Land (Hague IV), 3 *Martens Nouveau Recueil* (3d) 461. For the 1899 treaty, see Convention (II) with Respect to the Laws and Customs of War on Land, 32 Stat. 1803, 1 Bevans 247, 91 British Foreign and State Treaties 988.

⁵ Theodor Meron, 'The Martens Clause, Principles of Humanity, and Dictates of Public Conscience', (2000) 94 *American Journal of International Law* 78.

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Balkan Wars used the provisions of the Hague Convention IV as a basis for its description of war crimes.⁶ Immediately following World War I, the Commission on Responsibilities of the Authors of War and on Enforcement of Penalties, established to examine allegations of war crimes committed by the Central Powers, did the same.⁷ But actual prosecution for violations of the Hague Conventions would have to wait until Nuremberg. Offences against the laws and customs of war, known as 'Hague Law' because of their roots in the 1899 and 1907 Conventions, are codified in the 1993 Statute of the International Criminal Tribunal for the former Yugoslavia⁸ and in Article 8(2)(b), (e) and (f) of the Statute of the International Criminal Court.

As World War I wound to a close, public opinion, particularly in England, was increasingly keen on criminal prosecution of those generally considered to be responsible for the war. There was much pressure to go beyond violations of the laws and customs of war and to prosecute, in addition, the waging of war itself in violation of international treaties. At the Paris Peace Conference, the Allies debated the wisdom of such trials as well as their legal basis. The United States was generally hostile to the idea, arguing that this would be *ex post facto* justice. Responsibility for breach of international conventions, and above all for crimes against the 'laws of humanity' – a reference to civilian atrocities within a State's own borders – was a question of morality, not law, said the United States delegation. But this was a minority position. The resulting compromise dropped the concept of 'laws of humanity' but promised the prosecution of Kaiser Wilhelm II 'for a supreme offence against international morality and the sanctity of treaties'. The Versailles Treaty formally arraigned the defeated German emperor and pledged the creation of a 'special tribunal' for his trial.⁹ Wilhelm of Hohenzollern had fled to neutral Holland which refused his extradition, the Dutch Government considering that the charges consisted of retroactive criminal law. He lived out his life there and died, ironically, in 1941, when his country of refuge was falling under German occupation in the early years of World War II.

⁶ Report of the International Commission to Inquire into the Causes and Conduct of the Balkan Wars, Washington DC: Carnegie Endowment for International Peace, 1914.

⁷ *Violations of the Laws and Customs of War, Reports of Majority and Dissenting Reports of American and Japanese Members of the Commission of Responsibilities, Conference of Paris, 1919*, Oxford: Clarendon Press, 1919.

⁸ Statute of the International Criminal Tribunal for the former Yugoslavia, UN Doc. S/RES/827 (1993), Annex, Art. 3.

⁹ Treaty of Peace between the Allied and Associated Powers and Germany ('Treaty of Versailles'), (1919) TS 4, Art. 227.

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The Versailles Treaty also recognized the right of the Allies to set up military tribunals to try German soldiers accused of war crimes.¹⁰ Germany never accepted the provisions, and subsequently a compromise was reached whereby the Allies were to prepare lists of German suspects, but the trials would be held before the German courts. An initial roster of nearly 900 was quickly whittled down to about forty-five, and in the end only a dozen were actually tried. Several were acquitted; those found guilty were sentenced to modest terms of imprisonment, often nothing more than time already served in custody prior to conviction. The trials looked rather more like disciplinary proceedings of the German army than any international reckoning. Known as the 'Leipzig Trials', the perceived failure of this early attempt at international justice haunted efforts in the inter-war years to develop a permanent international tribunal and were grist to the mill of those who opposed war crimes trials for the Nazi leaders. But two of the judgments of the Leipzig court involving the sinking of the hospital ships *Dover Castle* and *Llandovery Castle*, and the murder of the survivors, mainly Canadian wounded and medical personnel, are cited to this day as precedents on the scope of the defence of superior orders.¹¹

The Treaty of Sèvres of 1920, which governed the peace with Turkey, also provided for war crimes trials.¹² The proposed prosecutions against the Turks were even more radical, going beyond the trial of suspects whose victims were either Allied soldiers or civilians in occupied territories to include subjects of the Ottoman Empire, notably victims of the genocide of the Armenian people. This was the embryo of what would later be called crimes against humanity. However, the Treaty of Sèvres was never ratified by Turkey, and no international trials were undertaken. The Treaty of Sèvres was replaced by the Treaty of Lausanne of 1923 which contained a 'Declaration of Amnesty' for all offences committed between 1 August 1914 and 20 November 1922.¹³

¹⁰ *Ibid.*, Arts. 228–230.

¹¹ *German War Trials, Report of Proceedings Before the Supreme Court in Leipzig*, London: His Majesty's Stationery Office, 1921. See also James F. Willis, *Prologue to Nuremberg: The Politics and Diplomacy of Punishing War Criminals of the First World War*, Westport, CT: Greenwood Press, 1982; Gerd Hankel, *Die Leipziger Prozesse*, Hamburg: Hamburger Edition, 2003.

¹² (1920) UKTS 11; (1929) 99 (3rd Series), DeMartens, *Recueil général des traités*, No. 12, p. 720 (French version).

¹³ Treaty of Lausanne Between Principal Allied and Associated Powers and Turkey, (1923) 28 LNTS 11.

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Although these initial efforts to create an international criminal court were unsuccessful, they stimulated many international lawyers to devote their attention to the matter during the years that followed. Baron Descamps of Belgium, a member of the Advisory Committee of Jurists appointed by the Council of the League of Nations, urged the establishment of a ‘high court of international justice’. Using language borrowed from the Martens clause in the preamble to the Hague Conventions, Descamps recommended that the jurisdiction of the court include offences ‘recognized by the civilized nations but also by the demands of public conscience [and] the dictates of the legal conscience of civilized nations’. The Third Committee of the Assembly of the League of Nations declared that Descamps’ ideas were ‘premature’. Efforts by expert bodies, such as the International Law Association and the International Association of Penal Law, culminated, in 1937, in the adoption of a treaty by the League of Nations that contemplated the establishment of an international criminal court.¹⁴ But, failing a sufficient number of ratifying States, that treaty never came into force.

The Nuremberg and Tokyo trials

In the Moscow Declaration of 1 November 1943, the Allies affirmed their determination to prosecute the Nazis for war crimes. The United Nations Commission for the Investigation of War Crimes, composed of representatives of most of the Allies, and chaired by Sir Cecil Hurst of the United Kingdom, was established to set the stage for post-war prosecution. The Commission prepared a ‘Draft Convention for the Establishment of a United Nations War Crimes Court’, basing its text largely on the 1937 treaty of the League of Nations, and inspired by work carried out during the early years of the war by an unofficial body, the London International Assembly.¹⁵ But it was the work of the London Conference, convened at the close of the war and limited to the four major powers, the United Kingdom, France, the United States and the Soviet Union, that laid the groundwork for the prosecutions at Nuremberg. The Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, and Establishing the Charter of the International Military Tribunal

¹⁴ Convention for the Creation of an International Criminal Court, League of Nations OJ Spec. Supp. No. 156 (1936), LN Doc. C.547(I).M.384(I).1937. V (1938).

¹⁵ Draft Convention for the Establishment of a United Nations War Crimes Court, UN War Crimes Commission, Doc. C.50(1), 30 September 1944.

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(IMT) was formally adopted on 8 August 1945. It was promptly signed by representatives of the four powers. The Charter of the International Military Tribunal was annexed to the Agreement.¹⁶ This treaty was eventually adhered to by nineteen other States who, although they played no active role in the Tribunal's activities or the negotiation of its statute, sought to express their support for the concept and indicate the wide international acceptance of the norms the Charter set out.¹⁷

In October 1945, indictments were served on twenty-four Nazi leaders. Their trial – known as the Trial of the Major War Criminals – began the following month. It concluded nearly a year later, with the conviction of nineteen defendants and the imposition of sentence of death in twelve cases. The Tribunal's jurisdiction was confined to three categories of offence: crimes against peace, war crimes and crimes against humanity. The Charter of the International Military Tribunal had been adopted after the crimes had been committed, and for this reason it was attacked as constituting *ex post facto* criminalization. Rejecting such arguments, the Tribunal referred to the Hague Conventions, for the war crimes, and to the 1928 Kellogg–Briand Pact, for crimes against peace.¹⁸ The judges also answered that the prohibition of retroactive crimes was a principle of justice, and that it would fly in the face of justice to leave the Nazi crimes unpunished. This argument was particularly important with respect to the category of crimes against humanity, for which there was little real precedent, apart from the famous declaration by the three Allied powers in 1915 condemning the Turkish persecution of the Armenians. In the case of some war crimes charges, the Tribunal refused to convict after hearing evidence of similar behaviour by British and American soldiers.¹⁹

¹⁶ Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, and Establishing the Charter of the International Military Tribunal (IMT), Annex, (1951) 82 UNTS 279. See Ariejh J. Kochavi, *Prelude to Nuremberg: Allied War Crimes Policy and the Question of Punishment*, Chapel Hill, NC, and London: University of North Carolina Press, 1998; Report of Robert H. Jackson, *United States Representative to the International Conference on Military Trials*, Washington DC: US Government Printing Office, 1949.

¹⁷ Australia, Belgium, Czechoslovakia, Denmark, Ethiopia, Greece, Haiti, Honduras, India, Luxembourg, the Netherlands, New Zealand, Norway, Panama, Paraguay, Poland, Uruguay, Venezuela and Yugoslavia.

¹⁸ The Kellogg–Briand Pact was an international treaty that renounced the use of war as a means to settle international disputes. Previously, war as such was not prohibited by international law. States had erected a network of bilateral and multilateral treaties of non-aggression and alliance in order to protect themselves from attack and invasion.

¹⁹ France *et al. v. Goering et al.*, (1946) 22 IMT 203; (1946) 13 ILR 203; (1946) 41 *American Journal of International Law* 172. The judgment itself, as well as the transcript of the

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In December 1945, the four Allied powers enacted a somewhat modified version of the Charter of the International Military Tribunal, known as Control Council Law No. 10.²⁰ It provided the legal basis for a series of trials before military tribunals that were run by the occupying regime, as well as for subsequent prosecutions by German courts that continued for several decades. Control Council Law No. 10, which was really a form of domestic legislation because it applied to the prosecution of Germans by the courts of the civil authorities, largely borrowed the definition of crimes against humanity found in the Charter of the Nuremberg Tribunal, but omitted the latter's insistence on a link between crimes against humanity and the existence of a state of war, thereby facilitating prosecution for pre-1939 atrocities committed against German civilians, including persecution of the Jews and euthanasia of the disabled. Several important thematic trials were held pursuant to Control Council Law No. 10 in the period 1946–8 by American military tribunals. These focused on groups of defendants, such as judges, doctors, bureaucrats and military leaders.²¹

In the Pacific theatre, the victorious Allies established the International Military Tribunal for the Far East. Japanese war criminals were tried under similar provisions to those used at Nuremberg. The bench was more cosmopolitan, consisting of judges from eleven countries, including India, China and the Philippines, whereas the Nuremberg judges were appointed by the four major powers, the United States, the United Kingdom, France and the Soviet Union. Judge Pal of India wrote a lengthy dissenting opinion that reflected his profound anti-colonialist sentiments.

hearings and the documentary evidence, are reproduced in a forty-volume series published in English and French and available in most major reference libraries, as well as on the website of the Library of Congress (www.loc.gov/rr/frd/Military_Law/NT_major-war-criminals.html). The literature on the Nuremberg trial of the major war criminals is extensive. Probably the best modern account is Telford Taylor, *The Anatomy of the Nuremberg Trials*, New York: Alfred A. Knopf, 1992.

²⁰ Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity, 20 December 1945, *Official Gazette of the Control Council for Germany*, No. 3, 31 January 1946, pp. 50–5.

²¹ Frank M. Buscher, *The US War Crimes Trial Program in Germany, 1946–1955*, Westport, CT: Greenwood Press, 1989. The judgments in the cases, as well as much secondary material and documentary evidence, have been published in two series, one by the United States Government entitled *Trials of the War Criminals*, the other by the United Kingdom Government entitled *Law Reports of the Trials of the War Criminals*. Both series are readily available in reference libraries.

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At Nuremberg, Nazi war criminals were charged with what the prosecutor called ‘genocide’, but the term did not appear in the substantive provisions of the Statute, and the Tribunal convicted them of ‘crimes against humanity’ for the atrocities committed against the Jewish people of Europe. Within weeks of the judgment, efforts began in the General Assembly of the United Nations to push the law further in this area. In December 1946, a resolution was adopted declaring genocide a crime against international law and calling for the preparation of a convention on the subject.²² Two years later, the General Assembly adopted the Convention for the Prevention and Punishment of the Crime of Genocide.²³ The definition of genocide set out in Article II of the 1948 Convention is incorporated unchanged in the Rome Statute of the International Criminal Court, as Article 6. But, besides defining the crime and setting out a variety of obligations relating to its prosecution, Article VI of the Convention said that trial for genocide was to take place before ‘a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction’. An early draft of the Genocide Convention prepared by the United Nations Secretariat had actually included a model statute for a court, based on the 1937 treaty developed within the League of Nations, but the proposal was too ambitious for the time and the conservative drafters stopped short of establishing such an institution.²⁴ Instead, a General Assembly resolution adopted the same day as the Genocide Convention, on 9 December 1948, called upon the International Law Commission to prepare the statute of the court promised by Article VI.²⁵

The International Law Commission

The International Law Commission is a body of experts, named by the United Nations General Assembly, charged with the codification and progressive development of international law. Besides the mandate

²² GA Res. 96 (I).

²³ Convention on the Prevention and Punishment of the Crime of Genocide, (1951) 78 UNTS 277.

²⁴ William A. Schabas, *Genocide in International Law: The Crime of Crimes*, 2nd edn, Cambridge: Cambridge University Press, 2009, pp. 62–3.

²⁵ Study by the International Law Commission of the Question of an International Criminal Jurisdiction, GA Res. 216 B (III).

to draft the statute of an international criminal court derived from Article VI of the Genocide Convention, in the post-war euphoria about war crimes prosecution the General Assembly had also asked the Commission to prepare what are known as the ‘Nuremberg Principles’, a task it completed in 1950,²⁶ and the ‘Code of Crimes Against the Peace and Security of Mankind’, a job that took considerably longer. The final version of the Code of Crimes was only adopted by the International Law Commission in 1996. Much of the work on the draft statute of an international criminal court and the draft code of crimes went on within the Commission in parallel, almost as if the two tasks were hardly related. The two instruments can be understood by analogy with domestic law. They correspond in a general sense to the definitions of crimes and general principles found in criminal or penal codes (the ‘code of crimes’), and the institutional and procedural framework found in codes of criminal procedure (the ‘statute’).

Meanwhile, alongside the work of the International Law Commission, the General Assembly also established a committee charged with drafting the statute of an international criminal court. Composed of seventeen States, it submitted its report and draft statute in 1952.²⁷ A new committee, created by the General Assembly to review the draft statute in the light of comments by Member States, reported to the General Assembly in 1954.²⁸ The International Law Commission made considerable progress on its draft code and actually submitted a proposal in 1954.²⁹ Then, the General Assembly suspended the mandates, ostensibly pending the sensitive task of defining the crime of aggression.³⁰ By then,

²⁶ The Principles begin with an important declaration: ‘Any person who commits an act which constitutes a crime under international law is responsible therefor and liable to punishment.’ They proceed with statements excluding the defences of official capacity, superior orders and retroactive criminal law, they define the categories of crimes against peace, war crimes, and crimes against humanity, and provide that complicity in such crimes is also punishable.

²⁷ Report of the Committee on International Criminal Court Jurisdiction, UN Doc. A/2135 (1952).

²⁸ Report of the Committee on International Criminal Court Jurisdiction, UN Doc. A/2645 (1954).

²⁹ *Yearbook ... 1954*, vol. I, 267th meeting, para. 39, p. 131 (ten in favour, with one abstention). On the 1954 draft code in general, see D. H. N. Johnson, ‘Draft Code of Offences Against the Peace and Security of Mankind’, (1955) 4 *International and Comparative Law Quarterly* 445.

³⁰ GA Res. 897 (IX) (1954).

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political tensions associated with the Cold War had made progress on the war crimes agenda virtually impossible.

The General Assembly eventually adopted a definition of aggression, in 1974,³¹ but work did not immediately resume on the proposed international criminal court. In 1981, the General Assembly asked the International Law Commission to revive activity on its draft code of crimes.³² Doudou Thiam was designated the Special Rapporteur of the Commission, and he produced annual reports on various aspects of the draft code for more than a decade. Thiam's work, and the associated debates in the Commission, addressed a range of questions, including definitions of crimes, criminal participation, defences and penalties.³³ A substantially revised version of the 1954 draft code was provisionally adopted by the Commission in 1991, and then sent to Member States for their reaction.

But the code did not necessarily involve an international jurisdiction. That aspect of the work was only initiated in 1989, the year of the fall of the Berlin Wall. Trinidad and Tobago, one of several Caribbean States plagued by narcotics problems and related transnational crime issues, initiated a resolution in the General Assembly directing the International Law Commission to consider the subject of an international criminal court within the context of its work on the draft code of crimes.³⁴ Special Rapporteur Doudou Thiam made an initial presentation on the subject in 1992. By 1993, the Commission had prepared a draft statute, this time under the direction of Special Rapporteur James Crawford. The draft statute was examined that year by the General Assembly, which encouraged the Commission to complete its work. The following year, in 1994, the Commission submitted the final version of its draft statute for an international criminal court to the General Assembly.³⁵

The International Law Commission's draft statute of 1994 focused on procedural and organizational matters, leaving the question of

³¹ GA Res. 3314 (XXIX) (1974). ³² GA Res. 36/106 (1981).

³³ These materials appear in the annual reports of the International Law Commission.

³⁴ GA Res. 44/89.

³⁵ James Crawford, 'The ILC's Draft Statute for an International Criminal Tribunal', (1994) 88 *American Journal of International Law* 140; James Crawford, 'The ILC Adopts a Statute for an International Criminal Court', (1995) 89 *American Journal of International Law* 404. For the International Law Commission's discussion of the history of the draft statute, see Report of the International Law Commission on the Work of Its Forty-Sixth Session, 2 May–22 July 1994, UN Doc. A/49/10, chapter II, paras. 23–41.