
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 in

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.

2 INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT

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 Moynier'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 important provisions dealing with both the conduct of hostilities and the protection of non-combatants. 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 Balkan Wars

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.

used the provisions of 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 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 of 1919, 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’, was a question of morality, not law, said the US 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. He lived out his life there and died, ironically, in 1941, after his country of refuge had fallen under German occupation in the early years of World War II.

The Versailles Treaty also recognized the right of the Allies to set up military tribunals to try German soldiers accused of war crimes.¹⁰

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. See William A. Schabas, *The Trial of the Kaiser*, Oxford: Oxford University Press, 2018.

¹⁰ Treaty of Versailles, Arts. 228–30.

4 INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT

Although it had accepted the Treaty, when the victors submitted an initial list of more than nine hundred suspects to be surrendered for trial, Germany was able to negotiate a compromise whereby a much smaller number were tried, and by the German courts rather than those of the victors. In the end only a dozen men, prison camp commandants and U-boat officers rather than the generals and admirals in Berlin, were brought to justice. 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 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, governing 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

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

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 World War I*, 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, Miscellaneous Provisions, VIII, Declaration of Amnesty.

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's 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 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 (IMT) was formally adopted on 8 August 1945. It was promptly signed by representatives of the four

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. See William A. Schabas, 'The United Nations War Crimes Commission's Proposal for an International Criminal Court', (2014) 25 *Criminal Law Forum* 171.

powers. The Charter of the International Military Tribunal was annexed to the Agreement.¹⁶ This treaty was eventually adhered to by nineteen other States that, 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 issued for twenty-four Nazi leaders. Their trial, known as the Trial of the Major War Criminals or the Nuremberg Trial, 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. 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 charges relating to submarine warfare, the Tribunal said the law had been breached by the German naval forces, but it refused to impose a sentence on the offenders after hearing evidence of similar behaviour by British and American sailors.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 Arieh 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: 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 to protect themselves from attack and invasion.

¹⁹ *France et al. v. Göring et al.* (1946) 22 IMT 411, at p. 559. The judgment itself, as well as the transcript of the hearings and the documentary evidence, are reproduced in a forty-two-

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. This enabled prosecution for pre-1939 atrocities committed against German civilians, including persecution of the Jews and euthanasia of the disabled, although despite the text, the tribunals were still hesitant to recognize international criminality in peacetime. 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

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. The literature on the Nuremberg trial of the major war criminals is extensive. For example, Telford Taylor, *The Anatomy of the Nuremberg Trials: A Personal Memoir*, New York: Alfred A. Knopf, 1992; Guénaél Mettraux, ed., *Perspectives on the Nuremberg Trial*, Oxford: Oxford University Press, 2008.

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 Kevin Jon Heller, *The Nuremberg Military Tribunals and the Origins of International Criminal Law*, Oxford: Oxford University Press, 2011. The judgments in the cases, as well as much secondary material and documentary evidence, have been published in two series, one by the US government titled *Trials of the War Criminals*, the other by the UK government titled *Law Reports of the Trials of the War Criminals*. Both series are readily available in reference libraries.

a lengthy dissenting opinion that reflected his profound anti-colonialist sentiments.²²

At Nuremberg, Nazi war criminals were charged with what the prosecutors called ‘genocide’, but the term did not appear in the substantive provisions of the Charter, 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, it adopted a resolution declaring genocide a crime against international law and calling for the preparation of a convention on the subject.²³ Two years later, the General Assembly proclaimed the Convention on the Prevention and Punishment of the Crime of Genocide.²⁴ 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 1948 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 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.²⁵ Instead, a General Assembly resolution, adopted the same day as the Genocide Convention, on 9 December 1948, called on the International Law Commission to prepare the statute of the court promised by Article VI.²⁶

²² David Cohen and Yuma Totani, *The Tokyo War Crimes Tribunal, Law, History and Jurisprudence*, Cambridge: Cambridge University Press, 2018; Neil Boister and Robert Cryer, *The Tokyo International Military Tribunal – A Reappraisal*, Oxford: Oxford University Press, 2008.

²³ UN Doc. A/RES/96 (I).

²⁴ Convention on the Prevention and Punishment of the Crime of Genocide, (1951) 78 UNTS 277.

²⁵ William A. Schabas, *Genocide in International Law: The Crime of Crimes*, 2nd edn, Cambridge: Cambridge University Press, 2009, pp. 62–3.

²⁶ Study by the International Law Commission of the Question of an International Criminal Jurisdiction, UN Doc. A/RES/216 B (III).

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 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 also asked the Commission to prepare what are known as the ‘Nuremberg Principles’, a task it concluded in 1950,²⁷ 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 1952.²⁸ 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 1954.²⁹

The International Law Commission made considerable progress on its draft code and actually submitted a proposal in 1954.³⁰ However, the

²⁷ 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. They proved controversial in the General Assembly, however, and it never formally adopted them.

²⁸ Report of the Committee on International Criminal Court Jurisdiction, UN Doc. A/2135 (1952).

²⁹ Report of the Committee on International Criminal Court Jurisdiction, UN Doc. A/2645 (1954).

³⁰ *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

General Assembly decided to suspend the mandates, ostensibly pending the sensitive task of defining the crime of aggression.³¹ By then, political tensions associated with the Cold War had made progress on the international criminal court agenda virtually impossible.

The General Assembly eventually adopted a definition of aggression, in 1974,³² 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 the draft code of crimes.³³ Doudou Thiam was designated the Special Rapporteur of the Commission. 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.³⁴ 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.

Throughout the 1980s, the Commission reminded the General Assembly that there was limited interest in an international code if there was not to be an international court charged with enforcing it. However, the General Assembly did not react until late 1989, a few weeks after the fall of the Berlin Wall. Trinidad and Tobago, one of several Caribbean States plagued by narcotic drug 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.³⁵ 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 following year, in 1994, the Commission submitted the final version of its draft statute for an international criminal court to the General Assembly.³⁶

Offences against the Peace and Security of Mankind', (1955) 4 *International and Comparative Law Quarterly* 445.

³¹ UN Doc. A/RES/897 (IX).

³² UN Doc. A/RES/3314 (XXIX).

³³ UN Doc. A/RES/36/106.

³⁴ These materials appear in the annual reports of the International Law Commission.

³⁵ UN Doc. A/RES/44/39, para. 1.

³⁶ 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