

The Evolution of International Criminal Tribunals

Harry M. Rhea^{*,#}

Department of Sociology, Anthropology & Criminal Justice, Rutgers University, 405-7 Cooper Street, Camden, NJ 08102-1521, USA

Abstract: International criminal justice is a relatively new and uniquely distinct system of criminal justice. It combines international law and criminal law from various legal systems. Historically, international law applied only to States; however, it is now applied to individuals through its merging with criminal law. The majority of States have been genuinely unwilling or unable to prosecute those most responsible for the planning and commission of international crimes. This lack of genuine willingness to prosecute perpetrators of genocide, war crimes, and crimes against humanity has resulted in the recent creation of multiple international criminal tribunals. The emergence of international and quasi-international criminal tribunals should not reflect the assumption that the idea of such courts is new. On the contrary, the idea and discussions for creating international criminal tribunals have been with us for well over a century. This article traces the evolution of international criminal tribunals starting from 1864. Each major debate to establish an international criminal tribunal is closely analyzed. The article concludes with analysis of the International Criminal Court.

Keywords: International Criminal Law, International Criminal Justice, International Criminal Courts and Tribunals, International Crimes.

The Rome Statute of the International Criminal Court was adopted by an unrecorded vote on July 17, 1998.¹ Excluding abstentions, 120 States voted in favor and seven States voted against the adoption of the statute (Summary Record of the 9th Plenary Meeting, 1998). The Rome Statute entered into force on July 1, 2002, after the ratification of sixty States as required under Article 126. The International Criminal Court (ICC) has jurisdiction over “the most serious crimes of concern to the international community as a whole” (Preamble and Art. 5), which include genocide, crimes against humanity, war crimes, and the crime of aggression (Art. 5). The purpose of the ICC is “to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of these crimes” (Preamble). The Rome Statute applies to all persons without distinction based on official capacity, including heads of State (Art. 27(1)).

The ICC is the first permanent international criminal tribunal; however, non-permanent international criminal tribunals have been established both prior to and since the adoption of the Rome Statute. Yet, “the general

principle of subjecting heads of State to the criminal law is in fact neither new or brave” (Laughland, 2008, p. 16). Establishing courts to prosecute the worst crimes against the international community is not a new idea, either. It is one that dates back at least 150 years. This paper traces the development of international criminal tribunals established to prosecute violators of international crimes.

PURPOSE AND METHODOLOGY OF STUDY

International criminal justice has gained considerable attention over the past two decades as a result of the establishment of numerous international criminal tribunals. Yet, international criminal justice is not new and has been studied and written about at length over the past century. While international criminal justice has a long history, this research attempts to answer the questions: Why was the International Criminal Court established only sixteen years ago, and were there any previous attempts to establish it? This research is a result of qualitative analysis of archives, including official government documents, personal collections, and official minutes of the meetings of war crimes commissions. Primary written records of government debates over international criminal tribunals were also analyzed. Many of the archival documents consulted, particularly prior to and immediately following the First World War, seem never to have been studied previously.

PRE-FIRST WORLD WAR

There is consensus that the first international prosecution occurred in 1474 when the Archduke of

*Address correspondence to this author at the Department of Sociology, Anthropology & Criminal Justice, Rutgers University, 405-7 Cooper Street, Camden, NJ 08102-1521, USA; E-mail: harry.rhea@rutgers.edu

#Harry M. Rhea is Assistant Professor of Criminal Justice at Rutgers University - Camden. He is a former United States Marine and holds a B.A. from Rutgers University, an M.S. from Saint Joseph's University, an M.A. from La Salle University, and a Ph.D. in Law from the Irish Centre for Human Rights, National University of Ireland, Galway. Dr. Rhea is Chair of the Academy of Criminal Justice Sciences International Section and is credited for establishing the first doctoral program in international crime and justice in the United States.

¹Votes were counted, but it was not recorded how States voted. The seven States that voted against the Rome Statute were easily identified.

Austria ordered the trial of Peter von Hagenbach for “tramp[ing] under foot the laws of God and man” (quoted by Schwarzenberger, 1968, p. 465; see also Bassiouni, 1991; Bassiouni & Blakesley, 1992; McCormack, 1997; Schabas, 2011). Hagenbach was judged by twenty-seven justices representing the Holy Roman Empire for allowing his troops to rape, kill, and destroy the properties of innocent civilians, including women and children (Schwarzenberger, 1968). Hagenbach was convicted and executed for his crimes. There have since been questions regarding the international nature of Hagenbach’s prosecution by allied States of the Holy Roman Empire (McCormack, 1997; Schwarzenberger, 1968). The Holy Roman Empire was one entity, but Schwarzenberger (1968) describes it as having been “degenerated” (p. 464) by the time of Hagenbach’s trial to the extent that States were acting as units of international law rather than municipal law. If this description is accurate, then Hagenbach was arguably prosecuted either by an international or multinational tribunal with international character.

There is little known literature considering international prosecutions over the four centuries following Hagenbach’s trial. One reason for the lack of international criminal tribunals was the Peace of Westphalia, signed on October 24, 1648, at the conclusion of the 30-Year War. The Peace of Westphalia established a policy of sovereignty between States, which meant that they would not interfere with each other’s affairs. Therefore, it was up to each State to police its own affairs, including prosecuting violators of the law of nations (currently referred to as international law) through national courts.

More than two centuries after the Peace of Westphalia was signed, the Geneva International Conference of 1863 established the International Committee of the Red Cross (ICRC). The following year, States adopted the Geneva Convention for the Amelioration of the Condition of the Wounded on the Field of Battle. One of the founding members of the ICRC, Gustave Moynier, originally thought that public criticism of Geneva Convention violations would be strong enough to deter future violators. Moynier believed that an international criminal court was unnecessary and perhaps problematic since, in his opinion, “a treaty is not a law imposed by a superior authority on its subordinates,” but “it is only a contract whose signatories cannot decree penalties against themselves since there would be no one to implement them” (quoted in Boissier, 1985, p. 282). Moynier’s

position was that “public opinion is ultimately the best guardian of the limits it has itself imposed. The Geneva Convention, in particular, is due to the influence of public opinion on which we can rely to carry out the orders it has laid down” (quoted in Boissier, 1985, p. 282).

However, Moynier later became concerned that there was no practical enforcement of the Geneva Convention. He changed his prior opinion that punishment could not be implemented for violations of the Geneva Convention (Boissier, 1985). He also realized that punishment “could not be exercised by ‘the belligerents’ ordinary tribunals because, however respectable their magistrates might be, they could at any time unknowingly be influenced by their social environment.’ Such cases, therefore, would have to be handled by an international tribunal, appointed by another convention” (quoted in Boissier, 1985, pp. 282-83). Consequently, at a meeting of the ICRC on January 3, 1872, Moynier presented a proposal for an international criminal tribunal to punish violators of the Geneva Convention of 1864 (Hall, 1998). This was the first proposal for a permanent international criminal court (Hall, 1998). No State, however, publicly considered Moynier’s draft (Hall, 1998). An international criminal court was not welcomed.

Russia’s Czar Nicholas II called for an international conference in 1899 for the purpose of limiting armaments (Translation, 1898). From May 18 to July 29, 1899, 26 States sent a total of 100 representative delegates to The Hague for the first Hague Peace Conference (Ferencz, 1980). The Czar believed the conference would establish “the principles of justice and right, upon which repose the security of states and the welfare of peoples” (quoted in Tryon, 1911, p. 472). At the conclusion of the conference, three conventions were adopted: 1) Convention for the Pacific Settlement of International Disputes, 2) Convention Respecting the Laws and Customs of War on Land, and 3) Convention for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention of August 22, 1864. The most notable was the Convention Respecting the Laws and Customs of War on Land, which codified many general principles of customary international law. However, there was no mention in the convention that violations were crimes and should result in prosecution. The Convention for the Pacific Settlement of International Disputes established the Permanent Court of Arbitration, which does not have criminal jurisdiction. Establishing the court, however, symbolized that the international community was yearning for international

justice through law. As Tryon (1911) explains of adopting the convention,

This is sometimes called the Magna C[h]arta of the coming World State. It contains a declaratory preamble recognizing the "solidarity uniting the members of the society of civilized nations," and expressing the desire of the signatory powers to extend the "empire of law" and strengthen "the appreciation of international justice." The belief is expressed that "the permanent institution of a Tribunal of Arbitration accessible to all in the midst of independent powers, will contribute effectively to this result." By the first article of the convention, "the contracting powers agree to use their best efforts to insure the pacific settlement of international differences." (p. 474)

A second Hague peace conference commenced on June 15, 1907, when 44 States sent 256 delegates to the Knights Hall located in the center of The Hague for the second time in ten years. The second conference ended on October 18, 1907, but not before adopting another Convention on Laws and Customs of War on Land. This convention, like its predecessor, did not indicate that violations were crimes and that violators should be prosecuted. It was agreed at the conclusion of the second conference that a third conference would take place within no more than the eight years that had separated the first two conferences (Final Act, 1907). However, the First World War commenced in 1914, preventing a third conference.

POST-FIRST WORLD WAR

After the armistice with Germany was signed on November 11, 1918, the Allied powers of the First World War convened a peace conference in Paris to discuss post-war policies. A major dilemma that the Allied powers faced during negotiations was whether an international criminal court should be created to prosecute war criminals, particularly Germany's former Emperor William II. On January 18, 1919, State delegates at the Paris Peace Conference were invited to submit memoranda on the responsibilities of the authors of the war and punishment of war criminals (Papers Relating, 1943). On January 25, 1919, a commission was established to examine the "responsibility of the authors of the war and enforcement of penalties" (Papers Relating, 1943, p.

177). The resolution establishing the commission read as follows:

That a Commission, composed of two representatives apiece from the five Great Powers and five representatives to be elected by the other Powers, be appointed to inquire into and report upon the following:

1. The Responsibility of the authors of war.
2. The facts as to the breaches of the customs of law committed by the forces of the German Empire and their Allies on land, on sea and in the air during the present war.
3. The degree of responsibility for these offences attaching to particular members of the enemy forces, including members of the General Staffs and other individuals, however highly placed.
4. The Constitution and procedure of a tribunal appropriate to the trial of these offenses.
5. Any other matters cognate or ancillary to the above which may arise in the course of the inquiry and which the Commission finds it useful and relevant to take into consideration. (Draft Resolution, 1919; Papers Relating, 1943)

The Commission was officially titled the Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties. Ten States sat on the Commission: the United States, the British Empire, France, Italy, and Japan represented the five "Great Powers," while five smaller States were represented by Belgium, Greece, Poland, Rumania, and Serbia. The Commission established three sub-commissions, each with a specific task (Commission on the Responsibility, 1919). The first sub-commission was responsible for reporting on crimes committed during the First World War. The second sub-commission was responsible for deciding which States had been responsible for the First World War. The third sub-commission was responsible for reporting any violations of the laws and customs of war, and upon finding such violations, recommending if and how persons should be prosecuted (Commission on the Responsibility, 1919).

The first sub-commission determined that violations of the laws and customs of war, as well as laws of humanity, had been violated (Report Presented to the Preliminary Peace Conference, 1919). The second

sub-commission determined that the responsibility for the First World War lay wholly upon Germany and Austria, first, and Turkey and Bulgaria, second (Report Presented to the Preliminary Peace Conference, 1919). The negotiations of the third sub-commission were complicated and at certain times even hostile (see also Rhea, 2012; Willis, 1982). States' delegates on the third sub-commission could not agree on who should be prosecuted and by which type of court.

The majority of States on the commission, in particular the British Empire and France, favored creating an international criminal court to prosecute crimes that did not fall within the national jurisdiction of one of the Allied or Associated powers, as well as crimes that affected more than one State. The United States agreed that States had the right to combine their jurisdictions and together prosecute their offenders. However, the United States was vehemently against creating an international criminal court and thought that where States did not have jurisdiction over crimes, there was simply no jurisdiction to prosecute (Report Presented to the Preliminary Peace Conference, 1919).

States that favored creating an international criminal court did so mainly for the prosecution of Germany's former Emperor William II. The jurisdiction of the former Emperor and other high officials were outside the jurisdiction of national courts, since they had not directly committed any crimes. However, States that favored prosecuting William II argued that he had known violations of the laws and customs of war were being violated and failed to take any action as a head of State to prevent or lessen the offenses (Commission on the Responsibility, 1919; Report Presented to the Preliminary Peace Conference, 1919).

Robert Lansing and James Brown Scott were the United States delegates on the Commission. Lansing was chair of the Commission and chair of the third sub-commission. He was against establishing an international criminal court in its entirety. Moreover, President Woodrow Wilson was against creating an international criminal court. Lansing once wrote that the President "approved entirely of my attitude in regard to an international tribunal for trial of the Kaiser and others, only he is even more radically opposed than I am of that folly" (Letter from Robert Lansing to Frank L. Polk, 1919, p. 6).

In its report to the Paris Peace Conference, the Commission recommended the creation of an

"International High Tribunal" for the prosecution of William II (Report Presented to the Conference, 1919). The United States and Japan submitted minority reports arguing against the creation of an international high tribunal. Both minority reports were annexed to the Commission's report. A compromise was eventually made. Article 227 of the Treaty of Peace between the Allied and Associated Powers and Germany read as follows:

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 defense. It will be composed of five judges, one appointed by each of the following Powers: namely, the United States of America, Great Britain, France, Italy and Japan.

In its decision the tribunal will be guided by the highest motives of international policy, with a view to vindicating the solemn obligations of international undertakings and the validity of international morality. It will be its duty to fix the punishment which it considers should be imposed (Treaty of Peace, 1919, Art. 227).

The "special tribunal" referenced in Article 227 never came to fruition, as William II had fled to the Netherlands, which refused to extradite him for prosecution. It may look like the special tribunal would have been an international criminal court. However, if created, it would have been a multinational tribunal that would have included the United States, the British Empire, France, Italy, and Japan. The five "Great Powers" together would have prosecuted William II. The first serious international debate concerning the legality of establishing an international criminal court had taken place.

Shortly after the Treaty of Peace entered into force, the League of Nations established an Advisory Committee of Jurists to prepare a scheme for the establishment of the Permanent Court of International

Justice provided for in Article 14.² The Committee was established in February 1920 and held meetings that same year from June 16 to July 24. At the Committee's fifth meeting, Baron Descamps (Belgium, President of the Committee) explained his "Project for the organization of international justice" (*Procès-Verbaux of the Proceedings*, 1920, p. 131). Descamps proposed that the organization of international justice include three tribunals: the existing Permanent Court of Arbitration established at the Hague Peace Conference of 1899, the High Court of International Justice, and the Permanent Court of International Justice (*Procès-Verbaux of the Proceedings*, 1920). He proposed that the High Court of International Justice would have jurisdiction to hear cases "which concern international public order, for instance: crimes against the universal Law of Nations" (*Procès-Verbaux of the Proceedings*, 1920, p. 142). Descamps later submitted a proposal to the Committee for the establishment of the High Court of International Justice. He supported his proposal by arguing that there was consensus about the existence of crimes of an international character that victimize the international community. Descamps further argued that an international tribunal with jurisdiction to try crimes of an international character should not be established *ex post facto* when such crimes are committed in the future (*Procès-Verbaux of the Proceedings*, 1920). He went on to say that it would be wiser to establish a tribunal that could not later be criticized for being used for "revenge" and that such a court could possibly have a deterrent effect, preventing such crimes from being committed again (*Procès-Verbaux of the Proceedings*, 1920).

The Committee unanimously adopted two proposals as resolutions in its Final Report. The first resolution stated, "A new interstate Conference, to carry on the work of the two first Conferences at The Hague, should be called as soon as possible" and the title of "the new Conference should be called the Conference for the Advancement of International Law" (*Procès-Verbaux of the Proceedings*, 1920, pp. 747-748). The second paragraph made the following statement:

[T]he Institute of International Law, the American Institute of International Law,

the Union Juridique Internationale, the International Law Association and the Iberian Institute of Comparative Law should be invited to adopt any method, or use any system of collaboration that they may think fit, with a view to the preparation of draft plans to be submitted, first to the various Governments, and then to the Conference, for the realization of this work (*Procès-Verbaux of the Proceedings*, 1920, pp. 747-748).

Article 3 of the second resolution proposed creating the High International Court of Justice that would "be competent to try crimes constituting a breach of international public order or against the universal law of nations, referred to it by the Assembly or by the Council of the League of Nations" (*Procès-Verbaux of the Proceedings*, 1920, p. 748). After much debate in the League of Nations over the resolutions adopted by the Advisory Committee of Jurists, the League did not support creating an international criminal court. M. Lafontaine of Belgium thought that it was impossible to create an international criminal court, "since there was no defined notion of international crimes and no international penal law" (*League of Nations*, 1920, p. 329). Other members of the League agreed. Yet, this was not the end of the discussion on an international criminal court.

Fifteen years later, on December 10, 1934, the League of Nations established the Committee for the International Repression of Terrorism (Report to the Council, 1936). A number of States sent proposals and suggestions for the Committee to consider when creating a draft convention on the repression of terrorism (Replies from Governments, 1936). Among France's suggestions was a proposal to create an international criminal court competent to prosecute certain acts of terrorism (Letter from the French Government, 1936). Members of the Committee held differences of opinion as to the principle and utility of establishing an international criminal court, and it was agreed that it should be established as a separate instrument that parties to the terrorism convention could be free to accept or not (Report to the Council, 1936). On January 15, 1936, the Committee for the International Repression of Terrorism adopted its Report to the Council (Report to the Council, 1936). Annexed to the Report were two draft conventions: a Draft Convention for the Prevention and Punishment of Terrorism (Draft Convention for Prevention, 1936) and a Draft Convention for the Creation of an International

²The Covenant of the League of Nations included arts. 1-26 of the Treaty of Peace Between the Allied and Associated Powers and Germany. The first sentence of art. 14 stated, "The Council shall formulate and submit to the Members of the League for adoption plans for the establishment of a Permanent Court of International Justice."

Criminal Court (Draft Convention for the Creation, 1936).

On January 23, 1936, the Council of the League of Nations adopted its Report and directed the Secretary-General to transmit the Committee's Report to governments with a request that they submit any observations they wished to make by July 15, 1936 (Report Adopted by the Council, 1936). On May 27, 1937, the League of Nations passed a resolution scheduling the Conference on the International Repression of Terrorism to commence on November 1 of that year (Convocation, 1937). The two draft conventions were adopted on the last day of the conference, but the Convention for the Creation of an International Criminal Court (Convention for the Creation, 1937) never entered into force, since it failed to receive the sufficient number of ratifications (Schabas, 2011).

POST-SECOND WORLD WAR

The Second World War officially commenced on September 1, 1939, when Germany invaded Poland. By 1942, Nazis had committed several war crimes against Allied prisoners of war. Also, the "Final Solution" to solve the "Jewish Question" was being implemented. As a result, States, in particular the United States and the United Kingdom, issued several retributive threats to Germany for committing these crimes. In June 1942, while in Washington D.C., the United Kingdom's Prime Minister Winston Churchill suggested to President Franklin Roosevelt that a United Nations commission be established to investigate atrocities committed by the Nazis (Kochavi, 1998). Roosevelt liked the idea and agreed to it. On October 7, 1942, the United States and the United Kingdom declared that the United Nations War Crimes Commission would be created to investigate and hold "ringleaders" responsible for the organization and implementation of war crimes (United Nations War Crimes Commission, 1948).

The United Nations War Crimes Commission (UNWCC) held its first meeting on October 20, 1943. Its purpose was to "collect, investigate, and record evidence of war crimes, and to report to the governments concerned all instances in which a prima facie case existed" (Tutorow, 1986, p. 4). The UNWCC went further and drafted a convention for a United Nations War Crimes Court, later distributed to UN governments, that would prosecute perpetrators of war

crimes during the Second World War³ (Draft Convention for the Establishment, 1944). The United States and the United Kingdom thought that the UNWCC went beyond its mandate by initiating a United Nations War Crimes Court. Previously, at the Tripartite Conference in Moscow from October 19, 1943 to October 31, 1943, the United States, the United Kingdom, and the Soviet Union had agreed to declare that German atrocities would be punished on behalf of the thirty-three member States of the United Nations (Declaration of German Atrocities, 1943, pp. 310-311). The Declaration stated that German war criminals would be judged by the victimized States and that the major war criminals, including the Nazi hierarchy, "will be punished by the joint decision of the Governments of the Allies" (Declaration of German Atrocities, 1943, p. 311). The "Government of the Allies" did not necessarily include States in the UNWCC, since the Soviet Union had never joined it. The Moscow Declaration included justice and punishment, but it did not include substantive procedural mechanisms. This left the door open to criminal prosecutions as well as summary executions. The United States, the United Kingdom, and the Soviet Union decided to move forward on their own accord rather than approving the United Nations War Crimes Commission's recommendation to create a United Nations War Crimes Court.

The decision on how to punish the major war criminals became a political battle. Originally, Roosevelt and Churchill favored summary executions. After the plan to summarily execute major war criminals was released by the press, Roosevelt changed his position and argued in favor of prosecutions. On April 12, 1945, Roosevelt died. His successor, Harry S. Truman, exhibited no doubt that he wanted to establish a tribunal to prosecute the major war criminals (Harris, 1999; Taylor, 1992). On May 2, 1945, Truman designated Robert H. Jackson, an Associate Justice on the United States Supreme Court, to represent the United States in establishing a tribunal and prosecuting major war criminals (Executive Order 9547, 1945). The Soviet Union and France agreed with the United States that a tribunal should be created to prosecute the major war criminals. The United Kingdom, however, disagreed with prosecutions and argued that the crimes

³This was not the current United Nations whose charter was adopted the on June 26, 1945, and entered into force on October 24, 1945. The United Nations refers to the nations included in the United Nations War Crimes Commission.

of the major war criminals were political rather than legal; therefore, political punishments were sufficient, including summary executions. The United Kingdom eventually came on board with the other three Allies (see Rhea, 2007).

On June 3, 1945, the United States received an invitation from the United Kingdom to join France and the Soviet Union in London for a conference to create a tribunal for the prosecution of major war criminals (Aide-Mémoire, 1945). The London Conference commenced on June 26, 1945 (the same day the Charter of the United Nations was signed in San Francisco). There were disagreements between the four Allied powers, as they came from different legal backgrounds and had different legal philosophies. For example, the United States and the United Kingdom practiced common law, while France and the Soviet Union practiced continental law.

In addition to differences in legal philosophy, there were differences of opinions as to the purpose of prosecuting major war criminals. The Soviet Union thought that the major war criminals were already guilty of their crimes and only their punishments had to be determined (Minutes of Conference Session, June 29, 1945). Jackson strongly disagreed and argued that even "the President of the United States has no power to convict anybody. He can only accuse" (Minutes of Conference Session, June 29, 1945, p. 115). Convictions of the Nazi hierarchy would have to be based on evidence (Minutes of Conference Session, June 29, 1945). Jackson further argued, "I have no sympathy with these men, but, if we are going to have a trial, then it must be an actual trial" (Minutes of Conference Session, June 29, 1945, p. 115). Eventually, Jackson won the argument and the four Allies signed the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis on August 8, 1945 (Agreement, 1945). The Charter of the International Military Tribunal was annexed to the Agreement.

The four Allied powers appointed one judge and one alternative to the International Military Tribunal. Also, each State assigned its own prosecutor and assistant prosecutors. Individually, the major war criminals were charged with crimes against peace, war crimes, and crimes against humanity. The crimes were defined under Article 6 of the Charter of the International Military Tribunal as follows:

(a) *Crimes Against Peace*: namely, planning, preparation, initiation or waging

of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing;

(b) *War Crimes*: namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labor or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity;

(c) *Crimes Against Humanity*: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.

Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan (Charter of International Military Tribunal, 1945, Art. 6).

The International Military Tribunal was more "international" in name than character. The crimes, not without controversy, were international crimes in that their egregiousness offended the international community. However, the institutional structure of the International Military Tribunal was multinational rather than international (Röling, 1960). The Tribunal was similar to the "special tribunal" foreseen in Article 227 of the Treaty of Peace after the First World War, which had authorized the five "Great Powers" to judge William II. Instead of five great powers, four Allied powers judged the defendants who represented the hierarchy of the Nazi regime after the Second World War.

COLD WAR

The Charter of the United Nations was adopted in San Francisco on June 26, 1945, entering into force four months later on October 24. The General Assembly of the United Nations took on the effort of advancing international law and establishing an international criminal jurisdiction immediately after the International Military Tribunal completed in November 1946. On December 11, 1946, the General Assembly affirmed the principles of international law recognized by the Charter of the Nuremberg Tribunal and directed the Committee on the Codification of International Law to formulate, "in the context of a general codification of offenses against the peace and security of mankind, or of an International Criminal Code, of the principles recognized in the Charter of the Nurnberg Tribunal and in the judgment of the Tribunal" (Affirmation, 1946). At the same meeting, the General Assembly affirmed "that genocide is a crime under international law which the civilized world condemns, and for the commission of which principles and accomplices are punishable" and requested "the Economic and Social Council to undertake the necessary studies, with a view to drawing up a draft convention on the crime of genocide" (The Crime of Genocide, 1946). Discussion on an international criminal court would arise in the debates during the development of the Nuremberg Principles and in the debates drafting the Genocide Convention.

The Economic and Social Council passed Resolution 47(IV) asking the Secretary-General to submit a draft convention on the crime of genocide in accordance with General Assembly Resolution 96(I) (Schabas, 2009). The Secretary-General's draft convention included an international criminal court for the prosecution of the crime of genocide. Annexed to the Secretary-General's draft convention were two draft statutes for an international criminal court. The first draft statute was for a permanent international criminal court (Establishment of a Permanent International Criminal Court, 1947), while the second was for the establishment of an ad hoc international criminal court (Establishment of an Ad Hoc International Criminal Court, 1947). Both draft statutes had taken much of their substance from the League of Nations' 1937 Convention for the Creation of an International Criminal Court (see also Schabas, 2011). States, however, were weary of including an international criminal court in the Genocide Convention. As a result, one was not included. Article VI includes the possibility of genocides being prosecuted in an "international penal tribunal,"

but it requires States first to have accepted the jurisdiction of the tribunal, if one was ever established, prior to being prosecuted (Convention, 1948, Art. VI).

On November 21, 1947, the General Assembly established the International Law Commission to replace the Committee on the Codification of International Law (Establishment of the International Law Commission, 1947). The International Law Commission's object is "the promotion of the progressive development of international law and its codification" (Statute of the International Law Commission, 1947, Art. 1). At the same meeting, the General Assembly entrusted "the formulation of the principles of international law recognized in the charter of the Nurnberg Tribunal and in the judgment of the Tribunal to the International Law Commission" (Formulation, 1947). The following year, immediately after the adoption of the Genocide Convention, the General Assembly invited "the International Law Commission to study the desirability and possibility of establishing an international judicial organ for the trial of persons charged with genocide or other crimes over which jurisdiction will be conferred upon that organ by international conventions" (Study, 1948).

The International Law Commission appointed rapporteurs Ricardo Alfaro (Panama) and Emil Sandström (Sweden) to study the "desirability and possibility" of an international criminal jurisdiction (Report of the International Law Commission, 1949). Both were requested to conduct their studies and submit to the International Law Commission's next session a working paper on the topic (Report of the International Law Commission, 1949). Sandström's report stated that the time was not yet ripe for the establishment of an international criminal court (Report on Question of International Criminal Jurisdiction by Emil Sandström, 1950). Alfaro's report was more positive and stated that it was both possible and desirable to establish an international criminal court (Report on the Question of International Criminal Jurisdiction by Ricardo J. Alfaro, 1950).

The General Assembly moved forward and established the Committee on International Criminal Jurisdiction "for the purpose of preparing one or more preliminary draft conventions and proposals relating to the establishment and the statute of an international criminal court" (International Criminal Jurisdiction, 1950, para. 1). The Committee's report was published in 1952 and included a draft statute for an international criminal court in its annexes (Report of the Committee,

1952, Annex 1). After discussing the committee's report, the General Assembly decided to establish a second committee in 1952:

- (i) To explore the implications and consequences of establishing an international criminal court and of the various methods by which this might be done;
- (ii) To study the relationship between such a court and the United Nations and its organs;
- (iii) To re-examine the draft statute (International Criminal Jurisdiction, 1952, para. 3(a)).
- (iv) (Report of the 1953 Committee, 1954, Annex)

Annexed to the committee's report was a revised draft statute for an international criminal court.

The creation of an international criminal court at the time was starting to be considered a real possibility. However, the crime of aggression was the one obstacle that stood in the way. The Nuremberg principles and the Genocide Convention had been adopted. Yet, achieving consensus on a definition of the crime of aggression proved to be too much of a challenge, and on December 14, 1954, the General Assembly decided "to postpone consideration of the question of an international criminal jurisdiction until the General Assembly has taken up the report of the Special Committee on the question of defining aggression" (International Criminal Jurisdiction, 1954). The General Assembly adopted a resolution defining aggression on December 14, 1974 (Definition of Aggression, 1974), exactly twenty years after it had postponed the question of an international criminal jurisdiction. However, the question of an international criminal jurisdiction would not start up again for another 15 years.

POST-COLD WAR

The United Nations General Assembly passed a resolution in 1989 calling on the International Law Commission to re-study the feasibility of an international criminal court (International Criminal Responsibility, 1989). Three years later, the General Assembly instructed the International Law Commission to prepare a draft statute for an international criminal court (Report, 1992). Meanwhile, turmoil was unfolding in Yugoslavia, where crimes against humanity, and questionably genocide, were being committed. As a result, the United Nations Security Council passed a

resolution requesting the Secretary-General to establish an impartial Commission of Experts to investigate "grave breaches of the Geneva Conventions and other violations of international humanitarian law committed in the territory of the former Yugoslavia" (Security Council Resolution 780, 1992, p. 2). M. Cherif Bassiouni, a distinguished international law professor from DePaul University, would become the Chairperson of the Commission of Experts. The Commission subsequently decided that many international crimes had been committed and recommended that the United Nations establish an international criminal tribunal to prosecute violators of international law in the territory of the former Yugoslavia (Bassiouni, 1996).

On December 16, 1992, United States Secretary of State Lawrence Eagleburger publicly accused Slobodan Milosevic, Radovan Karadzic, and Ratko Mladic of committing international crimes and stated that a second Nuremberg was awaiting them (Eagleburger, 1992). On February 22, 1993, the Security Council decided to establish the International Criminal Tribunal for the former Yugoslavia "for the prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991" (Security Council Resolution 808, 1993, p. 2). The International Criminal Tribunal for the former Yugoslavia (ICTY) was officially established on May 25, 1993 (Security Council Resolution 827, 1993) by general agreement of the Security Council's fifteen members (Schabas, 2006).

The Security Council created the ICTY under Chapter VII of the Charter of the United Nations. Article 39 of the Charter states, "The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken [...] to maintain or restore international peace and security" (Charter of the United Nations, 1945, Art. 39). Article 41 further states, "The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures" (Charter of the United Nations, 1945, Art. 41). On November 8, 1994, the Security Council established another tribunal, the International Criminal Tribunal for Rwanda (ICTR), to prosecute those most responsible for the 1994 genocide (Security Council Resolution 955, 1994).

While the Security Council established the ICTY and ICTR, the International Law Commission submitted its Draft Statute for an International Criminal Court to the General Assembly in 1994 (Draft Statute, 1994). Shortly thereafter, the General Assembly established an *ad hoc* committee to review issues arising out of the International Law Commission's draft statute (Establishment of an International Criminal Court, 1994). The *ad hoc* committee was unable to resolve different positions held by States concerning substantive and administrative issues of an international criminal court, but was "of the opinion that issues can be addressed most effectively by combining further discussions with the drafting of texts, with a view to preparing a consolidated text of a convention for an international criminal court" (Establishment of an International Criminal Court, 1995, p. 2). On December 11, 1995, the General Assembly established a preparatory committee "to discuss further the major substantive and administrative issues arising out of the draft statute prepared by the International Law Commission [...] with a view of preparing a widely acceptable consolidated text of a convention for an international criminal court" (Establishment of an International Criminal Court, 1995, p. 2). The Preparatory Committee on the Establishment of an International Criminal Court began meeting in 1996 and presented its final report in April 1998, which included a draft statute for the International Criminal Court and a draft final act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an international criminal court (Report of the Preparatory Committee, 1998). An international conference of plenipotentiaries was scheduled for June 15 to July 17, 1998. The Rome Statute was adopted on the last day of the conference by a vote of 120 to seven (Summary Record of the 9th Plenary Meeting, 1998).

PRESENT

It was agreed that the Rome Statute would enter into force on the first day of the month after the 60th day following the date of the 60th ratification (Rome Statute, Art. 126). On April 11, 2002, the Rome Statute received its required 60th ratification and entered into force on July 1, 2002. The initial years of the International Criminal Court consisted of development, i.e., electing officials and establishing the Office of the Prosecutor and Chambers.

The International Criminal Court has jurisdiction to prosecute genocide, crimes against humanity, war crimes, and the crime of aggression (Rome Statute,

Art. 5). States Parties and the Security Council can refer cases to the Court (Rome Statute, Art. 13(a)(b)). The prosecutor can also open an investigation of his or her own accord with substantial evidence of crimes (Rome Statute, Art. 13(c)). As of September 2012, 16 cases and seven situations had been brought before the ICC (Situations and Cases). Of the 16 cases, the ICC had only completed one. Since then, there have been an acquittal and a second conviction. Closing arguments for a fourth case are scheduled for fall 2014.

The International Criminal Court has struggled for the first fifteen years. The Court is dependent on the cooperation of States, which are not always supportive of its goals. Over 120 States have joined the ICC and many more have signed the Rome Statute, which means they are working towards joining the Court. However, the ICC's success will not be determined by how many States join the Court, but rather if these States fulfill their legal obligations so the Court can operate efficiently. For this to happen, the ICC must depend on States to financially support it and enforce arrest warrants and submit evidence against the accused. So far, this has not been the case (Kaberia, 2012). Yet, the international community remains optimistic that the ICC will continue to complete its cases and hold perpetrators responsible for their heinous crimes.

INTERNATIONAL V. NATIONAL CRIMINAL COURTS

International and national courts commonly share concurrent jurisdiction. International criminal tribunals established by the Security Council have primacy over national courts and "may formally request national courts to defer to the competence of the International Tribunal" (Security Council Resolution 827, 1993, Art. 9, para. 2; Security Council Resolution 955, 1994, Art. 8, para. 2.). Security Council resolutions are binding on all members of the United Nations, and such tribunals, having been established under Chapter VII of the United Nations Charter, have primacy over national courts. The ICC distinguishes itself from Security Council tribunals in that it complements national courts and can proceed with a case when "a State is unwilling or unable genuinely to carry out the investigation or prosecution" (Rome Statute, 2002, Art. 17, para. 1(a)).

The principle of complementarity signifies that international and national criminal justice systems share a common purpose – to bring perpetrators of crimes to justice in the form of punishment for purposes of retribution, deterrence, incapacitation and

rehabilitation (Cryer *et al.*, 2014). However, international criminal justice mechanisms have broader goals, such as vindicating the rights of victims, recording history, and reconciling armed conflicts (Cryer *et al.*, 2014), as well as influencing both the content of national legislation and jurisprudence and the social and moral fabric of societies (Knoops, 2003).

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Received on 21-02-2017

Accepted on 13-03-2017

Published on 10-04-2017

DOI: <https://doi.org/10.6000/1929-4409.2017.06.06>

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