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THE ESTABLISHMENT OF INTERNATIONAL CRIMINAL TRIBUNALS

The idea of setting up an international criminal court to bring to justice individuals, including leading State officials, allegedly responsible for serious international crimes goes back to the aftermath of the First World War. The attainment of that goal has been slow and painstaking. The process toward the eventual adoption of a Statute for a permanent International Criminal Court can be conceptualized in terms of various distinct phases: (i) abortive early attempts (1919–45); (ii) criminal prosecutions in the aftermath of the Second World War: the Nuremberg and Tokyo Tribunals (1945–47); (iii) elaboration by the ILC of the Statute of a permanent Court; (iv) the post-Cold War 'new world order': the development of the two ad hoc Tribunals (1993–94); (v) the drafting of the ICC Statute (1994–98).

18.1 ABORTIVE EARLY ATTEMPTS (1919–1945)

The period immediately following the First World War is notable for numerous attempts to establish a variety of international criminal institutions, all of which ended in failure. For instance, in 1919 the 'Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties' proposed the establishment of a 'high tribunal composed of judges drawn from many nations'.[1] In the same year the victors had agreed upon a few provisions of the peace treaty with Germany, signed at Versailles, which provided for the punishment of the leading figures responsible for war crimes committed during the war and went so far as to lay down in Article 227 the responsibility of the German Emperor (Wilhelm II) for 'the supreme offence against international morality and the sanctity of treaties'. The same provision envisaged the establishment of 'a special tribunal', composed of five judges (to be appointed by the USA, Great Britain, France, Italy, and Japan) and charged with trying the Emperor. The Allies were clearly motivated by their outrage at the atrocities

[1] See the Report of the Commission, in 14 AJIL (1920), at 116. As for the objections of the US delegates, see ibid., 129, 139 ff.

perpetrated by the vanquished Powers, in particular Germany, and wished to set an example. Since the accused would have been judged by their erstwhile opponents, this would throw doubt on the fairness of the proceedings and the impartiality of the tribunal. However, the Netherlands, where the German Emperor had taken refuge, refused to extradite him, chiefly because the crimes of which he was accused were not contemplated in the Dutch Constitution.[2] In addition, the aforementioned provisions of the Versailles Treaty were harshly criticized by some eminent publicists, among them the Italian leading jurist and politician V. E. Orlando.[3]

As for the trials of German military personnel alleged to have committed war crimes, no international court was set up, nor were they tried by courts of the Allies, as had been envisaged in Articles 228–30 of the Versailles Treaty. Eventually, out of the 895 Germans accused (who comprised various generals and admirals including the Chief of Staff of the Army, General E. Ludendorff, General Paul von Hindenburg, later Chief of Staff of the Army, as well as the former Chancellor Bethmann-Hollweg), the Allies selected only 45 cases for prosecution.[4] Ultimately 12 minor indictees were brought to trial in 1921, and before a German court, the 'Imperial Court of Justice' (*Reichsgericht*, sitting at Leipzig). Six of the 12 indictees were acquitted. Thus, the attempts to establish some sort of international criminal justice ended in failure. (However some of the judgments delivered by the Leipzig Court set significant precedents, chiefly because of the high legal quality of those judgments. Similarly, although the attempts to bring to justice the 'Young Turks' responsible for the Armenian genocide of 1915 were generally failures, courts in Istanbul brought some accused to trial: see in particular *Kemâl and Tevfik* (at 1–7) and *Bahâeddîn Şâkiz* (at 1–8)).

In 1920, the 'Advisory Committee of Jurists', summoned to prepare the project for the Permanent Court of International Justice, proposed that the 'High Court of International Justice' to be established should also 'be competent to try crimes constituting a breach of international public order or against the universal law of nations, referred

[2] On the non-implementation of Article 227, see, *inter alia*, A. Merignhac and E. Lemonon, *Le Droit des gens et la guerre de 1914–1918*, II (Paris: Pedone, 1921), 580 ff.

The Dutch diplomatic note of 21 January 1920 to the Allies stated that 'Or, ni les lois constituantes du Royaume qui sont basées sur des principes de droit universellement reconnus, ni une respectable tradition séculaire qui a fait de ce pays de tout temps une terre de refuge pour les vaincus des conflits internationaux, ne permettent au Gouvernement des Pays-Bas de déférer au désir des Puissances en retirant à l'ex-empereur le bénéfice de ces lois et cette tradition' (see the text of the Dutch diplomatic notes in A. Mérignhac, 'De la responsabilité pénale des actes criminels commis au cours de la guerre 1914–1918' in 47 *Revue de droit international et de législation comparée* (1920), 37–45. According to a distinguished author, B. Swart, 'Arrest and Surrender' in Cassese, Gaeta, and Jones (eds), *ICC Commentary*, II, at 1643, 'Given the fact that the former Article 4 of the Dutch Constitution permitted extradition on the basis of a treaty only, that the acts alleged did not constitute criminal offences according to Dutch law or to extradition treaties concluded with the Allied and Associated Powers, and that the Constitution did not permit the conclusion of an extradition treaty for the surrender of one person only, it is hard to see that the Dutch government could have reacted in a different way'.

[3] V. E. Orlando, 'Il processo del Kaiser' (1937), reprinted in *Scritti varii di diritto pubblico e scienza politica* (Milan: Giuffrè, 1940), 97 ff.

[4] See C. Mullins, *The Leipzig Trials—An Account of the War Criminals' Trials and a Study of German Mentality* (London: Witherby, 1921), at 27.

to it by the Assembly or by the Council of the League of Nations'.[5] However, a few months later the Assembly of the League of Nations rejected out of hand the proposal as being 'premature'.[6] Thereafter, draft statutes of an international criminal court were adopted by non-governmental organizations such as the Inter-Parliamentary Union, in 1925,[7] and by scholarly bodies such as the International Law Association, in 1926.[8] None of these drafts, however, led to anything concrete.[9]

Such early attempts were laudable for their far-sighted recognition of the need for an international organ of criminal jurisdiction. Nevertheless, these initiatives could not bear fruit in a period which placed an exceptionally high premium upon considerations of national sovereignty. Although new values had emerged which transcended narrow nationalistic concerns (such as the gradual elaboration of principles seeking to limit the methods of warfare, or the protection of workers through the establishment of the International Labour Organization, or the protection of minorities through the numerous treaties entered into after the First World War), State sovereignty was nevertheless still very much the bedrock of the international community. The practical import of this was that no feasible mechanism could be brought into being enabling a State official—let alone a Head of State—accused of war crimes or other outrages to be tried. It is no coincidence that the first provision criminalizing international action was Article 227 of the Versailles Treaty, which provided for the criminal liability of the most important and representative among State officials, a Head of State, and that that provision remained a dead letter and indeed caused an uproar in the international community.

18.2 CRIMINAL PROSECUTION IN THE AFTERMATH OF THE SECOND WORLD WAR: THE NUREMBERG AND TOKYO TRIBUNALS (1945–1947)

It was nevertheless this scenario (an international community dominated by State sovereignty) that led to the successful establishment, in the immediate post-war period, of the Nuremberg and Tokyo Tribunals. These Tribunals were a response to the overwhelming horrors of the Nazi genocide in Europe and the Japanese crimes perpetrated during the wartime occupation of large parts of many South East Asian nations (for instance, the so-called rape of Nanking, biological experiments in

[5] See the text of the Second Resolution adopted by the Advisory Committee in Lord Phillimore, 'An International Criminal Court and the Resolutions of the Committee of Jurists', 3 BYBIL (1922–3), 80.

[6] Ibid., at 84.

[7] See the text of the draft in B. Ferencz (ed.), *An International Criminal Court—A Step Toward World Peace—A Documentary History and Analysis*, vol. I (London, Rome, New York: Oceana, 1980), 244 ff.

[8] Text reproduced in Ferencz, ibid., at 252 ff.

[9] A Convention for the creation of an International Criminal Court to try terrorist offences was also adopted on 16 November 1937 by the League of Nations, but never entered into force. See generally V. V. Pella, 'Towards an International Criminal Court', 44 AJIL (1950), 37–68.

Manchuria, the fall of Singapore and the loss of life there, and other crimes). It took the full extent of the atrocities committed during the war to demonstrate the pernicious consequences that could follow from the pursuit of extreme notions of State sovereignty and to jolt the international community out of its complacency. The widespread conviction gradually emerged that never again could tyranny and the attendant disregard for human dignity be allowed to go unchecked and unpunished.

It is worthwhile to consider what, in particular, induced the Allies to hold trials of the Germans and their collaborators after the Second World War and what, more recently, has persuaded governments to hold similar trials for war crimes and crimes against humanity.

After the defeat of Germany, the British led by Churchill stated that it was enough to arrest and hang those primarily responsible for determining and applying Nazi policy, without wasting time on legal procedures; minor criminals, they suggested, could be tried by specially created tribunals.[10] However, neither President F. D. Roosevelt, nor Henry Stimson, the US Defense Secretary, agreed; nor, indeed, did Stalin. In the end, they prevailed, and the International Military Tribunal was set up in Nuremberg to try the 'great Nazi criminals', while lesser Allied tribunals in the four occupied zones of Germany were to deal with minor criminals. The Americans advanced various arguments to support their view, later accepted by the other Allies.

First, how could a defeated enemy be condemned without due process of law? To hang them without trial would mean to do away with one of the mainstays of democracy: no one can be considered guilty until his crimes have been proved in a fair trial. To relinquish such a fundamental principle would have put the Allies on a par with the Nazis who had ridden roughshod over so many principles of justice and civilization, when they had held mock trials, or punished those allegedly guilty without even the benefit of judicial process.

Secondly, those who set up the Nuremberg Tribunal felt that the dramatic rehearsal of Nazi crimes—and of racism and totalitarianism—would make a deep impression on world opinion. Thus, the trial was designed to render great historical phenomena plainly visible, and was conceived of as a means of demythologizing the Nazi State by exposing their hideous crimes for all humanity to see.

The third reason was a desire on the part of the Allied powers to act for posterity. The crimes committed by the Third Reich and its Nazi officials were so appalling that some visible record had to be left. A trial held on a grand scale would allow the Tribunal to assemble a massive archive useful not only in court, but also to historians and to the generations to come. The trial was therefore seen as a method of compiling a dossier of historical documents that might otherwise vanish; it would also serve as a lesson in history for future generations.

In addition, for the Americans there was a particular motivation behind the establishment of an international tribunal. It was eloquently set forth by Justice

[10] See F. Smith (ed.), *The American Road to Nuremberg: the Documentary Record, 1944–1945* (Stanford, Cal.: Hoover Institution Press, 1982), 31–3, 155–7.

Robert H. Jackson (the special representative of the US President to the London Conference and later the US Chief Prosecutor at Nuremberg) in a Memorandum he submitted on 30 June 1945, together with a Redraft of the US proposals for the new International Tribunal, to the representatives of the UK, France, and the Soviet Union participating in the London Conference on military trials. He wrote the following:

> The Unites States . . . has conceived of this case as a broad one. It must be borne in mind that Russian, French, English and other European peoples are familiar with the Hitlerite atrocities and oppressions at first-hand. Our country, three thousand miles away, has known of them chiefly through the press and radio and through the accusations of those who have suffered rather than through immediate experience. German atrocities in the last war were charged. The public of my country was disillusioned because most of these charges were never authenticated by trial and conviction. If there is to be continuing support in the United States for international measures to prevent the regrowth of Nazism, it is necessary now to authenticate, by methods which the American people will regard as of the highest accuracy, the whole history of this Nazi movement, including its extermination of minorities, its aggressions against neighbors, its treachery and its barbarism.[11]

A further rationale for the Nuremberg trial was the collective character of the Nazi crimes. The massacre of civilians and prisoners of war, the persecution of Jews, gypsies, and political opponents were not only large-scale phenomena but, in addition, indicative of a policy pursued assiduously by the highest echelons of the Nazis and applied by the whole military and bureaucratic apparatus. The crimes commissioned by the directives of the Nazi leaders belonged to 'collective or system criminality': such was their nature that it would have been impossible to punish them by using the courts of the State to which the perpetrators belonged. In consequence, and as mentioned above, only an adversary (together with neutral States, as had been suggested)[12] could have made sure that justice was done, upon winning the war.

In the summer of 1945, the nations that were victorious in the Second World War (the 'Big Four': the United Kingdom, France, the United States, and the Soviet Union) convened the London Conference to decide by what means the world was to punish the high-ranking Nazi war criminals. The resultant Nuremberg Charter established the IMT to prosecute individuals for 'crimes against peace', 'war crimes', and 'crimes against humanity'. The IMT met from 14 November 1945 to 1 October 1946. In addition, in occupied Germany, the four major Allies, pursuant to Control Council Law no. 10, prosecuted through their own courts sitting in Germany, in their respective zones of occupation, the same crimes committed by lower-ranking defendants.

[11] International Conference on Military Trials, at 126.

[12] See for instance C. C. Hyde, 'Punishment of War Criminals', *Proceedings of the American Society of International Law, Thirty-Seventh Annual Meeting, 1943* (1943), 43–4.

On 26 July 1945, two weeks before the conclusion of the London Conference, the 'Big Four' issued the Potsdam Declaration announcing, to the surprise of many, their intention to prosecute leading Japanese officials for these same crimes.[13] Subsequently, on 19 January 1946, General Douglas MacArthur, Supreme Commander for the Allied Powers in Japan, approved, in the form of an executive order, the Tokyo Charter, setting forth the constitution, jurisdiction, and functions of the International Military Tribunal for the Far East (IMTFE). Like the Nuremberg Charter, the Tokyo Charter, which was issued on 26 April 1946, included the newly articulated crimes against peace and humanity.[14]

By and large, the Tokyo Charter was modelled on the Nuremberg Charter. However, there were some differences between the two texts and the way they regulated the structure of the Tribunals and the charges that could be brought against the defendants.[15] It is also notable that the bench comprised persons from newly independent countries, such as India and the Philippines.

The Tokyo Trial (which commenced on 3 May 1946, and lasted for approximately two and a half years) was the source of much controversy both during and after the event. Some have claimed that the trial was either a vehicle for America's revenge for the treacherous attack on Pearl Harbor, or a means of assuaging American national guilt over the use of atomic weapons in Japan. Others, defence counsel at the trial included, attacked the trial's legitimacy on legal grounds.[16]

Whereas the post-First World War experience showed the extent to which international justice can be compromised for the sake of political expedience, the post-Second World War experience revealed, conversely, how effective 'international' justice could be when there is political will to support it as well as the necessary resources. These sets of experiences were nevertheless one-sided, as everybody knows. They imposed 'victors' justice' over the defeated. The major drawback of the two 'international' Tribunals was that they were composed of judges (respectively 4, and 11) appointed by each of the victor Powers; the prosecutors too were appointed by each of those Powers and acted under the instructions of each appointing State (but at Tokyo there was a chief prosecutor, or 'Chief of Counsel' as he was called, namely the American Joseph B. Keenan, and 10 associate prosecutors). Thus, the view must be shared that the two Tribunals were not independent international courts proper, but judicial bodies acting as organs common to the appointing States. The Nuremberg IMT admitted this legal reality when it stated that:

[13] Some of the Allies in the Pacific Theatre prosecuted the Japanese for 'war crimes' under their respective military laws: see, *inter alia*, R. John Pritchard, 'War Crimes Trials in the Far East,' in R. Bowring and P. Kornick (eds), *Cambridge Encyclopedia of Japan* (Cambridge: Cambridge University Press, 1993), 107.

[14] The Charter had been drafted by the Americans only, essentially by Joseph B. Keenan, Chief Prosecutor at the Tokyo Trial, and the other Allies were only consulted after it was issued: B. V. A. Röling and A. Cassese, *The Tokyo Trial and Beyond* (Cambridge: Polity Press, 1993), 2.

[15] For a summary of the principal differences see ibid., 2–3.

[16] For instance, the legal categories of the crimes against peace and humanity have been criticized as *ex post facto* legislation on the part of the London Conference, in that these crimes did not exist in international law prior to 1945 (ibid., 3–5).

> The making of the Charter [of the IMT] was the exercise of the sovereign legislative power by the countries to which the German Reich unconditionally surrendered; and the undoubted right of these countries to legislate for the occupied territories has been recognised by the civilised world . . . The Signatory Powers created this Tribunal, defined the law it was to administer, and made regulations for the proper conduct of the Trial. In doing so, they have done together what any one of them might have done singly; for it is not to be doubted that any nation has the right thus to set up special courts to administer law. (At 218.)

However, the IMTs were important in many respects. First, they broke the 'monopoly' over criminal jurisdiction concerning such international crimes as war crimes, until that moment firmly held by States. For the first time non-national, or multi-national, institutions were established for the purpose of prosecuting and punishing crimes having an international dimension and scope. Secondly, new offences were envisaged in the London Agreement and made punishable: crimes against humanity and crimes against peace. Whether or not this was done in breach of the principle of *nullum crimen sine lege*, it is a fact that since 1945 those crimes gradually became the subject of international customary law prohibitions. Thirdly, the statutes and the case law of the IMT and the IMTFE and the various tribunals set up by the Allies in the aftermath of the Second World War contributed to the development of new legal norms and standards of responsibility which advanced the international rule of law, for example the elimination of the defence of 'obedience to superior orders', and the accountability of Heads of State. Finally, a symbolic significance emerged from these experiences in terms of their moral legacy, which was drawn on by those seeking a permanent, effective, and politically uncompromised system of international criminal justice.[17]

18.3 THE WORK OF THE ILC (1950–1954) FOR THE ELABORATION OF THE STATUTE OF AN INTERNATIONAL CRIMINAL COURT

In order to build on the positive dimensions of the establishment of the IMT and IMTFE, and perhaps stung by the inevitable association of these Tribunals with 'victor's justice', the United Nations system in the late 1940s commenced its quest to establish more permanent and impartial mechanisms for dispensing international criminal justice. (The 1948 Convention on Genocide confined itself to envisaging in Article VI the future establishment of an 'international penal tribunal'.)

The efforts of the United Nations to establish a permanent criminal tribunal can be traced along two separate tracks: codification of international crimes and the elaboration of a draft statute for the establishment of an international court.

Pursuant to a request by the General Assembly on 21 November 1947 (res. 177/II),

[17] M. Lippman, 'Nuremberg: Forty-Five Years Later', 7 *Conn. J. Int. L.* (1991), 1.