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978-1-107-02884-5 - 'Crimes against Peace' and International Law

Kirsten Sellars

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In 1946, the judges at the International Military Tribunal at Nuremberg declared 'crimes against peace' – the planning, initiation or waging of aggressive wars – to be 'the supreme international crime'. At the time, the prosecuting powers heralded the charge as being a legal milestone, but it later proved to be an anomaly arising from the unique circumstances of the post-war period.

This study traces the idea of criminalising aggression, from its origins after the First World War, through its high-water mark at the post-war tribunals at Nuremberg and Tokyo, to its abandonment during the Cold War. Today, a similar charge – the 'crime of aggression' – is being mooted at the International Criminal Court, so the ideas and debates that shaped the original charge of 'crimes against peace' assume new significance, and offer valuable insights to lawyers, policy-makers and scholars engaged in the study of international law and international relations.

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Preface

In an article written in 1951, Josef Kunz reflected upon Roscoe Pound's view that primitive law aims, before anything else, to establish peace and guarantee the *status quo*.¹ Kunz was writing at a time when the world had been through two cataclysmic world wars and now faced the threat of a third, and he observed that of the two juridical values, security and justice, security was 'the lower, but most basic value'.² His observation was certainly true of the early experiments in international criminal law carried out at the International Military Tribunals at Nuremberg and Tokyo. Here, security was the overriding concern, represented by the central charge of 'crimes against peace'. For the prosecuting Allied powers in 1945, peace – even an unjust peace – was infinitely preferable to war, whether 'just' or not.

This study traces the emergence of the idea of criminalising aggression, from its origin after the First World War to its high-water mark at the post-war tribunals and its subsequent abandonment during the Cold War. The concept first emerged in 1918, when Britain and France, the two leading entente powers, considered the possibility of prosecuting the former Kaiser for initiating the First World War. The ensuing debate raised fundamental questions, such as whether national leaders could be held personally responsible for embarking upon war – and if so, whether their punishment should take a legal or a political form. In the event, under pressure from the United States, it was decided not to charge Wilhelm II for the crime of aggression. Instead, energies

¹ J.L. Kunz, 'Bellum justum and bellum legale', *American Journal of International Law* 45 (1951), p. 533.

² *Ibid.*, pp. 533–534.

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were directed towards the newly founded League of Nations, which had a primarily preventative purpose: to discourage states from going to war in the future, rather than seeking to punish individuals after the event.

After the Second World War (and the failure of the League of Nations to prevent it) the same issues arose once more. The victorious Allies, this time led by the United States and the Soviet Union, returned to the idea of criminalising aggression. They decided to prosecute the German leaders for crimes against peace, as part of a broader plan to dispose of their former enemies, impose control over Germany, and retrospectively legitimise their own wartime aims and conduct. The trial, wrote Telford Taylor, would enable the Allies, 'To give meaning to the war against Germany. To validate the casualties we have suffered and the destruction and casualties we have caused. To show why those things had to be done.'³

At the 1945 London Conference, the prosecuting powers conceived the charge of crimes against peace – the planning, preparation, initiation and waging of wars of aggression – as an *ad hoc* measure, to be applied only to the leaders of the European Axis powers. The charge, duly enshrined in the Nuremberg Charter, could best be described as innovation in the service of orthodoxy: the innovation being the prosecution of leading individuals for embarking upon war, and the orthodoxy being the maintenance of the international *status quo*. The Allies were cautious innovators, however, and they recognised that the new aggression charge involved risks as well as benefits. They were sensitive to accusations that they themselves had been guilty of similar crimes before and during the Second World War, and mindful too that they were creating a legal precedent that might one day be used against them. So, Articles 1 and 6 of the Charter stated that the court would try only the 'major war criminals of the European Axis',⁴ while Article 3 precluded challenges to the Tribunal's authority,⁵ and Article 18 enjoined it to 'rule out irrelevant issues'⁶ – in other words, counter-charges against the Allies.

³ Taylor, 'An approach to the preparation of the prosecution of Axis criminality', 2 June 1945, 1: Box 7, RG238, US Counsel for the Prosecution, Washington, correspondence 1945–46, NARA.

⁴ London Conference, *Report of Robert H. Jackson, United States representative, to the international conference on military trials* (Washington DC: Department of State, 1949), pp. 422, 423.

⁵ *Ibid.*, p. 422. ⁶ *Ibid.*, p. 426.

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When the judges at Nuremberg eventually handed down their decision against the leaders of Germany in October 1946, they declared crimes against peace to be 'the supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole'.⁷ These words were intended to validate the Allies' prosecutorial approach, but the significant number of acquittals reflected the judges' unease about convicting on this and the associated conspiracy count. Legal opinion outside the court was also far from unanimous. Some endorsed the Judgment, believing the Second World War to be an exceptional event requiring special legal remedies, and commending the Tribunal for advancing international law. Others, however, saw the charge of crimes against peace as an *ex post facto* enactment, selectively applied by the prosecuting powers to serve their own interests.

Stung by these criticisms, the Allies did everything they could to ensure that the Nuremberg Judgment on crimes against peace would be reinforced by their other great assize: the International Military Tribunal for the Far East, set up in Tokyo in 1946 to try the Japanese leaders. In this, they were ultimately unsuccessful. The problems of legitimacy associated with the charge at Nuremberg were simply replicated in less auspicious circumstances at Tokyo. Although Tokyo's Majority Judgment duplicated the legal principles set out in the Nuremberg Judgment, the trial left a highly ambivalent legacy on the question of aggression, shaped by the dissenting judgments as well as by the exigencies of the Cold War. By the time the Tribunal closed in late 1948, the prosecuting powers were keen to put trials of former wartime enemy leaders – and the attendant crimes against peace charge – well behind them.

Meanwhile, attempts in the United Nations to place crimes against peace on a stronger jurisdictional footing fared little better. In 1946, the General Assembly had affirmed the 'Nürnberg Principles', including the crimes against peace charge, but attempts to codify these principles in the 'draft Code of Offences Against the Peace and Security of Mankind' stalled in the early 1950s, and would not be considered again for another third of a century. The idea of prosecuting leaders for aggressive war – which, after all, had been devised by the Allies as a temporary expedient – had exhausted its usefulness. Altogether, the

⁷ International Military Tribunal, *Trial of the major war criminals before the International Military Tribunal*, 'The Blue Series', 42 vols. (Nuremberg: IMT, 1947–49), vol. 1, p. 186.

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charge of crimes against peace had an operative existence of just three years, from the opening of the Nuremberg trial in November 1945 to the closing of the Tokyo trial in November 1948 – a modest legacy that stands in marked contrast to the grand pronouncements made about ‘the great crime of crimes’ at its inception.⁸

Since then, successive generations of commentators have interpreted the Nuremberg and Tokyo tribunals in their own ways, influenced by the conflicts and concerns of their own times. During the Cold War, it was generally assumed that these trials were an experiment that was not likely to be repeated, but since then, with the revival of interest in international criminal law, practitioners have paid greater attention to the post-war tribunals. Of the substantive charges heard there, crimes against peace has thus far attracted less attention than the others, but this situation has begun to change, spurred by the decision in June 2010 to amend the International Criminal Court’s statute to include the ‘crime of aggression’ within its operative remit. In this context, the ideas and debates that shaped the earlier charge of ‘crimes against peace’ assume a new significance beyond their obvious historical importance: they offer valuable lessons to lawyers and legislators grappling with similar issues today.

⁸ London Conference, p. 384.

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Singapore, December 2012

Abbreviations

AAD	Access to Archival Databases, NARA
AAOM	Wellington Supreme Court records, New Zealand
ADM	Admiralty, London
AMAE	Archives du Ministère des Affaires Étrangères, Paris
AWM	Australian War Memorial, Canberra
BWCE	British War Crimes Executive
CAB	Cabinet Office, London
CO	Colonial Office, London
DO	Dominions Office, London
EA	Department of External Affairs; Canberra, Ottawa or Wellington
FCO	Foreign and Commonwealth Office, London
FEC	Far Eastern Commission
FO	Foreign Office, London
FRUS	<i>Foreign Relations of the United States</i>
GU	Georgetown University
HLS	Harvard Law School
ICC	International Criminal Court
IMT	International Military Tribunal
IMTFE	International Military Tribunal for the Far East
LCO	Lord Chancellor's Office, London
LoC	Library of Congress
NAA	National Archives of Australia
NANZ	National Archives of New Zealand
NARA	National Archives and Records Administration, United States
OSS	Office of Strategic Services, United States
PREM	Prime Minister's Office, London
TNA	The National Archives, United Kingdom

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LIST OF ABBREVIATIONS XV

UNGA	United Nations General Assembly
UNSC	United Nations Security Council
UNWCC	United Nations War Crimes Commission
WO	War Office, London