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**Historical Background:
Evolution of the International Criminal Law, Individual Criminal
Accountability and the Idea of A Permanent International Court**

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Historical Background: Evolution of the International Criminal Law, Individual Criminal Accountability and the Idea of A Permanent International Court

In assessing the role of global civil society in the creation of the first permanent global institutions to address the gravest crimes it is essential to first trace back the idea behind creating such a body. In this journey it is also necessary and relevant to examine how the individual human being has become a subject of international law and how the international criminal law has gradually evolved over the course of nineteenth and twentieth century. Of course it is not possible to explore the details;¹ so this part is focused on the aforesaid subject only to the extent that this attempt to explore the historical background reveals that the developments in international criminal law and the evolution of individual criminal responsibility has been limiting the state's domain and sphere of influence in global politics.²

In the meantime, this part should also demonstrate that due to the lack of an external pressure exerted on the states, they have easily managed to resist against the realization of the idea of a permanent international court, basing their resistance on the premise that such a court would damage the prominence and dominance of the nation-state, and the principle of sovereignty that have kept the state as the determinant actor of global politics. While the idea that an international

¹ There is a vast literature on various subjects and aspects of international criminal law. Among others, see the following: Ilias Bantekas and Susan Nash, *International Criminal Law* (London: Cavendish, 2001); M. Cherif Bassiouni, (ed.), *Introduction to International Criminal Law* (Ardsley NY: Transnational Publishers, 2003); *International Criminal Law* (Ardsley, NY: Transnational Publishers, 1998); (ed.), *International Criminal Law*, 3 vols. (Ardsley-on-Hudson: Transnational Publishers, 1986); *International Criminal Law: A Draft International Criminal Code* (Alphen aan den Rijn, Netherlands; Germantown, MD: Sijthoff & Noordhoff, 1980); Bassiouni and Ved P. Nanda (compiled and edited), *A Treatise on International Criminal Law* (Springfield, IL: Thomas, 1973); Antonio Cassese, *International Criminal Law* (Oxford: Oxford University Press, 2003); Rodney Dixon, Karim Kahn and Richard May (eds.), *Archbold: International Criminal Courts: Practice, Procedure and Evidence* (London: Sweet & Maxwell, 2002); Sterling Johnson, *Peace Without Justice? Hegemonic Instability or International Criminal Law* (Aldershot, Hants, England; Burlington, VT: Ashgate, 2003); Kriangsak Kittichaisaree, *International Criminal Law* (Oxford; New York: Oxford University Press, 2001); Helen Malcolm and Rodney Dixon (eds.), *International Criminal Law Reports* (London: Cameron May, 2000); Donald W. van Ness, *International Standards and Norms Relating to Criminal Justice: Conventions, Guidelines, Rules and Recommendations Promulgated by the United Nations, Council of Europe, Organization of American States, Organization of African Unity and Commonwealth of Nations* (Bethesda, Md.: Pike & Fischer, 1997); Jordan J. Paust, Leila Sadat and M. Cherif Bassiouni (eds.), *International Criminal Law: Cases and Materials* (Durham, N.C.: Carolina Academic Press, 2000), Geert-Jan A. Knoops, *The Prosecution and Defense of Peacekeepers under International Criminal Law* (Ardsley NY: Transnational Publishers, 2003), Bruce Broomhall, *International Justice and the International Criminal Court: Between Sovereignty and the Rule of Law* (Oxford and New York: Oxford University Press, 2003), Christoph Safferling, *Towards an International Criminal Procedure* (Oxford: Oxford University Press, 2001), Iain Cameron, *The Protective Principle of International Criminal Jurisdiction* (Aldershot, England; Brookfield, Vt.: Dartmouth Pub. Co., 1994), Yoram Dinstein and Mala Tabory (eds.), *War Crimes in International Law* (The Hague and Boston: Martinus Nijhoff Publishers, 1996), David McClean, *International Cooperation in Civil and Criminal Matters* (Oxford and New York: Oxford University Press, 2002), Salvatore Zappala, *International Criminal Trials and Human Rights* (Oxford: Oxford University Press, 2003), Lyal S. Sunga, *The Emerging System of International Criminal Law: Developments in Codification and Implementation* (The Hague and Cambridge: Kluwer Law International, 1997) and Claire de Than and Edwin Shorts, *International Criminal Law and Human Rights* (London: Sweet & Maxwell, 2003).

² For a detailed account on the relationship between the state sovereignty and international criminal law, see, among others, Jackson Nyamuya Maogoto, *State Sovereignty and International Criminal Law: Versailles to Rome* (Ardsley, NY: Transnational Publishers, 2003).

criminal court should be established to prevent future atrocities has often been voiced, because there was no coordinated and single-minded global civil action, the state-centric world has not witnessed the existence of this long-desired international body for a long time.

When presenting the historical developments concerning the issues under review here, the scholars of international criminal law often choose between focusing on the evolution and current application of the idea of universal jurisdiction as whole, -i.e. the crimes that fall into the scope of universal jurisdiction, the relevant international legal arrangements, etc.- and simply listing the most outstanding historical developments pertinent to the core subject of international criminal responsibility. However, in order to make the subject clearer by clarifying between the relevant concepts, both the historical developments and the whole subject of universal jurisdiction are examined here.

A Brief Historical Survey of International Criminal Law and Individual Criminal Responsibility

For practical reasons it is possible to divide the history of international criminal law into three parts. Although there may be some serious overlaps between the periods, such a division seems to be helpful in understanding the development and evolution of individual criminal responsibility in a more precise and clearer fashion. Given that the state-centric world system has been dominant over the course of nineteenth and twentieth centuries, and that the evolution of international criminal law is closely related to this system, it would be wise to choose important historical turning points in order to explain the evolution concerned. Undoubtedly these historical points are the two world wars, which, as one may easily expect, brought the idea that those responsible for the deaths in large scales should be tried and convicted to the fore. Therefore, in general terms the evolution of international criminal law is examined in four phases: pre-World War I, inter-war period, that is to say, the period between the World War I and the World War II, the period between the end of World War II and the collapse of the Soviet Union, and lastly the period that covers the developments since the end of cold war. Although the last period does not involve a *real* war, given that it relates to another type of war, there is nothing unusual to regard it as a historical turning point.

i. Prior to World War I:

Over the past 500 years the global community has sought numerous ways to address the most serious crimes that concerned and equally horrified the whole world.³ Bassiouni even argues that there is evidence of a tribunal holding the individuals responsible for war crimes in Greece in 405 BC.⁴ Schabas joins this view saying, “war criminals have been prosecuted at least since the time of the ancient Greece, and probably well before that.”⁵ Some others also refer to similar

³ Sandra L. Jamison, “A Permanent International Criminal Court: A Proposal that Overcomes Past Objections,” *Denver Journal of International Law & Policy*, Vol. 23, Issue 2, 1995, p. 419.

⁴ M. Cherif Bassiouni, *Crimes Against Humanity in International Criminal Law*, 2nd rev. ed. (Cambridge, MA : Kluwer Law International, 1999), p. 517.

⁵ William A. Schabas, *An Introduction to the International Criminal Court* (Cambridge, UK and New York, NY: Cambridge University Press, 2001), p. 1.

examples from ancient China, India and Japan.⁶ Therefore, it could be argued presumably that the world has always shown an interest and desire toward a superior judicial body having the power to deal with the most heinous crimes, given that those crimes have always been committed. However, both historians and international lawyers often agree that such a body has not come into the existence until the end of the fifteenth century. Although it is asserted that “the concept of a permanent ICC has intrigued the international community since the thirteenth century,”⁷ in fact “the concept of an international tribunal with its own super-national criminal justice power” could be traced to the 15th century.⁸ In this vein, it is generally accepted that the first known international criminal trial was conducted in 1474. It is contended that international criminal rules were first enforced and invoked when an ad hoc tribunal was established to try Peter von Hagenbach who was accused of and then convicted for committing such crimes as “murder, rape, perjury, and other crimes in violation of ‘the laws of God and man.’”⁹ It is essential to point out that those crimes were committed against a civilian community during his military occupation of Austria.¹⁰ Given that the referred crimes were war crimes, and that von Hagenbach was tried by a criminal tribunal of 28 judges from different locations and political entities, including Alsace, Rhineland, Switzerland and Austria,¹¹ it is understandable that many has referred to this famous occasion as the first attempt to hold a foreign individual responsible for perpetrating crimes that are today believed to fall into the definition of international crimes.

However, it should be noted that the view that the Peter von Hagenbach case could be seen as the earliest precedent for the individual criminal responsibility at the international level is challenged

⁶ Adriaan Bos, “The International Criminal Court: A Perspective,” in Roy S. Lee (ed.), *The International Criminal Court: The Making of the Rome Statute: Issues, Negotiations, Results* (The Hague: Kluwer Law International, 1999), p. 465 and Yves Beigbeder, *Judging War Criminals: The Politics of International Justice* (New York: St. Martin’s, 1999), pp. 4-5, cited in Paul Bowers, *The International Criminal Court Bill (HL), Bill 70 of 2000-2001*, Research Paper 01/39, 28 March 200, through House of Commons Library, United Kingdom, accessed via: <http://www.parliament.uk/commons/lib/research/rp2001/rp01-039.pdf>, p. 13, footnote 8.

⁷ Brook Sari Moshan, “Women, War, and Words: The Gender Component in The Permanent International Criminal Court’s Definition of Crimes Against Humanity,” *Fordham International Law Journal*, Vol. 22, Issue 1, 1998, p. 165.

⁸ Scott W. Andreasen, “The International Criminal Court: Does the Constitution Preclude Its Ratification by the United States?” *Iowa Law Review*, Vol. 85, Issue 2, 2000, p. 703.

⁹ Damir Arnaut, “When in Rome? The International Criminal Court and Avenues for U.S. Participation,” *Virginia Journal of International Law*, Vol. 43, Issue 2, 2003, p. 532.

¹⁰ Roseann M. Latore, “Escape Out the Back Door or Charge in the Front Door: U.S. Reactions to the International Criminal Court,” *Boston College International & Comparative Law Review*, Vol. 25, Issue 1, 2002, p. 162. It should be noted that the trial of Peter von Hagenbach is often cited by many others as the first international criminal proceeding. For instance, see, among others, Jamison, “A Permanent International Criminal Court: A Proposal that Overcomes Past Objections,” p. 421; M. Cherif Bassiouni, “From Versailles to Rwanda in Seventy-Five Years: The Need to Establish a Permanent International Criminal Court,” *Harvard Human Rights Journal*, Vol. 10, Issue 10, 1997, p. 11; Jules Deschênes, “Toward International Criminal Justice,” in Roger S. Clark and Madeleine Sann, (eds.) *The Prosecution of International Crimes* (New Brunswick, NJ: Transaction Publishers, 1996), pp. 30-32; James D. Meernik and Kimi L. King, “The Effectiveness of International Law and the ICTY – Preliminary Results of an Empirical Study,” *International Criminal Law Review*, Vol. 1, Issue 3-4, 2001, p. 344; Aryeh Neier, *War Crimes: Brutality, Genocide, Terror, and the Struggle for Justice* (New York: Times Books, 1998) and Walter Gary Sharp, Sr., “International Obligations to Search for and Arrest War Criminals: Government Failure in the Former Yugoslavia,” *Duke Journal of Comparative & International Law*, Vol. 7, Issue 2, 1997, p. 417.

¹¹ Marlies Glasius, “Expertise in the Cause of Justice: Global Civil Society Influence on the Statute for an International Court,” in Marlies Glasius, Mary Kaldor ve Helmut Anheier (eds.), *Global Civil Society 2002* (Oxford: Oxford University Press, 2002), p. 138.

and questioned, since it is not obvious that whether the law applied and even the tribunal itself were truly international and whether the crimes committed during the invasion were in fact war crimes.¹² This view is also objectionable in that it does not seem possible to talk about an international order based on the interactions between nations. It is also interesting to note that no other 'international' criminal court trying the individuals responsible for international crimes is cited for the period that covers the developments before the world war, a fact that raises doubts about the credibility of the view concerning the first international criminal trial stated above. Although there have been attempts to deal with serious international, particularly war crimes, they were not of international character, and have not foreseen the establishment of an international criminal court. Among these attempts probably the most notable one is the so-called Lieber Code,¹³ a set of rules regulating the conduct of war. Drafted by Francis Lieber from Columbia University and applied by Abraham Lincoln during the American Civil War, those rules could be cited as the earliest modern codification of the laws of war.¹⁴ They were of significance, as they explicitly proscribed inhumane conduct of war, and maintained notable punishments should the inhumane acts take place during the war, including death penalty.¹⁵ The importance of these rules notwithstanding, they were national regulations, applying to the US

¹² See, for instance, Timothy L. H. McCormack, "Selective Reaction to Atrocity: War Crimes and the Development of International Criminal Law," *Albany Law Review*, Vol. 60, Issue 1, 1997, pp. 690-92.

¹³ For a brief narration of the process through which the Lieber Code has been prepared as well as some biographical snapshots of the Code's author, Dr. Lieber, see, George B. Davis, "Doctor Francis Lieber's Instructions for the Government Armies in the Field," *American Journal of International Law*, Vol. 1, Issue 1, 1907, pp. 13-25.

¹⁴ Schabas, *An Introduction to the International Criminal Court*, p. 1.

¹⁵ Instructions for the Government of Armies of the United States in the Field, prepared by Francis Lieber, LL.D., Originally Issued as General Orders No. 100, Adjutant General's Office, April 24, 1863, Washington 1898: Government Printing Office. Those could be reached at <http://www.yale.edu/lawweb/avalon/lieber.htm>. Some important provisions from the Orders are as follows:

Art. 33.

It is no longer considered lawful - on the contrary, it is held to be a serious breach of the law of war - to force the subjects of the enemy into the service of the victorious government, except the latter should proclaim, after a fair and complete conquest of the hostile country or district, that it is resolved to keep the country, district, or place permanently as its own and make it a portion of its own country.

Art. 37.

The United States acknowledge and protect, in hostile countries occupied by them, religion and morality; strictly private property; the persons of the inhabitants, especially those of women: and the sacredness of domestic relations. Offenses to the contrary shall be rigorously punished.

Art. 67.

The law of nations allows every sovereign government to make war upon another sovereign state, and, therefore, admits of no rules or laws different from those of regular warfare, regarding the treatment of prisoners of war, although they may belong to the army of a government which the captor may consider as a wanton and unjust assailant.

Art. 70.

The use of poison in any manner, be it to poison wells, or food, or arms, is wholly excluded from modern warfare. He that uses it puts himself out of the pale of the law and usages of war.

Art. 76.

Prisoners of war shall be fed upon plain and wholesome food, whenever practicable, and treated with humanity. They may be required to work for the benefit of the captor's government, according to their rank and condition.

Art. 80.

Honorable men, when captured, will abstain from giving to the enemy information concerning their own army, and the modern law of war permits no longer the use of any violence against prisoners in order to extort the desired information or to punish them for having given false information.

nationals only. Similar endeavors in other parts of the world were no different. Therefore, prosecution for war crimes “was only effected by national courts, and these were and remain ineffective when those responsible for the crimes are still in power and their victims remain subjugated.”¹⁶

Nevertheless, it would not be fair to say that the above rules have entirely remained as national regulations. Although those rules have not been incorporated in any international text regulating the conduct of war, they have had a great deal of impact on the works relevant to the codification of legal rules on war crimes and similar atrocities. Professor Bluntschli, who was charged with “the preparation of a draft of the proposed compilation of the recognized rules and usages of war” for the international meeting held in Brussels in 1874, heavily relied on the instructions prepared by Dr. Lieber. The impact of the instructions on the works of Bluntschli was so significant that the outcome of the Brussels meeting “bears in every article a distinct impression of the Instructions.”¹⁷ Considering the heavy influence and practical usage of the Brussels Code,¹⁸ which was prepared with the chief reliance on Lieber’s Code, during the proceedings of The 1899 Hague Conference,¹⁹ it could be said that the Lieber Instructions in fact became – although indirectly- internationally recognized rules. Despite the fact that those rules were promulgated during an internal war, they did not lose eminence with the time and continued partially impacting on the international codifications on the Code’s subject matter.

However, no matter whether the above case constitutes a precedent for the international criminal proceedings, it is obvious that it did not significantly affect and contribute to the inquiry for international criminal justice, as the first proposal for creation a permanent international court was first made in 1872, when Gustave Moynier of Switzerland, one of the founders of the International Committee of the Red Cross, suggested the creation of an international criminal court to address violations of the 1864 Geneva Convention²⁰ in the Franco-Prussian War of 1870-71,²¹ far later than the supposedly first international criminal tribunal was established in 1474.

¹⁶ Schabas, *An Introduction to the International Criminal Court*, p. 1.

¹⁷ Davis, “Doctor Francis Lieber’s Instructions for the Government Armies in the Field,” p. 22.

¹⁸ The text of the outcome of the Brussels Conference could be found at: Project of an International Declaration Concerning the Laws and Customs of War, Adopted by the Conference of Brussels, August 27, 1874, reprinted in *The American Journal of International Law*, Vol. 1, Issue 2, Supplement: Official Documents, 1907, pp. 96-103.

¹⁹ *Ibid.*, p. 23.

²⁰ *Laws of War: the Geneva Convention for Amelioration of the Condition of the Wounded on the Field of Battle* (also known as the Red Cross Convention); adopted at Geneva, August 22, 1864, entered into force June 22, 1865. The text of the Convention can be reached through the website of the Avalon Project of Yale University at: <http://www.yale.edu/lawweb/avalon/lawofwar/geneva04.htm>.

²¹ Arnaut, “When in Rome? The International Criminal Court and Avenues for U.S. Participation,” p. 532. Unlike the von Hagenbach case, there is an agreement and thus certainty that the proposal for the establishment of a permanent international criminal court was first made Gustave Moynier in 1872. See, for example, Christopher Keith Hall, “The First Proposal for A Permanent International Criminal Court,” *International Review of the Red Cross*, Issue 322, 1998, p. 57-74; Christopher W. Mullins, David Kauzlarich and Dawn Rothe, “The International Criminal Court and the Control of State Crime: Prospects and Problems,” *Critical Criminology*, Vol. 12, Issue 3, 2004, p. 289; Marie Törnquist-Chesnier, “NGOs and International Law,” *Journal of Human Rights*, Vol. 3, Issue 2, 2004, p. 256; Christopher K. Hall, “La Primera Propuesta de Creacion de un Tribunal Penal Permanente,” 145 *Revista Internacional de la Cruz Roja* 63-82 (1998), as cited in Héctor Olásolo, “The Prosecutor of the ICC Before the Initiation of Investigations: A Quasi-judicial or a Political Body?” *International Criminal Law Review*, Vol. 3, Issue 2, 2003, p. 87. On January 3rd 1872, Moynier presented his draft for the establishment of a permanent

The main reason and impetus behind this proposal was the reluctance of states to comply with the provisions of the Geneva Convention cited above. While that Convention was signed by a large number of states at the time, atrocities in large scale were committed in the Franco-Prussian War.²² During the discussions after that war while many referring to the uselessness of the aforesaid Convention and other related arrangements were in favor of abolishing the rules of war, given that those rule were not observed at the times of wars, Moynier took the opposite position and argued that those rules should be backed by an international criminal court so that the Convention would have a deterring effect on the warring parties.²³ However, his proposal was met with skepticism and eventually was largely ignored.²⁴ It should be noted that the proposal was too extreme and radical,²⁵ given the political circumstances of the time and the dominance of power politics.

The proposal drafted by Moynier was very brief with ten articles only, and modest in terms of scope and reference to an international body that was to have the authority to prosecute war crimes. Article 1 of the draft provided that “in order to ensure the implementation of the Geneva Convention of 22 August 1864, and of its additional articles, there will be established, in the event of a war between two or more Contracting Powers, a tribunal to which may be addressed complaints concerning breaches of the aforementioned Convention.”²⁶ Therefore, the draft did not refer to a separate statute governing the proposed court, but suggested that the 1864 Geneva Convention be observed. The Court Moynier proposed lacked of a permanent panel of judges. Article 2 stated that the adjudicators would be nominated by three Powers to be chosen by the President of Swiss Confederation, as soon as war has been declared.²⁷ Furthermore, the draft did not determine the venue where the judges would sit, once they have been appointed. This choice was left to the judges.²⁸ The proposed tribunal was not to be authorized to act on its own, but it

international criminal court at a meeting in the International Committee for the Relief of the Wounded (later to become the Red Cross), which was set up under *the Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field, 1864*. This proposal was published in the *Bulletin International des Sociétés de secours aux militaires blesés* on January 28th, 1872. See, Morten Bergsmo, “Folkerettslig belysning av ‘etisk rensing’ i det tidligere Jugoslavia,” pp. 75-133 in Bård-Anders Andreassen and Elin Skaar (eds.), *Forsoning eller rettferdighet? Om beskyttelse av menneskerethighetene gjennom sannhetskommisjoner og rettstribunaler* (Oslo: Cappelen Akademisk Forlag, 1998), p. 98, cited in Tom Syring, “Good Governance and the ICC: Strengthening Besieged Democratic Regimes by International Means, The Logic of Institutional Empowerment,” Paper presented at Arbeidsgruppe Internasjonal Politikk (Working Group on International Politics), Oslo, December 19th, 2002, p. 7, *footnote 3*.

²² It is interesting to note that Moynier, the owner of the first proposal for creating a permanent criminal court, was not originally in favor of such an institution. However, the atrocities committed in the Franco-Prussian War seemed to radically change his mind. See, Hall, “The First Proposal for A Permanent International Criminal Court,” p. 57

²³ For a detailed examination of Moynier’s proposal, see, Hall, “The First Proposal for A Permanent International Criminal Court,” pp. 57-74. This article also includes the text of Moynier’s proposal, “Draft Convention for the Establishment of an International Judicial Body Suitable for the Prevention and Punishment of Violations of the Geneva Convention.”

²⁴ Marlies Glasius, “How Activists Shaped the Court,” Crimes of War Project, The International Criminal Court: An End to Impunity? *The Magazine Section*, December 2003, accessed via: <http://www.crimesofwar.org/print/icc/icc-glasius-print.html>.

²⁵ Hall, “The First Proposal for A Permanent International Criminal Court,” pp. 57-74.

²⁶ Article 1 of Draft Convention for the Establishment of an International Judicial Body Suitable for the Prevention and Punishment of Violations of the Geneva Convention, reprinted in *ibid*.

²⁷ *Ibid.*, Article 2.

²⁸ *Ibid.*, Article 3.

was recognized the power to deal with the complaints addressed to it by the interested governments.²⁹ The tribunal was to determine whether the accused was guilty or not. If the guilt were to be established, then the tribunal would also have the authority to impose the penalty in accordance with the existing rules of international law.³⁰ However, the tribunal would not be able to implement the decisions it made. Instead, the draft provided that “the tribunal will notify its judgments to interested governments. The latter shall impose on those found guilty the penalties which have been pronounced against them.”³¹

The brief review of the draft above suggests that Moynier’s proposal was in effect very modest by contemporary standards. No argument that it was daring and striking at that time, yet it should have been acceptable to the States, given its modesty and non-interference with national sovereignty. Despite this fact, States did not show interest towards the proposal, a fact proving the dominance of power politics and observation of national sovereignty and national interests. According to Hall, the lack of support and interest by the international law experts of the time towards Moynier’s proposal was one of most important reasons for the failure of its enactment.³² In other words, should the draft was supported by non-state figures; there could have been at least a little prospect for the creation of the institution provided in it.

However, as the arms technology was increasingly being enhanced and thus the wars were becoming more deadly, the people became more concerned about the implications of war. This necessitated the adoption of certain rules on the conduct of war. As a consequence, the attempts to develop a law of war that would be helpful to minimize the negative effects of warfare accelerated the codification of international legal arrangements on the conduct of war in particular starting from the end of nineteenth century.³³ Two developments are worth mentioning in this regard: The Hague Conventions of 1899 and 1907, where the first attempts to create an international penal code were made. The initial proposal for the Conference held in 1899 was made by Czar Nicholas II of the Russian Empire on August 24, 1898.³⁴ The proposal was

²⁹ *Ibid.*, Article 4.

³⁰ *Ibid.*, Article 5.

³¹ *Ibid.*, Article 6.

³² Hall comments on this matter as follows: “A century and a quarter after Gustave Moynier’s daring proposal, the prospects are increasingly bright that the international community will adopt a treaty establishing a permanent international criminal court. In dramatic contrast to the response of leading international law experts in 1872, more than three hundred non-governmental organizations throughout the world have joined forces in an NGO Coalition for an International Criminal Court to mobilize public support for the prompt establishment of an effective court.” Hall, “The First Proposal for A Permanent International Criminal Court,” pp. 57-74.

³³ Seha L. Meray, *Devletler Hukukuna Giriş*, revised 3rd ed., 2nd vol. (Ankara: Ankara University Press, 1965), p. 428.

³⁴ It is interesting to witness that the proposal for a conference that could have limited the state sovereignty was made by a head of state, who should normally be eager to preserve the sovereignty of the state he represents. However, considering that the Czar made the proposal to “diminish the burden of taxation for military and naval expenditures which presses down with enormously increasing weight upon the shoulders of the people,” it could be concluded that his sincerity for demanding world peace is questionable. William I. Hull, *The Two Hague Conferences and their Contributions to International Law* 3 (1908), cited in Leila Nadya Sadat, “The Establishment of the International Criminal Court: From The Hague to Rome and Back Again,” *Michigan State University-DCL Journal of International Law*, Vol. 8, Issue 1, 1999, p. 97, at note 1. In fact, it was not a concern for Russia only. The following quotation eloquently explains one of the most outstanding motives behind the States’ willingness to hold a multilateral conference in which discussions and deliberations on reducing armaments took place: “It was a world with an Arms Race going on, and with military-industrial complexes to feed it. The costs were enormous, and

accepted by twenty-six countries and eventually the Peace Conference was held in The Hague. The Czar once again assumed role in the second Hague Conference held in 1907 by issuing the formal invitation. However, this time the proposal for the Conference came from the United States. Forty-four countries participated in the Conference.³⁵

Those conventions were “the first significant codification of the laws of war in an international treaty.”³⁶ The Convention of 1899 created the Convention for the Pacific Settlement of Disputes and a Court of Arbitral Justice.³⁷ Also known as Permanent Court of Arbitration (PCA),³⁸ this Court is especially significant, as it is seen by some scholars as one of the earliest predecessors of the permanent International Criminal Court. Two reasons are referred to for this assertion. First, it is commented that the establishment of the PCA foresaw that inter-State disputes could be sometimes resolved through legal endeavors, and would not necessarily be matters of political rivalries. Second, its establishment triggered a general tendency toward international adjudication.³⁹

However, it is worth noting that the Court whose creation was proposed at the 1899 Hague Conference had important defects. The most important one is explained as follows:

The Hague Tribunal is not in the true sense a permanent court, it is permanent only in name. Its membership of judges is not confined to a few selected men who sit as a permanent court ready at all times to do its business and receiving a fixed salary during an appointment for life.⁴⁰

came not just from the numbers of men involved. These were years when...there was much application of scientific invention to military purposes. New weapons and new means of delivering them were being developed every year. As soon as one military establishment had acquired a new military marvel, every state with which it might come into conflict felt the lack of an equivalent. It was repeatedly claimed, and not by socialists and liberals alone, that the costs were becoming too heavy to bear.” Geoffrey Best, “Peace Conferences and the Century of Total War: The 1899 Hague Conference and What Came After,” *International Affairs*, Vol. 75, Issue 3, 1999, pp. 619-20.

³⁵ Sadat, “The Establishment of the International Criminal Court: From The Hague to Rome and Back Again,” pp. 97-98.

³⁶ Schabas, *An Introduction to the International Criminal Court*, p. 2. “They include an important series of provisions dealing with the protection of civilian populations...Other provisions of the Regulations protect cultural objects and private property of civilians.” *Ibid*.

³⁷ Jamison, “A Permanent International Criminal Court: A Proposal that Overcomes Past Objections,” p. 421. There are four Hague Conventions adopted at the Hague Convention of 1899. These are: CONVENTION (I) FOR THE PACIFIC SETTLEMENT OF INTERNATIONAL DISPUTES (HAGUE I) (29 July 1899), entered into force 4 September 1900, access via: <http://www.yale.edu/lawweb/avalon/lawofwar/hague01.htm>, CONVENTION WITH RESPECT TO THE LAWS AND CUSTOMS OF WAR ON LAND (HAGUE, II) (29 July 1899), entered into force 4 September 1900, access via: <http://www.yale.edu/lawweb/avalon/lawofwar/hague02.htm>, CONVENTION FOR THE ADAPTATION TO MARITIME WARFARE OF THE PRINCIPLES OF THE GENEVA CONVENTION OF AUGUST 22, 1864, adopted July 29, 1899, entered into force, September 4, 1900, access via:

<http://www.yale.edu/lawweb/avalon/lawofwar/hague993.htm> and Declaration on Prohibiting Launching of Projectiles and Explosives from Balloons (Hague, IV); July 29, 1899, entered into force, September 4, 1900.

³⁸ For brief information on the attempts made before The Hague Conference of 1899 with regard to international arbitration, see, William L. Penfield, “International Arbitration,” *American journal of International Law*, Vol. 1, Issue 2, 1907, pp. 330-341.

³⁹ Sadat, “The Establishment of the International Criminal Court: From The Hague to Rome and Back Again,” p. 98, at note 2.

⁴⁰ R. Floyd Clark, “A Permanent Tribunal of International Arbitration: Its Necessity and Value,” *American Journal of International Law*, Vol. 1, Issue 2, 1907, p. 343.

Instead of a permanent court, what was proposed at The Hague was “a list of referees” from whom judges might be selected as “occasion offers. A clerk’s office and a council to run it is all that is permanent or continuous in the organization.” The judges were to be selected from a pool of 104. They were basically to be called from their vocations for a few months “to decide a certain dispute in their capacities as judges and then lapse back again into the private life and environment from which they came.”⁴¹

The Hague Convention of 1907 is of significance in that while during the former Convention it was decided that submission to the court would be optional, at the Convention of 1907 attempts were made in order to make the court’s jurisdiction obligatory. However, although the preconditions for the court’s entering into force were set at the Convention, because these conditions would not be met later, the court never went into effect.⁴² The Convention also witnessed the first comprehensive codification of laws of war.⁴³ Thirteen conventions on various aspects of warfare were adopted at the conference in 1907, although one is never ratified, thus did not enter into force.⁴⁴ Overall, the primary objective of these conventions was to create rules and procedures that would eliminate unnecessary suffering by the warring persons and ensure that noncombatants would not be targeted in the wars.⁴⁵

However, despite the novel arrangements made, The Hague Conventions fell short in many respects.⁴⁶ First of all, although the Hague Convention of 1907 managed to codify the laws of war, only states and not individuals were made obligated to comply with the rules adopted at the conference. In other words, the Conventions “were meant to impose obligations and duties upon States, and were not intended to create criminal liability for individuals.”⁴⁷ Furthermore, the

⁴¹ *Ibid.*, p. 344.

⁴² Sadat, “The Establishment of the International Criminal Court: From The Hague to Rome and Back Again,” p. 422.

⁴³ Gerard E. O’Connor, “The Pursuit of Justice and Accountability: Why The United States Should Support the Establishment of an International Criminal Court,” *Hofstra Law Review*, Vol. 27, Issue 4, 1999, p. 935.

⁴⁴ These are: Convention for The Pacific Settlement of International Disputes (1907), Convention Respecting The Limitation of The Employment of Force For The Recovery of Contract Debts (1907), Convention Relative to The Opening Of Hostilities (1907), Convention Respecting The Laws and Customs of War on Land (1907), Convention Respecting The Rights And Duties of Neutral Powers and Persons In Case of War on Land (1907), Convention Relating to The Status of Enemy Merchant Ships At The Outbreak Of Hostilities (1907), Convention Relating to The Conversion of Merchant Ships Into War-Ships (1907), Convention Relative to The Laying of Automatic Submarine Contact Mines (1907), Convention Concerning Bombardment by Naval Forces In Time of War (1907), Convention for The Adaptation to Maritime War of The Principles of The Geneva Convention (1907), Convention Relative to Certain Restrictions With Regard to The Exercise of The Right of Capture In Naval War (1907), Convention Relative to The Creation of An International Prize Court (Never Ratified) and Convention Concerning The Rights And Duties of Neutral Powers In Naval War (1907). All are accessible at: <http://www.lib.byu.edu/~rdh/wwi/hague.html>.

⁴⁵ O’Connor, “The Pursuit of Justice and Accountability: Why The United States Should Support the Establishment of an International Criminal Court,” p. 935.

⁴⁶ In fact, it is indicated in the preamble to the Conventions that they are incomplete. Schabas, *An Introduction to the International Criminal Court*, p. 2.

⁴⁷ *Ibid.*

enforcement of the laws was “primarily through reparations imposed upon a defeated state, or through reprisal or retaliation, which tended to escalate the spiral of savagery.”⁴⁸

More importantly, most conventions adopted at the Hague Conventions in order to maintain rules of laws of war lost the significant portion of their power, due to the reservations they contain. Like the Conventions of 1864 and of 1906, the Hague Conventions of 1907 state that any State Party to those conventions is obligated to abide by the rules contained in the conventions as long as the other States Parties comply with those rules. This was called ‘clause of solidarity’ (Clause de solidarité). According to this clause, if any State Party violates the Convention concerned, or a non-party joins the war, there would be a great possibility that other States Parties do not regard themselves as obligatory to comply with the provisions of that convention.⁴⁹

There is one simple and equally solid explanation for the weak provisions of the Conventions discussed above: states were concerned with preserving their sovereign rights. There was an obvious link between the attempts aiming at regulating warfare that were adopted at the two Hague Conferences and the notion of sovereignty that has been prevalent in world politics at the time. It was generally assumed that the head of a state has the authority over the authority of the state he rules, and that a state could not be subjected to any law other than its domestic legal rules, should that state does not explicitly express its consent to get bound by that law.⁵⁰

However, it should be noted that notwithstanding the shortcomings of The Hague Conventions of 1899 and 1907 stated above, there has been at least one attempt to invoke their provisions within a few years after their codification. The Carnegie Endowment for International Peace, a non-governmental organization, established a commission of inquiry to investigate atrocities committed especially against civilians and prisoners of war during two Balkan Wars of 1912 and 1913.⁵¹ In its report, the commission referred to the Hague Conventions as a basis for its description of war crimes.⁵² But it is worth remembering that the attempt was not led by states. Therefore, the initiative of the Carnegie Endowment could only be cited as a reference to the Hague Conventions.

Another reference to the Hague Conventions was made far later. Statute of the International Criminal Tribunal for the Former Yugoslavia of 1993⁵³ heavily relies on the Conventions as the main basis for the codification of the customs and laws of war. Indeed, the Rome Statute of the

⁴⁸ Bryan F. MacPherson, “Building an International Criminal Court for the 21st Century,” *Connecticut Journal of International Law*, Vol. 13, Issue 1, 1998, pp. 4-5.

⁴⁹ Meray, *Devletler Hukukuna Giriş*, p. 434.

⁵⁰ Sadat, “The Establishment of the International Criminal Court: From The Hague to Rome and Back Again,” p. 102.

⁵¹ M. Cherif Bassiouni, “Establishing an International Criminal Court: Historical Survey,” *Military Law Review*, Issue 149, 1995, p. 53.

⁵² *Report of the International Commission to Inquire into the Causes and Conduct of the Balkan Wars* (Washington, DC: Carnegie Endowment for International Peace, 1914), reprinted as George F. Kennan and Thomas M. Franck, *The Other Balkan Wars: A 1913 Carnegie Endowment Inquiry in Retrospect* (Washington, DC: Carnegie Endowment for International Peace, 1993).

⁵³ Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, U.N. Doc. S/25704 at 36, annex (1993) and S/25704/Add.1 (1993), adopted by Security Council on 25 May 1993, U.N. Doc. S/RES/827 (1993). The Statute’s text can be reached at: <http://www.un.org/icty/legaldoc-e/index.htm>.

International Criminal Court also borrows from those Conventions in its Article 8(2)(b), (e) and (f).⁵⁴ This is a clear recognition of those long ignored international legal arrangements on the laws of war as an authoritative base with respect to their coverage. Moreover, it is argued that the current permanent international criminal court is “the culmination of a process that goes back to the Red Cross and Hague Conventions on the conduct of warfare in the nineteenth and twentieth centuries,”⁵⁵ which is in effect a statement that gives full credit to the Hague Conventions and acknowledges their prominence in international criminal law.

There is in fact one more point, an important one given the subject matter of this study, that needs to be emphasized. While the above-mentioned two multilateral conferences are in general seen as the attempts of States Parties that participated in the conference, the input and encouragement of civil elements throughout the process cannot be overlooked. Although it may not be possible to refer to an organized civil society of that time, the ‘non-state’ elements’ contributions to both the inauguration of the conference and the principles and rules adopted there suggest that the achievement made by those conferences at least partially belongs to the civil society.

Especially the 1899 Hague Conference witnessed the visible contribution of different elements of civil society. The peace societies of the time were interested in the Conference. In particular, the Inter-Parliamentary Union’s participation is worth noting, as this organization has been involved in international peace congresses since 1880s. A further point worth mentioning is that women actively joined and assumed effective roles in those organizations. Aside from peace movements and early human rights organizations, the professional groups, especially those formed by the international lawyers made contributions during the Conference. There were also some gatherings of masses before the Conference, even though they are not comparable to the contemporary ones.⁵⁶

Of course, the magnitude of their presence in the Conference and the scope of their contributions to the deliberations and influence on the decisions to be made by States Parties’ delegates were limited and modest and are by no means comparable to the works of today’s global civil society. However, even considering alone the fact that the Conference was “the first ever occasion on which an intergovernmental...conference was accompanied by a great show of organized public opinion in its support”⁵⁷ reveals how important and crucial the participation of the ‘organized public’ was. Although they were aware of their limits, the organizations formed by ‘peoples’ wanted to be taken by the delegations seriously during the Conference. Otherwise, they might have formed an alternative conference other than the official one. They also tried to influence the outcome by lobbying and informal meetings. However, as already noted, their contribution was modest largely due to their limited influence and resources. Best refers to another reason for this limited influence: that not from all participant States were civil elements present at the Conference.⁵⁸ In any case, the important point is the success of the Conference, if any, cannot be

⁵⁴ Schabas, *An Introduction to the International Criminal Court*, p. 3.

⁵⁵ Giulio M. Gallarotti and Arik Y. Preis, “Toward Universal Human Rights and the Rule of Law: The Permanent International Criminal Court,” *Australian Journal of International Affairs*, Vol. 53, Issue 1, 1999, p. 95.

⁵⁶ Best, “Peace Conferences and the Century of Total War: The 1899 Hague Conference and What Came After,” pp. 620-21.

⁵⁷ *Ibid.*, p. 623.

⁵⁸ *Ibid.*, p. 624.

attributed to the States Parties alone, but to the civil elements that participated in the Conference as well.

ii. Interwar Period:

It could be argued that the failures in creating an international judicial body empowered to prosecute war criminals over the course of nineteenth century, which witnessed the outstanding impacts of the industrial revolution on arms technology, significantly contributed to the breakout of World War I. Although it is not possible to prove that point with certainty, it is obvious that power politics and the struggle between nations over sharing the world's economic and strategic assets were the major reasons of the war. The fact that the warring parties largely ignored the sanctity of human life led to a deadly war. Therefore, it should not be surprising that "the true impetus for the creation and acceptance of international jurisdiction over individuals committing war crimes was World War I, the first military conflict that truly took place on a world-wide scale."⁵⁹

During the war, there have been many incidents in which civilians were murdered, tortured, deported, or subjected to other inhumane or degrading treatments. This marks one of the most obvious differences between World War I and the wars in the past: the previous ones have mainly been fought between the armies of the warring parties, whilst World War I for the most part did not distinguish the civilian population from the warring personnel. For this reason to a large extent, civilians have become directly affected by and involved in the deadly campaigns. Particularly the inhumane conduct of war by Germans caused popular protest.

One of the most notorious atrocities committed by German troops was the "Sack of Louvain" in which they executed over two hundred civilians and burned portions of a Belgium city. Over sixty thousands civilians were forced to move from the occupied parts of Belgium by Germans to labor camps.⁶⁰ German troops, after invading Belgium, also committed war crimes in France. There were numerous reports stating German atrocities in France. In particular, the destruction of the Cathedral at Rheims and the large-scale commission of the pillage, rape and murder of civilians could be cited in this regard.⁶¹ The aerial bombardment of London by Germans causing civilian casualties was another significant and unforgettable incident inciting public protest and outcry. In 1915, the Germans went even further and wielded poisonous gas.⁶² Furthermore, Germans targeted commercial and passenger vessels. In May 1915 a German U-boat sank the vessel Lusitania, killing 1,198 civilians.⁶³ Along with the Lusitania incident, the execution of Nurse Edith Cavell, who was the head of a training school for nurses in Brussels, and executed with the Kaiser's authorization for assisting and hiding Allied troops, has over the time become

⁵⁹ Andreasen, "The International Criminal Court: Does the Constitution Preclude Its Ratification by the United States?" p. 703.

⁶⁰ James F. Willis, *Prologue to Nuremberg: The Politics and Diplomacy of Punishing War Criminals of the First World War* (Westport, CT: Greenwood Press, 1982), p. 9.

⁶¹ *Ibid.*, p. 13.

⁶² *Ibid.*, p. 19.

⁶³ *Ibid.*, p. 20.

the symbol for German atrocities during the war.⁶⁴ Those two infamous incidents are frequently cited in order to emphasize on the civilian losses and inhumanities of World War I.

With the end of World War I, especially victorious powers have sought to address the atrocities during the war. Of course, the attempts for addressing the crimes committed during the war intensified on the defeated states only and not on the victorious powers. In fact, even at the dawn of the war there have been numerous calls for pursuit of justice and expression of concerns over the large-scale commission of war crimes and other related outlawed behaviors. For instance, in 1915, Elihu Root, former Secretary of War and State under Theodore Roosevelt, stated, “the civilized world will have to determine whether what we call international law is to be continued as a mere code of etiquette or is to be a real body of laws imposing obligations much more definite and inevitable than they have been heretofore.”⁶⁵ Theodore S. Woolsey, former law professor from Yale University, proposed the establishment of an international criminal court for prosecuting the German atrocities.⁶⁶ A similar proposal was advanced by historian Hugh H. L. Bellot, who “urged that, in the event of an Allied victory, the Central Powers should be required to accept the convening of a criminal court to prosecute those war criminals who remained unpunished.”⁶⁷

The examples cited above and countless others resulted in a collective demand by people towards the punishment of those responsible for wartime atrocities. Due to the lack of an independent and permanent international body addressing the crimes similar to those committed during the World War, the major powers tried to get involved in the process for the sake of the maintaining justice. However, their attempts turned to be ineffective, largely due to considerations over national interests. Nevertheless, the period after the World War I is significant in that during this period there have been a number of attempts to implement the laws of war. Although most of those attempts failed, they left a legacy for the future generations.

There appeared a possibility for the establishment of an international criminal tribunal to prosecute war crimes in Paris Peace Conference of 1919 convened by the victorious powers of the War.⁶⁸ At the Conference a Commission on the Responsibility of the Authors of the War and on Enforcement and Punishment was appointed to seek a resolution for addressing the crimes committed during the war. The Commission was charged to inquire into and report on the following:

1. The responsibility of the authors of the war.
2. The facts as to breaches of the laws and customs of war committed by the forces of the German Empire and their Allies.

⁶⁴ Matthew Lippman, “Towards an International Criminal Court,” *San Diego Justice Journal*, Vol. 3, Issue 1, 1995, p. 3.

⁶⁵ Elihu Root, “The Outlook For International Law,” *Proceedings of American Society of International Law*, Vol. 9, 1915, pp. 2-4, cited in Lippman, “Towards an International Criminal Court,” *San Diego Justice Journal*, Vol. 3, Issue 1, 1995, p. 5, at note 22.

⁶⁶ Lippman, “Towards an International Criminal Court,” p. 6.

⁶⁷ *Ibid.*, pp. 8-9.

⁶⁸ Andreasen, “The International Criminal Court: Does the Constitution Preclude Its Ratification by the United States?” p. 702.

3. The degree of responsibility for these offences attaching particular members of the enemy forces.
4. The constitution and procedure of a tribunal appropriate for the trial of these offences.
5. Any other matters cognate or ancillary to the above which may arise in the course of the enquiry, and which the Commission finds it useful and relevant to take into consideration.⁶⁹

The Commission appointed three Sub-Commissions. Sub-Commission I on Criminal Acts was appointed to “discover and collect the evidence necessary to establish the facts relating to culpable conduct which (a) brought about the World War and accompanied its inception, and (b) took place in the course of hostilities.” Sub-Commission II on the Responsibility for the War assumed the role to consider whether, based on the findings of Sub-Commission on Criminal Acts relating to the initiation of the war, “prosecutions could be instituted, and, if it decided that prosecutions could be undertaken, to prepare a report” indicating the individuals who it found guilty and the court that would be competent to proceed the prosecutions. Sub-Commission on the Responsibility for the Violation of the Laws and Customs of War was to consider whether, based on the findings of Sub-Commission on Criminal Acts relating to the conduct of war, prosecutions could be instituted, and the court those prosecutions would proceed.⁷⁰

The relevant Sub-Commission determined that the responsibility for initiating a policy of aggression “rests first on Germany and Austria, secondly on Turkey and Bulgaria”⁷¹ and consequently concluded that “the war was premeditated by the Central Powers together with their Allies, Turkey and Bulgaria, and was the result of acts deliberately committed in order to make it unavoidable,” and that “Germany, in agreement with Austria-Hungary, deliberately worked to defeat all the many conciliatory proposals made by the Entente Powers and their repeated efforts to avoid war.”⁷² In relation to the outlawed acts committed during the war, the Commission that was assigned to work on this matter also concluded that “the war was carried on by the Central Empires together with their allies, Turkey and Bulgaria, by barbarous or illegitimate methods in violation of the established laws and customs of war and the elementary laws of humanity.”⁷³ The commission of outlawed acts was so widespread that the same Commission also recommended the creation of a committee for the purpose of collecting and classifying information and preparing a complete list of facts concerning violations of the laws and customs of war committed by the German Empire and its Allies on land, sea and in the air, in the course of the war.⁷⁴

It further concluded that individuals who were thought of having been involved in inhumane conduct of war should be held responsible for violations of the laws and customs of war and of

⁶⁹ Report of the Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties, presented to the Preliminary Peace Conference, March 29, 1919, Official English text, reprinted from Pamphlet No. 32, Division of International Law, Carnegie Endowment for International Peace, Washington, D.C. in *American Journal of International Law*, Vol. 14, Issue 1, 1920, pp. 95-154.

⁷⁰ *Ibid.*, pp. 97-98.

⁷¹ *Ibid.*, p. 98.

⁷² *Ibid.*, p. 107.

⁷³ *Ibid.*, p. 115.

⁷⁴ *Ibid.*

the laws of humanity.⁷⁵ The Commission dismissed the sovereign immunity defense and asserted that otherwise, “the greatest outrages against the laws and customs of war and the laws of humanity...could in no circumstances be punished. Such a conclusion would shock the conscience of civilized mankind.”⁷⁶ It especially referred to the punishment of the Kaiser and stressed that the principles of the laws and customs of war and the laws of humanity would be meaningless, if the Kaiser were not brought to trial while “other offenders less highly placed were punished.”⁷⁷ However, while it referred to the Kaiser and the other high-rank officials as liable for numerous atrocities committed during the War, the Commission concluded that it would be unprecedented to hold the Kaiser and other German officials ‘criminally’ liable for waging a war of aggression against Belgium and Luxembourg.⁷⁸

While it also contended that those found guilty of the prescribed crimes could be tried in national courts, an international criminal court should be created in the cases where the accusations against the suspects were directed in more than one states.⁷⁹ The Commission asserted that each of the Allies had the authority to prosecute prisoners of war who were believed to have violated the laws and customs of war. However, it also proposed a consolidated single high tribunal for the cases involving individuals who allegedly committed war crimes and other similar crimes against civilians and troops from several allied countries. This tribunal should be authorized to apply “the principles of the law of nations as they result from the usages established among civilized peoples, from the laws of humanity and from the dictates of public conscience.”⁸⁰ The tribunal was to be composed of four persons. In case the tribunal finds the accused guilty, it would have the power to sentence him to a punishment that might be “imposed for such an offence or offences by any court in any country represented on the tribunal.”⁸¹ The selection of the cases was to be made by a Prosecuting Commission of five members who shall be appointed by the Governments of the United States, the British Empire, France, Italy and Japan.⁸²

However, despite shocking findings relevant wartime atrocities and the novel proposals of remedies contained in the Commission’s report, not all nations favored punishing those who were accused of having committed war crimes and other relevant crimes. In particular, the US sought a stable peace, rather than criminally prosecuting war criminals. For the US the greatest threat to the international order was Russian communism.⁸³ Especially for this reason, the US representatives submitted a number of reservations to the Commission’s report.⁸⁴ The American representatives in the Commission objected to the references to the “laws and principles of humanity” contained in the report, and further argued that those are too vague and general, thus

⁷⁵ The relevant conclusion in the report reads as follows: “all persons belonging to enemy countries, however high their position may have been, without distinction of rank...are liable to criminal prosecution.” *Ibid.*, p. 117.

⁷⁶ *Ibid.*, p. 116.

⁷⁷ *Ibid.*, p. 117.

⁷⁸ *Ibid.*, p. 118.

⁷⁹ MacPherson, “Building an International Criminal Court for the 21st Century,” p. 5.

⁸⁰ Report of the Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties, p. 121.

⁸¹ *Ibid.*, p. 122.

⁸² *Ibid.*, pp. 122-23.

⁸³ Lippman, “Towards an International Criminal Court,” p. 16.

⁸⁴ The text of the “Memorandum of Reservations Presented by The Representatives of The United States to the Report of the Commission on Responsibilities,” is annexed to the Report of the Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties, pp. 127ff.

cannot be proper guides for the administration of international criminal law.⁸⁵ The US also strongly objected the imposition of criminal liability on heads of State. The American representatives argued that such individuals were only accountable to domestic authorities, and thus, holding them responsible for commission of acts requiring criminal prosecution before a foreign or international tribunal would be a serious abrogation of State sovereignty.⁸⁶ According to the dissenting representatives, the existing national tribunals, rather than an international one, for the prosecution of war crimes were more reliable, as those tribunals already possessed well-established laws, procedures and punishments. For the cases involving criminal acts concerning more than one country, the American representatives proposed the gathering of the members of the relevant national courts.⁸⁷ The stated reason by the American representatives for the objection voiced against the high tribunal proposed by the Commission was that there was no precedent for such a tribunal and it was “unknown in the practice of nations.”⁸⁸ They also referred to the fact that there was “no international statute or convention making a violation of the laws and customs of war –not to speak of the laws or principles of humanity- an international crime, affixing a punishment to it, and declaring the court which has jurisdiction over the offence.”⁸⁹ Accordingly, the American representatives openly stated that the US was not willing to cooperate in the establishment and proper functioning of the proposed high tribunal.⁹⁰

In addition to the US, Japan also stated some objections against the proposals contained in the Commission’s report. Even though those objections were not as ardent as those of the US, they referred to almost the same concerns. Japanese delegates questioned the establishment of an international tribunal after a war is over, and the existence of a penal law under international law applicable to those who were found guilty of war crimes. In this vein, they also pointed out the possible consequences “which would be created in the history of international law by the prosecution for breaches of the laws and customs of war.”⁹¹

At the Conference held following the submission the Commission’s report, the Allied Powers also discussed the Germany’s surrender and negotiated a treaty where they dictated the terms. The deliberations at the conference also included the issues concerning the prosecution of high-level officials and war criminals from the defeated powers for “crimes against the laws of humanity.” Ultimately, the victorious powers concluded the Treaty of Versailles with Germany on June 1919.⁹² The Treaty included a provision that provided for the establishment of an ad hoc

⁸⁵ *Ibid.*, p. 134.

⁸⁶ *Ibid.*, pp. 135-36, 144, 148.

⁸⁷ *Ibid.*, p. 142.

⁸⁸ *Ibid.*, p. 145.

⁸⁹ *Ibid.*, p. 146.

⁹⁰ “In view of their objections to the uncertain law to be applied...and in view also of their objections to the extent of the proposed jurisdiction of that tribunal, the American representatives were constrained to decline to be a party of its creation...They therefore refrained from taking part either in the discussion of the constitution or of the procedure of the tribunal.” *Ibid.*, pp. 148-49.

⁹¹ “Reservations by the Japanese Delegation,” Annex III to Report of the Commission on Responsibilities, pp. 151-52.

⁹² Treaty of Peace Between the Allied and Associated Powers and Germany, concluded at Versailles, June 28, 1919 (Treaty of Versailles). The treaty text can be reached at:

<http://history.acusd.edu/gen/text/versaillestreaty/all440.html>.

international criminal tribunal to prosecute the Wilhelm II of Germany for initiating the war.⁹³ However, he fled to neutral Holland, which refused his extradition.⁹⁴ Although the Allied powers requested his extradition through diplomatic channels, because it became evident that Holland would never cooperate with them they made no formal attempts to have Holland submit the Kaiser to the international tribunal that would try him.⁹⁵

The failure in trying the Kaiser should be seen as a big disappointment and a step backward, given the salience of the accusations directed at him and that he was being held responsible for initiating the war, thus causing deaths in great numbers. Wilhelm II, the Kaiser of Germany, was especially held directly responsible for the slaughter of civilians in Belgium.⁹⁶ In the early days of the war he wrote in a note to the Austrian Kaiser:

My soul is torn, but everything must be put to fire and sword: men, women and children and old men must be slaughtered and not a tree or house be left standing. With these methods of terrorism, which are alone capable of affecting a people as degenerate as the French, the war will be over in two months, whereas if I admit considerations of humanity it will be prolonged for years. In spite of my repugnance I have therefore been obliged to choose the former system.⁹⁷

Despite this ‘confession’ and solid evidence proving the Kaiser’s involvement and clear connection with the wartime commissions of crimes, concerns over sovereign rights and the view that heads of states are immune against prosecutions prevailed.

The Treaty of Versailles also provided for the prosecution of German officials accused of violating the laws of war. However, in that case there would be no international tribunal but national courts of the Allied powers.⁹⁸ Treaty of Versailles, as noted earlier, created the Commission on the Responsibilities of the Authors of War and on Enforcement of Penalties. The crimes considered by the Commission included rape, use of poisonous gas, murders, massacres, waging aggressive war, for which it proposed a tribunal consisting of twenty-two members.⁹⁹

⁹³ Treaty of Versailles, Article 227. This articles state: “A special tribunal will be constituted to try the accused, thereby assuring him the guarantees essential to the right of defence. 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.”

⁹⁴ Schabas, *An Introduction to the International Criminal Court*, p. 3.

⁹⁵ O'Connor, “The Pursuit of Justice and Accountability: Why The United States Should Support the Establishment of an International Criminal Court,” p. 936.

⁹⁶ Lippman, “Towards an International Criminal Court,” p. 9.

⁹⁷ This note was reprinted in William Adams, “The American Peace Commission And The Punishment Of Crimes Committed During War,” *Law Quarterly Review*, Vol. 39, 1923, pp. 245-48, cited in Lippman, “Towards an International Criminal Court,” pp. 9-10, at note 42.

⁹⁸ Treaty of Versailles, Articles 228 and 229. Article 229 states: “Persons guilty of criminal acts against the nationals of one of the Allied and Associated Powers will be brought before the military tribunals of that Power. Persons guilty of criminal acts against the nationals of more than one of the Allied and Associated Powers will be brought before military tribunals composed of members of the military tribunals of the Powers concerned.”

⁹⁹ Jamison, “A Permanent International Criminal Court: A Proposal that Overcomes Past Objections,” p. 422.

The Commission completed its work and submitted its report consisted of a list of 895 alleged war criminals.¹⁰⁰

In addition to the failure in prosecuting the Kaiser in an international tribunal, the Allied powers could not proceed with the prosecutions of war criminals. Although the Treaty of Versailles provided their prosecution by the victorious powers' national courts, "by 1921, the zest of the Allies to set up joint or even separate military tribunals had waned, and new developments in Europe required that Germany not be further humiliated."¹⁰¹ The Allies were also greatly concerned about jeopardizing "the durability and stability of the already fragile Weimar Republic,"¹⁰² founded after the defeat of Germany in World War I. Moreover, it should be noted that Germany had refused to surrender the accused for prosecution by the Allies.¹⁰³ The German stance and determination was very well received by the Allies and thus they must have decided that Germany would never cooperate with them on this matter. As a consequence, the Allies, instead of establishing a separate Allied Tribunal, devolved this authority to Germany and asked the prosecution of a limited number of the suspects before the Supreme Court of Germany.¹⁰⁴

As a response to the request by the Allied forces, Germany passed the legislation that would make the trial of the alleged war criminals identified by the victorious powers possible. Although it had already introduced legal arrangements to implement the Treaty of Versailles' relevant provisions, with the new legislation Germany assumed to proceed with the trials. The trials took place in Leipzig and for that reason those trials are known as Leipzig trials. Since the Supreme Court authorities were empowered to decide which cases would be brought to trial under German law, German authorities requested all relevant information from the Allies. Accordingly, the Allies submitted only forty-five names from the original list of 895 previously prepared by the Commission to the German authorities for prosecution.¹⁰⁵

However, it should be noted that the information and evidence concerning those forty-five persons' involvement in war crimes was substantial, since both the 1919 Commission's extensive works and the Allies' supporting documentation were made available to the German Supreme Court. Despite the strong evidence, only twelve military officers were ultimately prosecuted before the *Reichsgericht*, the German Supreme Court.¹⁰⁶ However, the German Court's stance toward even those prosecuted was very mild. Not all prosecuted suspects were convicted. Even those who were convicted received sentences of imprisonment ranging from a

¹⁰⁰ Bassiouni, "From Versailles to Rwanda in Seventy-Five Years: The Need to Establish a Permanent International Criminal Court," p. 16.

¹⁰¹ *Ibid.*, p. 19.

¹⁰² O'Connor, "The Pursuit of Justice and Accountability: Why The United States Should Support the Establishment of an International Criminal Court," p. 936.

¹⁰³ MacPherson, "Building an International Criminal Court for the 21st Century," p. 6.

¹⁰⁴ Bassiouni, "From Versailles to Rwanda in Seventy-Five Years: The Need to Establish a Permanent International Criminal Court," p. 19.

¹⁰⁵ It is argued that the Allies originally sought to try 1,580 war criminals, a figure that contrasts with the Commission's list of 895. However, then the Allies reduced this number to 854. See, MacPherson, "Building an International Criminal Court for the 21st Century," p. 6. However, despite this conflict, it is certain that the Allies submitted forty-five names for a possible prosecution.

¹⁰⁶ Bassiouni, "From Versailles to Rwanda in Seventy-Five Years: The Need to Establish a Permanent International Criminal Court," p. 20.

few months to a few years. Most even did not serve their sentences in full.¹⁰⁷ Nevertheless, especially two of the judgments of the Supreme Court at Leipzig are important. These two concerning the sinking of two hospital ships and the killing of the war survivors are often cited “as precedents on the scope of the defense of superior orders.”¹⁰⁸ However, there were no other proceedings against any of the suspects of war crimes than those of the Leipzig Court. To sum up, “no international trials of Germans accused of war crimes ever took place, and no international court arose out of World War I”¹⁰⁹ and “the international community allowed many Germans believed to be guilty of war crimes to escape prosecution.”¹¹⁰

Undoubtedly, the Allies were reluctant to seek justice and try the individuals responsible for war crimes during World War I, and were much eager to observe their national interests.¹¹¹ This can clearly be seen in their urgent action to sign an armistice with Germany on November 11, 1919, and their postponement of the trials, which began about two years later than the armistice. This surely means that the Allies were ready to sacrifice the justice “on the altars of international and domestic politics of the Allies.”¹¹² This is also indicative of the fact that during the interwar period “the political will of the world's major powers [was] paramount over all else.”¹¹³

Notwithstanding that the Allies did not work hard to achieve justice after World War I by prosecuting and convicting the individuals responsible for large-scale crimes, the interwar period was “important because the proponents of international law moved to establish a permanent system of international criminal justice and a standing court to try violators of international law.”¹¹⁴ There have been numerous attempts to establish an international legal order that is more sensitive and responsive to the demands of justice.

The earlier attempt worth noting in this regard is the one made by the Executive Council of the League of Nations. During 1920 and 1921 it established an Advisory Committee of Jurists whose main task was to prepare a draft statute for the Permanent Court of International Justice. The draft statute submitted by this Committee was signed and ratified by many states in 1922.¹¹⁵ The Committee also became involved with the issue of creating an international criminal tribunal following World War I. Baron Descamps of Belgium, a member of the Advisory Committee proposed the establishment of a ‘high court of international justice’ and suggested that the jurisdiction of the court include offenses “recognized by the civilized nations but also by the demands of public conscience.” Although the Third Committee of the Assembly of the League

¹⁰⁷ MacPherson, “Building an International Criminal Court for the 21st Century,” p. 6.

¹⁰⁸ Schabas, *An Introduction to the International Criminal Court*, p. 4.

¹⁰⁹ Andreasen, “The International Criminal Court: Does the Constitution Preclude Its Ratification by the United States?” p. 704.

¹¹⁰ O'Connor, “The Pursuit of Justice and Accountability: Why The United States Should Support the Establishment of an International Criminal Court,” p. 936.

¹¹¹ For a detailed account on this matter, see, Willis, *Prologue to Nuremberg: The Politics and Diplomacy of Punishing War Criminals of the First World War*.

¹¹² Bassiouni, “From Versailles to Rwanda in Seventy-Five Years: The Need to Establish a Permanent International Criminal Court,” p. 20.

¹¹³ Bassiouni, “Establishing an International Criminal Court: Historical Survey,” p. 51.

¹¹⁴ O'Connor, “The Pursuit of Justice and Accountability: Why The United States Should Support the Establishment of an International Criminal Court,” p. 938.

¹¹⁵ Jamison, “A Permanent International Criminal Court: A Proposal that Overcomes Past Objections,” p. 423.

turned this proposal down declaring that the idea of creating such a court was “premature”¹¹⁶, it is of significance as it refers to public demands. There have been other attempts by especially individuals and non-governmental organizations, which seriously studied the creation of an international criminal court.¹¹⁷ This is an important fact indicating that civil society was a lot more concerned about achieving international justice.

A subsequent attempt and call for an International Court of Justice was made in 1922 at a meeting held by the International Law Association. Bearing in mind the failed attempt of the Advisory Committee of Jurists to create an international criminal court, the participants at the meeting stressed the need for such an institution. Hugh H. L. Bellot in his paper presented at the meeting referred to the “crying need” for the establishment of an International High Court of Justice.¹¹⁸ Bellot argued in the same paper that the existing procedures for the criminal prosecution of the alleged war criminals are unsatisfactory.¹¹⁹ National courts, the most widely used devices in the criminal prosecution of war criminals at the time, were open to biased approaches and conflicting judgments. He clearly stated that the preference in prosecuting the crimes involving an international dimension should be given to a transnational court as such a tribunal would be able to develop and implement a comprehensive transnational penal code.¹²⁰ Bellot’s proposed court would be so equipped that it would be competent to prosecute offenses against law and order during peace and war as well.¹²¹ Bellot’s proposal was so advanced that States as well as individuals would have the authority to lodge criminal cases with the proposed court.¹²² In Bellot’s opinion, the failure to prosecute and punish German war criminals made civilians more vulnerable to military attacks and created a general tendency toward the disregard of the international codifications on the conduct of war by the belligerents. In this regard, he noted, “frightfulness in all its manifestations must be prohibited; but if such prohibition is to be effective there must be a Court already in existence to pronounce judgment, and with power to carry that judgment into execution.”¹²³ In effect, he referred to the deterring impact of a permanent international court, an argument frequently voiced during the creation of the International Criminal Court. At the end of the meeting, where the urgency of creating a permanent International Criminal Court was emphasized, Bellot was charged with drafting a statute and then submitting it to a committee of the Association.¹²⁴

Subsequently, Bellot prepared a comprehensive draft statute for an international criminal court. This draft was presented at the conference held by the International Law Association in Stockholm in 1924 for discussion and possible revisions.¹²⁵ The draft met with serious and string

¹¹⁶ Schabas, *An Introduction to the International Criminal Court*, pp. 4-5.

¹¹⁷ MacPherson, “Building an International Criminal Court for the 21st Century,” p. 7.

¹¹⁸ Hugh H.L. Bellot, “A Permanent International Criminal Court,” *The International Law Association, Report of the Thirty-First Conference Held at the Palace of Justice, Buenos Aires, 24th August-30th August, 1922* 49 (1923), p. 63..

¹¹⁹ *Ibid.*, p. 74.

¹²⁰ *Ibid.*, pp. 74-75.

¹²¹ *Ibid.*, p. 76.

¹²² *Ibid.*, p. 77.

¹²³ *Ibid.*, p. 80.

¹²⁴ *Ibid.*, p. 86.

¹²⁵ Hugh H.L. Bellot, “Draft Statute For The Permanent International Criminal Court,” in *International Law Association, Report of the Thirty-Third Conference Held at the Riddarhuset and at the Riksdaghuset, Stockholm September 8th To 13th, 1924* 75 (1925)

criticisms. One of the critics noted the authority and ability of the military to control the conduct of combatants needed to be preserved, arguing that the proposed provision for the prosecution of war criminals after the end of the war would prolong the conflicts.¹²⁶ The same critic also stressed the impact of such a court on national sovereignty. According to him, an international criminal court was nothing but a threat to “the cause of national independence; of the right of each nation and each man to work out its and his own destiny and its and his own salvation without foreign dictation, free from foreign jurisdiction, foreign laws, or foreign control.”¹²⁷ John Hinkley of the United States also strongly opposed the proposed international court based on the same argument that the court would infringe upon national sovereignty. He argued that the right and authority to prosecute, try and punish an individual for a crime he committed “must rest on the authority conferred by the laws of his own country.”¹²⁸

While the criticisms intensified on the proposed court’s alleged infringement upon national sovereignty, additional criticisms are also worth noting. One of the most eagerly objected feature of the Bellot’s proposal was its recognition of individual complaints before the court.¹²⁹ The critics argued that international law regulated the inter-State relations, and did not recognize individuals as subjects.¹³⁰ After Bellot’s replies to the critics were heard, the Association forwarded Bellot’s draft statute to a committee for consideration and review.¹³¹

In 1926, a report and final draft of a Statute of a High Court prepared by the Permanent International Criminal Court Committee of the International Law Association was submitted and then discussed at the meeting held in Vienna.¹³² The committee contended that creation of such a court was not only an urgent need, but would also be a practical mean in resolving international conflicts. In reaching this observation, the committee noted that the prosecution of individuals before a foreign tribunal as well as the trial and punishment of war criminals by domestic courts were equally problematic,¹³³ as the first was easily dismissed and criticized by the home country of the accused, and the latter was in general seen as impaired with bias.

The preamble of the draft statute provided that the International Penal Court was to be a Division of the Permanent International Court of Justice at The Hague. This criminal division was to be given the jurisdiction over States and individuals accused of committing international crimes.¹³⁴ Under the proposed Statute, every state had the right to deposit a charge on its own behalf and on behalf of its subjects as well. Every State was entitled to lodge a charge against any other State

¹²⁶ *Ibid.*, pp. 94-95.

¹²⁷ *Ibid.*, p. 95.

¹²⁸ *Ibid.*, p. 108.

¹²⁹ *Ibid.*, p. 101.

¹³⁰ *Ibid.*, p. 102.

¹³¹ *Ibid.*, pp. 110-111. At the end, it was stated “that this Conference, without expressing any further opinion upon the practicability or expediency of the creation of an International Criminal Court, refers it to a Committee to consider Dr. Bellot’s report and see if a scheme for such a Court can be composed.”

¹³² International Law Association, Report Of The Permanent International Criminal Court Committee Report of the Thirty-Fourth Conference Held at the Imperial Palace and at the Chamber of Commerce, Vienna, August 5th to August 11th, 1926 109 (1927).

¹³³ *Ibid.*, pp. 109-110.

¹³⁴ Preamble of the International Law Association’s Draft Statute for an International Criminal Court of 1926, *ibid.*, p. 113.

on its own behalf as well as on behalf of its subjects or citizens against any other State.¹³⁵ If the accused was to be found guilty, the relevant judgment was to be executed by the State in which the accused was resident.¹³⁶

As usual, numerous criticisms were voiced against the draft statute on the grounds that it was contrary to the generally accepted principles regarding national sovereignty and non-intervention. Some argued that the proposed court would deteriorate the tensions following the end of state of war. Some others rejected the committee's comment that national courts were biased in prosecuting war crimes.¹³⁷ However, a significant number of participants supported the proposal. Some argued that such a court would not necessarily mean an interference with the national sovereignty, as States would voluntarily devolve sovereign power to the court.¹³⁸ Some others pointed out the lack of such an institution during war times, and stressed that should such a court had existed, many conflicts could have been prevented.¹³⁹ Largely due to those supports, in the end, the Association endorsed the draft statute for an international court of criminal justice.¹⁴⁰

In 1925, the Inter-Parliamentary Union, an international organization of Parliaments of sovereign States established in 1889, recognized the criminal jurisdiction of the Permanent Court of International Justice.¹⁴¹ The Union made several calls through a number of resolutions for the adoption of an international criminal code by which the individuals and States would be held liable for the commission of such acts as initiation of a war of aggression and war crimes.¹⁴² The Union also proposed that the Permanent Court of International Justice would be given jurisdiction to adjudicate all international crimes and offenses. The same proposal also provided that an International Public Prosecutor's Department and a Chamber where the accused would be brought to would be established.¹⁴³ The decisions of the Court were to be executed by the Council of the League of Nations and all Member States were to be obligated to comply with those decisions and the subsequent sanctions associated with the decisions.¹⁴⁴

A later attempt was made at the 1928 Havana Conference of Central American states. The participants drafted a Code of International Law in which such crimes as piracy and slave trade were referred to as violations of international law. However, it applied to only a state. Moreover, this document was criticized as it allowed nations to benefit from the 'good will' provision, which hindered any possible advance in the principle of universal criminal accountability.¹⁴⁵ In

¹³⁵ *Ibid.*, p. 120.

¹³⁶ *Ibid.*, p. 125.

¹³⁷ *Ibid.*, p. 153-154.

¹³⁸ *Ibid.*, pp. 157-58.

¹³⁹ *Ibid.*, pp. 173, 176.

¹⁴⁰ *Ibid.*, p. 308.

¹⁴¹ Inter-Parliamentary Union, Complete Rendu De Law XXXIII Conference Tenue a Washington Du 1 Au 7 Octobre et a Ottwar le 13 Octobre 1925, reprinted in Benjamin B. Ferencz, *Half A Century of Hope: An International Criminal Court- A Step Toward World Peace: A Documentary History and Analysis* (Dobbs Ferry, NY: Oceana Publications, Inc., 1980), p. 244.

¹⁴² "Fundamental Principles of an International Legal Code for the Repression of International Crimes," *ibid.*, pp. 247-50.

¹⁴³ *Ibid.*, p. 250.

¹⁴⁴ *Ibid.*

¹⁴⁵ Jamison, "A Permanent International Criminal Court: A Proposal that Overcomes Past Objections," p. 423.

addition to this regional attempt, the 1929 Geneva Conventions also contributed to the international criminal law by expanding the scope of the earlier Geneva arrangements on the wounded and prisoners of war. Moreover, the Hague regulations on the conduct of war were exceeded by the Kellogg-Briand Pact, which declared the initiation of a war of aggression to be illegal.¹⁴⁶

Although the earlier attempt had failed, there have been many other efforts to create an international criminal court. During the 1930s, those attempts were more focused on creating a high international body addressing the issue of terrorism and punishing the perpetrators of the terrorist acts. Those efforts culminated in setting up a Convention on Terrorism to meet two times in Geneva on April 30, 1935, and on January 26, 1936.

The trigger for and incentive towards those efforts could be associated with the assassination of King Alexander of Yugoslavia and French Foreign Minister by a Croatian nationalist in October 1934. The extradition of the assassin was declined by Italy where he fled to on the grounds that the assassinations were political crimes.¹⁴⁷ France responded this action by submitting a memorandum to the League of Nations that called for the codification of a convention on terrorism as well as the creation of a criminal court to be authorized to prosecute terrorists.¹⁴⁸ In December 1934, a Committee for the International Repression of Terrorism was established under the auspices of the Council of the League of Nations. The main task of the Committee was to prepare a preliminary draft of an international convention on the repression of crimes committed with a political and terrorist motive.¹⁴⁹ At its first meeting held in Geneva in April 1935, the Committee drafted a convention foreseeing the punishment of outlawed acts directed against leading public and political figures and similar ones threatening the public safety.¹⁵⁰ In the second meeting held in January 1936 the draft documents were modified based on the proposals and comments made by various governments.

The participants at the first Convention in April 1935 also discussed a draft international criminal code proposed by Pella of Italy. A proposal for the establishment of an international criminal court was also made; however, several participants opposed it. Therefore, in order to attain a solution, one year later in 1936 the proposal for an international criminal court was left behind and the issue of terrorism was discussed separately. Accordingly, the Convention for the Prevention and Punishment of Terrorism and the Convention for the Creation of an International Criminal Court were adopted in 1937. The proposed court's jurisdiction was confined to the

¹⁴⁶ "Development in the Law: International Criminal Law," *Harvard Law Review*, Vol. 114, Issue 7, 2001, pp. 1950-51. Article 1 of the Kellogg-Briand Pact of 1929 states, "The high contracting parties solemnly declare in the names of their respective peoples that they condemn recourse to war for the solution of international controversies, and renounce it as an instrument of national policy in their relations with one another." This pact is also important in that it was referred to as the basis for the war crimes trials conducted following the end of WWII. See, John A. Maxwell and James J. Friedberg (eds.), *Human Rights in Western Civilization: 1600-Present*, 2nd edition (Dubuque, IO: Kendall/Hunt Publishing, 1994), p. 128.

¹⁴⁷ Ferencz, *Half A Century of Hope: An International Criminal Court- A Step Toward World Peace: A Documentary History and Analysis*, p. 48.

¹⁴⁸ Suggestions Presented to the Council by the French Government, Appendix IV, Committee for The International Repression of Terrorism, Report to the Council on the First Session of the Committee, 1935, reprinted in *ibid.*, pp. 269ff.

¹⁴⁹ *Ibid.*, p. 270.

¹⁵⁰ *Ibid.*, pp. 271-72.

scope of the Convention on Terrorism. Also, the court's entry into force was made subject to the Terrorism Convention's entry into force. However, the Court never came into force.¹⁵¹ Only India ratified the Convention on Terrorism, while nineteen states signed it by May 1938. The Convention for the Creation of an International Criminal Court was signed by thirteen states, none of which ratified it. It seems that "the majority of these nations were not yet willing to give up their national sovereignty to a body with compulsory jurisdiction."¹⁵² The following observation confirms the preceding one:

The Convention for the Creation of an International Criminal Court was an effort to overcome the objections lodged against previous proposals. The court's jurisdiction was limited to a narrow range of offenses and the court was to apply municipal rather than international law. States were provided the option whether to prosecute or extradite offenders to a third party State or to the tribunal on terrorism. Nevertheless, States clearly were not willing to restrict their prosecutorial discretion and resisted recognizing the jurisdiction of an international court comprised of foreign judges who were empowered to apply alien legal doctrines.¹⁵³

iii. The Period Between World War II and the End of Cold War:

The failure of the world in introducing satisfying remedies to prevent future atrocities such as those committed during World War I could surely be considered as one of the leading factor that caused deaths, enormous in amount, and horrifying in kind, during World War II. It could be argued that if some effective measure were taken in the immediate aftermath of World War I, there would be no appalling massacres such as Holocaust in as late as 1940s, when the world were much more civilized in many respects, but equally ignorant of large-scale crimes committed against the human race.

However, this time the world seemed to be more sensitive and responsive to the atrocities, especially those committed by the Nazis. This sensitivity could be best seen in the efforts of the Allies to prosecute war criminals even before the actual end of the War.¹⁵⁴ In 1942, the Allies

¹⁵¹ It is argued that several world crises that erupted during the late 1930s prevented the proposed court's entry into force. See, Latore, "Escape Out the Back Door or Charge in the Front Door: U.S. Reactions to the International Criminal Court," p. 162.

¹⁵² Jamison, "A Permanent International Criminal Court: A Proposal that Overcomes Past Objections," p. 423.

¹⁵³ Lippman, "Towards an International Criminal Court," p. 44.

¹⁵⁴ However, it should be noted that some were in favor of executing the alleged war criminal immediately, without prosecutions and trials against them. For instance, it is argued that the British suggested that the Nazis be executed. See, MacPherson, "Building an International Criminal Court for the 21st Century," p. 8, and Andreasen, "The International Criminal Court: Does the Constitution Preclude Its Ratification by the United States?" p. 703. The British based their suggestion on the premise that "their 'guilt was so black' that it was 'beyond the scope of any judicial process.'" However, the big powers aside from Britain did not support this argument. For instance, Stalin advocated a special international tribunal for prosecuting the senior suspects of war criminals, namely Hitler, his close advisers, and top military leaders. Likewise, both the United States and France preferred the establishment of an international tribunal to prosecute war criminals. The British suggestion of summary execution was also attributed to the fear that "fair procedures would allow the accused to use the tribunal as a forum for propaganda and self-justification." Ultimately, largely because of the United States' insistence, the idea of an international criminal tribunal prevailed in this discussion. See, Bassiouni, "From Versailles to Rwanda in Seventy-Five Years: The Need to Establish a Permanent International Criminal Court," p. 23.

signed an agreement creating the United Nations War Crimes Commission (UNWCC).¹⁵⁵ This Commission, composed of members of most of the Allies, and chaired by Sir Cecil Hurst of the United Kingdom, was established to “set the state for post-war prosecution.”¹⁵⁶ Having recognized that “the likelihood that justice would not be served in the national court of a nation where state policy had actively participated in the atrocities committed,”¹⁵⁷ it then prepared a Draft Convention for the Establishment of a United Nations War Crimes Court,¹⁵⁸ which was largely based on the 1937 Treaty of the League of Nations.¹⁵⁹ However, despite the expectations from the Commission, it was to a large extent subject to political rivalries and “considerations and ultimately relegated to a role far inferior to that which was expected by the Allies.” It was unable to be effective especially because it had little support and political power, given that most of its representatives came from governments in exile, whose futures were uncertain. Moreover, in order to proceed with investigating and obtaining evidence of war crimes the Commission heavily relied on the Allied Powers, who then failed to provide adequate staff or funds. The Allies also failed to submit necessary information to the Commission, thus its chair announced it was unable to fulfill its mandate.¹⁶⁰

However, after it became evident that the atrocities committed in the territories occupied by Germany were so horrifying in kind and extensive in scale that they could not be overlooked and that the perpetrators could not be allowed to go unpunished, the Allies began working on collecting information on war criminals. In addition, the British government, considering the above fact, began to press the Commission to proceed. This pressure turned to be fruitful, and as a consequence, it managed to prepare 8,178 “dossiers” on alleged war criminals. Although the information it collected was never used in the proceedings of the international military tribunals, which will be addressed below, subsequent national prosecutions against the war criminals of World War II heavily relied on the Commission’s findings.¹⁶¹

Notwithstanding the Allies set the work of the Commission aside, they demonstrated the will and determination to achieve justice by establishing special international military tribunals that were mandated to prosecute and try the suspects of war criminals. It is worth noting that the governments of the United States, United Kingdom and the Soviet Union had already declared in 1943 Moscow Conference that

those German officers and men and members of the Nazi party who have been responsible for or have taken a consenting part in the above atrocities, massacres and executions will be sent back to the countries in which their abominable deeds were done

¹⁵⁵ It should be noted that while preceded by the term United Nations, this Commission had nothing to with the United Nations Organization created in 1945.

¹⁵⁶ Schabas, *An Introduction to the International Criminal Court*, p. 5.

¹⁵⁷ Jamison, “A Permanent International Criminal Court: A Proposal that Overcomes Past Objections,” p. 424.

¹⁵⁸ “Draft Convention for the Establishment of a United Nations War Crimes Court,” UN War Crimes Commission, Doc.C.50(1), 30 September 1944. Article 1(2) of the Convention was as follows: “The jurisdiction of the Court shall extend to the trial and punishment of any person - irrespective of rank or position - who has committed, or attempted to commit, or has ordered, caused, aided, abetted or incited another person to commit, or by his failure to fulfill a duty incumbent upon him has himself committed, an offence against the laws and customs of war.”

¹⁵⁹ Schabas, *An Introduction to the International Criminal Court*, p. 5.

¹⁶⁰ Bassiouni, “From Versailles to Rwanda in Seventy-Five Years: The Need to Establish a Permanent International Criminal Court,” p. 22.

¹⁶¹ *Ibid.*, pp. 22-23.

in order that they may be judged and punished according to the laws of these liberated countries and of free governments which will be erected therein

and that “German criminals whose offenses have no particular geographical localization and who will be punished by joint decision of the government of the Allies.”¹⁶² The Moscow Declaration was the forerunner of the London Agreement, of which Article 1 states that “an International Military Tribunal for the trial of war criminals whose offenses have no particular geographical location whether they be accused individually or in their capacity as members of the organizations or groups or in both capacities” shall be established.¹⁶³ This time, the Provisional Government of France also joined the Agreement, which annexed the Charter of the International Military Tribunal (also known and referred to as the Constitution of the International Military Tribunal).¹⁶⁴ Under the Charter, the Tribunal would have the power to try and punish who committed the acts coming within the jurisdiction of the Tribunal. These acts for which there would be individual criminal responsibility were classified into three groups, namely crimes against peace, war crimes and crimes against humanity.¹⁶⁵ The individual criminal responsibility would apply to all individuals, irrespective of their rank or official position.¹⁶⁶ This is a significant breakthrough, given that the provision allowing the prosecution of even Heads of States would be interpreted as a limitation to national sovereignty. The Charter also provided that each Acceding State would “appoint a Chief Prosecutor for the investigation of the charges against and the prosecution of major war criminals.”¹⁶⁷ Subsequently, the teams of investigation

¹⁶² “A Decade of American Foreign Policy: Basic Documents, 1941-1949,” (prepared by the Staff of the Committee and the Department of State) (Washington, DC: Government Printing Office, 1950), available through The Avalon Project of Yale University Law School website:

<http://www.yale.edu/lawweb/avalon/wwii/moscow.htm#imtmoscow>.

¹⁶³ The Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, Aug. 8, 1945, 82 U.N.T.S. 279 (London Agreement), available through The Avalon Project of Yale University Law School website: <http://www.yale.edu/lawweb/avalon/imt/proc/imtchart.htm>.

¹⁶⁴ Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Aug. 8, 1945, Charter of the International Military Tribunal, 59 Stat. 1544, 1546, 82 U.N.T.S. 279, 284 (London Charter), available at: <http://www.yale.edu/lawweb/avalon/imt/proc/imtconst.htm>. Nineteen states later acceded the Charter later.

¹⁶⁵ The Charter defines those acts in Article 6 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.

¹⁶⁶ Article 7 of the London Charter states that “The fact that the Defendant acted pursuant to order of his Government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment if the Tribunal determines that justice so requires.”

¹⁶⁷ Article 14 of the London Charter states,

The Chief Prosecutors shall act as a committee for the following purposes:

- (a) to agree upon a plan of the individual work of each of the Chief Prosecutors and his staff,
- (b) to settle the final designation of major war criminals to be tried by the Tribunal,

appointed by the signatories began collecting evidence. The American team was the most successful one, as it provided most of the documents used as evidence in the proceedings against the accused.¹⁶⁸

The Military Tribunal established to prosecute war criminals under the London Charter indicted twenty-four persons, all of whom German. Of those twenty-two prosecuted, three were acquitted, twelve were sentenced to death, three were sentenced to life imprisonment, and the rest were sentenced to terms of imprisonment ranging from ten to twenty years. One defendant committed suicide at the end of the trial.¹⁶⁹ Although these trials are important and might be seen as the achievement of at least partial justice, it is unfortunate that no Allied military personnel was indicted or tried for war crimes committed during the war.

Following the “Nuremberg Trials”¹⁷⁰, which were international in character, the Allies set up regional courts. Subsequent to the unconditional surrender of Germany, acting under the London Charter the Allies enacted Allied Control Council Law No. 10 (CCL 10), which allowed them to prosecute Germans.¹⁷¹ Like the Nuremberg Trials, the trials under CCL 10 were effective.¹⁷²

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- (c) to approve the Indictment and the documents to be submitted therewith,
 - (d) to lodge the Indictment and the accompany documents with the Tribunal,
 - (e) to draw up and recommend to the Tribunal for its approval draft rules of procedure.

Article 15 determines the duties of the Chief Prosecutors in their individual capacities:

- a) investigation, collection and production before or at the Trial of all necessary evidence,
- (b) the preparation of the Indictment for approval by the Committee,
- (c) the preliminary examination of all necessary witnesses and of all Defendants,
- (d) to act as prosecutor at the Trial,
- (e) to appoint representatives to carry out such duties as may be assigned them,
- (f) to undertake such other matters as may appear necessary to them for the purposes of the preparation for and conduct of the Trial.

¹⁶⁸ Bassiouni, “From Versailles to Rwanda in Seventy-Five Years: The Need to Establish a Permanent International Criminal Court,” p. 28.

¹⁶⁹ *Ibid.*, p. 29. Detailed information about those indicted, including their names and the accusations against them, can be found at: <http://www.yale.edu/lawweb/avalon/imt/proc/countb.htm>.

¹⁷⁰ There are a lot of works on Nuremberg Trials. See, among others, Steven Ratner, *Accountability for Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy* (Oxford: Oxford University Press, 1997); Philippe Sands (ed.), *From Nuremberg to The Hague: The Future of International Criminal Justice* (Cambridge: Cambridge University Press, 2003); W. J. Bosch, *Judgment on Nuremberg. American Attitudes toward the Major German War Crimes Trials* (Chapel Hill, NC: University of North Carolina Press, 1970); Robert E. Conot, *Justice at Nuremberg* (New York: Harper & Row, 1983); Eugene Davidson, *The Trial of the Germans, Nuremberg 1945-1946: An Account of the Twenty-Two Defendants before the International Military Tribunal at Nuremberg* (New York: Macmillan, 1967); George Ginsburg and V. N. Kudriavtsev (eds.), *The Nuremberg Trial and International Law* (Dordrecht: Nijhoff, 1990); Sheldon Glueck, *The Nuremberg Trial and Aggressive War* (New York: Knopf, 1946); J. J. Heydecker and J. Leeb. *The Nuremberg Trial* (Cleveland: World Publishing, 1962); A. M. S. Neave, *Nuremberg: A Personal Record of the Trial of the Major Nazi War Criminals in 1945-6* (London: Hodder & Stoughton, 1978); Bradley F. Smith, *The American Road to Nuremberg. The Documentary Record 1944-1945* (Stanford: Hoover Institution Press, 1982); Telford Taylor, *The Anatomy of the Nuremberg Trials. A Personal Memoir* (New York: Knopf, 1992) and Robert K. Woetzel, *The Nuremberg Trials in International Law* (New York: Praeger, 1960).

¹⁷¹ Allied 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, Berlin, January 31, 1946; reprinted in Ferencz, *Half A Century of Hope: An International Criminal Court: A Step Toward World Peace- A Documentary History and Analysis*, pp. 488ff.

About 20,000 German national were prosecuted by the war crime tribunals established by the Allies in the zones of occupation.¹⁷³ Moreover, based on the Council Law mentioned above, the German courts continued prosecutions against the suspects of war criminals for several decades.¹⁷⁴ France, Canada and Israel also held trials for punishing the perpetrators of the crimes committed during World War II. Australia and the United Kingdom, while having passed national legislation enabling the prosecutions, nobody has been brought to trial in this context.¹⁷⁵

However, the Allies did not achieve a similar success in trying the Italian war criminals. Since the aforesaid Council Law permitted them to act as the sovereign authority in Germany only, that law did not apply to the territory of Italy. Instead it was subjected to a Surrender Treaty that made the extradition and prosecution of war criminals possible.¹⁷⁶ However, the prosecutions foreseen in this document never took place, due to the subsequent fear of communism that became pervasive throughout Europe. Having believed that Italian fascists were prominent enemies of communism, the Allies hesitated to proceed with the prosecution or extradition of Italian suspects of war crimes. As a consequence, despite the strong evidence against those suspects, and the requests of the extradition of war criminals in pursuant Article 29 of the Surrender Treaty by the governments of Greece, Yugoslavia, Libya and Ethiopia, in 1946, Italy denied to extradite the requested persons.¹⁷⁷

However, the significance of the Nuremberg Trials should not be underestimated. One could easily appreciate what was achieved in Nuremberg, considering the political circumstances of the time. Affected greatly by the Nazis' atrocities, the text of the UN Charter of 1945 contained a few broad references to human rights. In other words it was not a truly human rights document, nor was strong enough to be binding over the States' practices concerning human rights. It was thus weak and insufficient both in terms of content and binding strength. As opposed to this, the Nuremberg Trials that took place almost at the same time were very powerful. Whereas the human rights provisions of the UN Charter "were more programmatic than operational, more a program to be realized by states over time than legal rules to be applied immediately to states," what was done at Nuremberg "was concrete and applied: prosecutions, convictions, punishment." The prosecutions at Nuremberg were based on international customs and norms that had deep roots in international law. But the most striking achievement of the Nuremberg was that it applied those customs, norms and doctrines to impose criminal punishment on individuals for committing the three crimes the London Charter covered. "The notion of crimes against the

¹⁷² Bassiouni, "From Versailles to Rwanda in Seventy-Five Years: The Need to Establish a Permanent International Criminal Court," p. 29.

¹⁷³ O'Connor, "The Pursuit of Justice and Accountability: Why The United States Should Support the Establishment of an International Criminal Court," p. 942.

¹⁷⁴ Schabas, *An Introduction to the International Criminal Court*, p. 6.

¹⁷⁵ Bassiouni, "Establishing an International Criminal Court: Historical Survey," p. 55.

¹⁷⁶ The Instrument of Surrender of Italy, 29 September 1943, Art. 29.

¹⁷⁷ It should be noted that the crimes committed by the alleged Italian war criminals were grave. The War Commission listed 750 Italian war criminals who were mainly responsible for the following: illegal use of poisonous gas against Ethiopian civilians and combatants, killing of innocent civilians and prisoners of wars, torture and mistreatment of prisoners, bombing ambulances, destruction of cultural property, and other violations of the laws of armed conflicts during the Italo-Abyssinian war. Moreover, the same Commission obtained extensive evidence of crimes committed by the Italian suspects in Greece, Libya, and Yugoslavia during World War II. See, Bassiouni, "From Versailles to Rwanda in Seventy-Five Years: The Need to Establish a Permanent International Criminal Court," pp. 30-31.

law of nations for which violators bore an individual criminal responsibility was itself an older one, but it had operated in a restricted field.”¹⁷⁸ In other words, it not only applied the long-existing principle of individual criminal responsibility in a concrete and open manner, but also expanded its applicability. In this vein, it would not be an exaggeration to assert that the judgment delivered at the Nuremberg Trials contains elements of modern international criminal law, as it declared that

The very essence of the Charter is that individuals have international duties which transcend the national obligations of obedience imposed by the individual State. He who violates the laws of war cannot obtain immunity while acting in pursuance of the authority of the State if the State in authorizing action moves outside its competence under international law.¹⁷⁹

Notwithstanding their significance as an achievement of international justice, Nuremberg trials have been criticized for several reasons. One criticism refers to the content and authority of the Tribunal. It is argued that the principle that states do not judge each other (*par in parem non habet iurisdictionem*) is one of the foundations of international law. The argument goes saying that Nuremberg Tribunal acted against the principles of classical law of nations by trying and punishing political figures, who have in fact acted on behalf of their nations.¹⁸⁰ In fact, the Nazis accused of having committed the crimes contained in the London Charter during the war advocated the same view at Nuremberg. Their argument could perfectly be summarized as follows: “For what we have done only Germany can judge us. We acted in the interests of Germany alone, and only Germany has the right to decide whether we acted rightly or wrongly. It is no business of any other country what we did.”¹⁸¹ It is interesting to note that this argument is a good indication for the states’ primacy in world affairs even in the late 1940s.¹⁸² It also demonstrates that the principle of non-intervention was so prevalent that even those who committed the gravest crimes referred to it as a panacea for what they were going through, instead of seeking any other possible way out.

The response to this criticism also reveals the state-centric approach. Counter argument claims that there is no violation of international law in those trials, since four States acted to perform a duty, which was supposed to be performed by one state, in this case Germany. Furthermore, as the occupier forces, the Allies legally took over the authority of Germany in trying the suspects. In that case, they acted on behalf of Germany and proceeded with the trials.¹⁸³

¹⁷⁸ Henry J. Steiner and Philip Alston (eds.), *International Human Rights in Context: Law, Politics and Morals* (Oxford: Clarendon Press, 1996), p. 99.

¹⁷⁹ Judgment of the International Military Tribunal for the Trial of German Major War Criminals, Nuremberg, 30th September and 1st October, 1946, available at: <http://www.yale.edu/lawweb/avalon/imt/proc/judlawch.htm>.

¹⁸⁰ Meray, *Devletler Hukukuna Giriş*, p. 590.

¹⁸¹ William Eldred Jackson, “Putting the Nuremberg Law to Work,” *Foreign Affairs*, Vol. 25, Issue 4, 1947, p. 550.

¹⁸² However, it should be noted that the Nuremberg Tribunal rejected this argument by having stated that “It was submitted that international law is concerned with the action of sovereign States, and provides no punishment for individuals; and further, that where the act in question is an act of state, those who carry it out are not personally responsible, but are protected by the doctrine of the sovereignty of the State. In the opinion of the Tribunal, both these submissions must be rejected. That international law imposes duties and liabilities upon individuals as well as upon States has long been recognized.” Judgment of the International Military Tribunal for the Trial of German Major War Criminals, available at: <http://www.yale.edu/lawweb/avalon/imt/proc/judlawch.htm>.

¹⁸³ Meray, *Devletler Hukukuna Giriş*, p. 590.

Another criticism posed against the Nuremberg Trials is that those trials conflicted with the principle that there is no punishment without law. It is asserted that the crimes contained in the London Charter did not exist prior to its adoption, and thus when the alleged crimes were committed. Based on this, the argument goes saying that this Charter did not cover the past. However, the Tribunal itself declared that it applied the rules and customs of the existing laws of nations.¹⁸⁴ Since war crimes were outlawed both in custom and doctrine, the Tribunal was authorized to prosecute the perpetrators of those crimes. Moreover, the Briand-Kellog Pact of 1928 codified the crime of aggression. It is important to note here that 63 nations, including Germany, acceded to that Pact. Moreover, this was not the only arrangement that made aggression outlawed. The League of Nations repeatedly denounced aggression as criminal; so the whole world was of the opinion that aggressive war was a crime.¹⁸⁵ More importantly, the crimes over which the Tribunal was made authoritative were acts prohibited in national jurisdictions.¹⁸⁶ Considering that Germany, by having acceded to the Briand-Kellog Pact, outlawed the aggressive war, the authority of the Nuremberg Tribunal is justifiable, as “if a man plans aggression when aggression has been formally renounced by his nation, he is criminal.”¹⁸⁷

However, the remaining two criticisms are more important than the above. Many criticized the Trials referring to the fact that the Tribunal was composed of judges, who were drawn from the Allied countries. This raised doubts and questions regarding the impartiality of the proceedings.¹⁸⁸ However, the Allies’ preference is understandable, given that the Leipzig Tribunal established after the end of World War I failed to prosecute and convict its own nationals. Therefore, it is quite possible that the Allies feared that this time too, the crimes committed during the war would have gone unpunished.¹⁸⁹ And the last criticism is perhaps the most important one: that only the persons from the defeated nations were prosecuted, tried and

¹⁸⁴ The Judgment of the Nuremberg Tribunal mentioned of the defendants objection on this matter: “It was urged on behalf of the defendants that a fundamental principle of all law -international and domestic- is that there can be no punishment of crime without a pre-existing law. " Nullum crimen sine lege. nulla poena sine lege." It was submitted that ex post facto punishment is abhorrent to the law of all civilized nations, that no sovereign power had made aggressive war a crime at the time the alleged criminal acts were committed, that no statute had defined aggressive war, that no penalty had been fixed for its commission, and no court had been created to try and punish offenders.” However, the Tribunal refused the argument that it was directing accusations that were not codified in the pre-existing law: “it is to be observed that the maxim nullum crimen sine lege is not a limitation of sovereignty, but is in general a principle of justice. To assert that it is unjust to punish those who in defiance of treaties and assurances have attacked neighboring states without warning is obviously untrue, for in such circumstances the attacker must know that he is doing wrong, and so far from it being unjust to punish him, it would be unjust if his wrong were allowed to go unpunished. Occupying the positions they did in the government of Germany, the defendants, or at least some of them must have known of the treaties signed by Germany, outlawing recourse to war for the settlement of international disputes; they must have known that they were acting in defiance of all international law when in complete deliberation they carried out the designs of invasion and aggression. On this view of the case alone, it would appear that the maxim has no application to the present facts.” Judgment of the International Military Tribunal for the Trial of German Major War Criminals. The text of the judgment is available at: <http://www.yale.edu/lawweb/avalon/imt/proc/judcont.htm>.

¹⁸⁵ Henry L. Stimson, “The Nuremberg Trial: Landmark in Law,” *Foreign Affairs*, Vol. 25, Issue 2, 1947, p. 182.

¹⁸⁶ Meray, *Devletler Hukukuna Giriş*, pp. 591-92.

¹⁸⁷ Stimson, “The Nuremberg Trial: Landmark in Law,” p. 184.

¹⁸⁸ Latore, “Escape Out the Back Door or Charge in the Front Door: U.S. Reactions to the International Criminal Court,” p. 164.

¹⁸⁹ Meray, *Devletler Hukukuna Giriş*, p. 593.

convicted. No proceeding was held against individuals from the Allied forces. This is surely a paramount shortcoming for the Nuremberg Trials and for the sake of international justice.

The last fact indicates that the Nuremberg Tribunal was not in fact international. It is asserted that this tribunal could be viewed as a joint attempt, given that it was “composed only of allied personnel and had a limited mandate to prosecute only the defeated enemy.”¹⁹⁰ Because it was set up by the Allied forces, it was not accountable to an international body. This was one of the primary reasons for that the principles advanced by this Tribunal could not be enhanced and expanded further in the aftermath. A *Foreign Affairs* article authored in 1947 foresaw this well in advance:

It would seem especially important that the Nuremberg principles, which establish a rule of law overriding sovereignty and binding on all nations, should remain strong while the United Nations has not achieved full command of its powers. But the assizes of Nuremberg are no longer in being. The sentences have been carried out, the Tribunal has dissolved, the prosecutors have departed, and all the elaborate mechanism of justice is dispersed. The men who conceived it and made it work have all returned to their normal occupations. How, then, can we find effective means of perpetuating the Nuremberg principles so that they may operate as continuing sanctions of peace?¹⁹¹

Although the United Nations General Assembly, by adopting a resolution on 11 December 1946, affirmed the principles contained in the Charter of Nuremberg Military Tribunal and its judgment as the principles of the law of nations,¹⁹² the subsequent developments demonstrated that this affirmation did not mean much. With strong political support and will, the Nuremberg could have been a precedent and prototype for a permanent criminal court. However, despite some weak attempts to create such a body, within a relatively short time the progress made by the Nuremberg slowed down and eventually evaporated.

The Allies, the USSR in particular, were also determined to address the war crimes committed by the Japanese. First, in response to the request made by the USSR, the establishment of the Far Eastern Commission was agreed to in December 1945.¹⁹³ The Commission seated in Washington was formed by eleven states; however, the four Allied States had veto power. It was to transmit its directives to the Allied Council for Japan, an advisory group seated in Tokyo. While the Commission was established as an investigative body, its role was mainly political. In this regard, its main task was to establish a policy of occupation for Japan and to coordinate this policy in the Far East.¹⁹⁴ However, in addition to this function, the Commission also played

¹⁹⁰ MacPherson, “Building an International Criminal Court for the 21st Century,” p. 9.

¹⁹¹ Jackson, “Putting the Nuremberg Law to Work,” p. 551.

¹⁹² Affirmation of the Principles of International Law Recognized by the Charter of the Nuremberg Tribunal, G.A. Res. 95 (I), U.N. GAOR, 1st Sess., pt. 2, at 1144, U.N. Doc. A/236 (1946), text could be reached at the UN website: <http://www.un.org/documents/ga/res/1/ares1.htm>.

¹⁹³ The Commission was established by the agreement of the United Kingdom, the US and the Soviet Union at the meeting held in Moscow in December 1945 and held its first meeting on February 26, 1946. “Political and Legal Organizations,” *International Organization*, Vol. 1, Issue 1, 1947, p. 176.

¹⁹⁴ The Commission was to exercise the following functions:

- 1- To formulate the policies, principles, and standards in conformity with which the fulfillment by Japan of its surrender obligations was to be accomplished.

important roles in the prosecution, trials and carrying out the sentences of the suspected war criminals. However, its function ended when a treaty was signed with Japan.¹⁹⁵

On January 19, 1946, when the Nuremberg Military Tribunal was still in operation, the US General Douglas MacArthur as the Supreme Commander for the Allied Forces for the Pacific Theater and on behalf of the aforesaid Commission established the International Military Tribunal for the Far East (IMTFE). The Charter of the Tribunal¹⁹⁶ was approved on the same day and later amended on April 26.¹⁹⁷ The Tribunal was empowered to try and punish Far Eastern, especially Japanese, war criminals who were “charged with offenses which include crimes against peace, conventional war crimes and crimes against humanity,”¹⁹⁸ the same crimes as those the defendants at Nuremberg Trials were accused of. Despite this similarity, however, unlike the Nuremberg Tribunal, the IMTFE was not based on a treaty, but on the General MacArthur’s order. Bassiouni attributes the lack of a treaty in the establishment of this Tribunal to the US concerns about the ambitions of the Soviet Union in the Far East. Largely due to this reason, every endeavor regarding the pursuit of post-war justice in the Far East was “guided by MacArthur’s wishes.”¹⁹⁹

General MacArthur was empowered by the policy decision of the Far Eastern Commission on the Apprehension, Trial and Punishment of War Criminals in the Far East to establish an agency to investigate the war crimes committed during the war, collect and classify evidence and deal with other relevant matters. The members of the Commission and then of the Tribunal itself acted on behalf of their governments, and not on behalf of them. This created a politicized Commission and a Tribunal and also “affected the internal workings of these bodies as well as the quality of justice they administered.” Procedural irregularities were frequently observed during the proceedings; the defendants were chosen on a political basis and tried in an unfair manner.²⁰⁰

In its judgment, the Tribunal ruled that Japan was guilty of waging of aggressive war. The judgment cited a long series of international agreements violated by Japan, including the several Hague Conventions.²⁰¹ All twenty-eight defendants were found guilty. However, a few of them received light sentences. Although seven were executed, the majority were sentenced to life imprisonment.²⁰² Two of the defendants died during the proceedings, and the trial of one

2- To review, on the request of any member, any directive issued to the Supreme Commander for the Allied Powers (General Douglas MacArthur) of any of his actions involving policy decisions within the jurisdiction of the Commission.

3- To consider such matters as might be assigned to it by agreement of the participating governments.

Ibid., p. 177.

¹⁹⁵ Bassiouni, “From Versailles to Rwanda in Seventy-Five Years: The Need to Establish a Permanent International Criminal Court,” p. 32.

¹⁹⁶ Charter of the International Military Tribunal for the Far East, *Trial of Japanese War Criminals* (Washington, DC: United States Government Printing Office, 1946), pp. 39-44.

¹⁹⁷ “Political and Legal Organizations,” p. 176.

¹⁹⁸ *Ibid.*

¹⁹⁹ Bassiouni, “From Versailles to Rwanda in Seventy-Five Years: The Need to Establish a Permanent International Criminal Court,” pp. 32-33.

²⁰⁰ *Ibid.*, pp. 33-34.

²⁰¹ “International Military Tribunal for the Far East,” *International Organization*, Vol. 3, Issue 1, 1949, p. 184.

²⁰² Jamison, “A Permanent International Criminal Court: A Proposal that Overcomes Past Objections,” p. 425.

defendant was suspended on the grounds of insanity.²⁰³ But those who received life imprisonment did not fully serve their terms, as the execution of those sentences were solely controlled by General Arthur, “who had the power to grant clemency, reduce sentences, and release convicted war criminals on parole.” Ultimately, every one was released by the end of the 1950s.²⁰⁴

What is more, no domestic proceedings were held against the suspected war criminals in Japan. On November 3, 1946, Emperor Hirohito, signed an Imperial Rescript granting amnesty to all members of the Japanese armed forces who may have committed offenses during the course of the war. General MacArthur approved this action by not opposing it. However, it was not publicized in order to avoid public opposition and criticism in Allied countries. The most important reason for this tacit approval could be the recent promulgation of the newly devised Constitution of Japan. Furthermore, Japan passed a law setting up a Commission to oversee the release of convicted Japanese war criminals.²⁰⁵

The Tokyo Trials were severely criticized. The critics argued that the proceedings were not fair, as some arguments of the defendants were never examined, that the judgments were released based on political considerations, and not on the evidence presented, and that the guilt of the defendants was not clearly stated, as some doubts arose about the fairness of the decisions following the proceedings.²⁰⁶

In fact, the influence of political concerns was so evident that the FEC decided on February 3, 1950 not to prosecute the Emperor of Japan as a war criminal. The underlying objective in taking this decision was to honor the Emperor who had shown his intention to cooperate with the Western World.²⁰⁷ What is more, the American trials conducted in Philippines, and those conducted by the other Allies in the Far East, did not include the prosecution and punishment of the crimes other than war crimes.²⁰⁸

Even the trials of war crimes were not always unbiased and fair. The prosecution of General Tomoyuki Yamashita, who then was convicted and executed for having committed war crimes, was exemplary in this regard. His execution is attributed to General MacArthur’s desire of vengeance, as he allegedly vowed to punish the Japanese when he left the Philippines when it left to Japanese forces. When the Allies retook it, General Yamashita was in command, but only for a couple of weeks. MacArthur ordered the trial of Yamashita for committing war crimes; however, there was substantial evidence proving that Yamashita actually had committed the crimes for which he was held liable. General MacArthur’s order influenced the judges who conducted the trial by having applied inappropriate legal standards, which resulted in his conviction and execution. The decision of the military panel based its decision of conviction on

²⁰³ “International Military Tribunal for the Far East,” p. 185.

²⁰⁴ Bassiouni, “From Versailles to Rwanda in Seventy-Five Years: The Need to Establish a Permanent International Criminal Court,” p. 34.

²⁰⁵ For further details, see, R. John Pritchard, “The Gift of Clemency Following British War Crimes Trials in the Far East, 1946-1947,” *Criminal Law Forum*, Vol. 7, Issue, 1996, pp. 37-38.

²⁰⁶ Jamison, “A Permanent International Criminal Court: A Proposal that Overcomes Past Objections,” pp. 425-26.

²⁰⁷ Bassiouni, “From Versailles to Rwanda in Seventy-Five Years: The Need to Establish a Permanent International Criminal Court,” p. 36.

²⁰⁸ *Ibid.*

the notion of superior responsibility. However, it was argued that there was not enough evidence of orders given by Yamashita that would substantiate his liability for the crimes committed by his subordinates.²⁰⁹

Moreover, the fact that the establishment of the Tribunal was associated with General MacArthur's initiative created doubts as to whether the Tribunal was of international character. That is in fact why two of the defendants before the Tribunal appealed to the US Supreme Court, alleging that the US High Court had jurisdiction, as the International Military Tribunal for Far East was appointed by MacArthur's order. Although the Court decided by a vote of 5 to 4 to hear the arguments voiced by those defendants, it then ruled it had no jurisdiction over the cases that fell into the competence of the Military Tribunal, since it was international in character.²¹⁰

The tribunals set up following the end of WWII to prosecute, try and punish the perpetrators of wartime crimes, especially the one established in Nuremberg, were significant in the history of international criminal jurisdiction; yet they could not have become predecessors for more enhanced and authorized ones. The fact that the years following the dissolution of the tribunals have not witnessed serious attempts towards the creation of a permanent international criminal court could be cited as the perfect proof for this comment and observation. What is more, "since World War II there have been many conflicts for which no international investigative or prosecutorial bodies were ever set up."²¹¹ Although no clear and solid reason could be mentioned for this state of reluctance, as Bassiouni suggests, justice might have been "the Cold War's casualty."²¹²

Of course, that does not necessarily mean there has been no attempt that made contributions to the evolution of international criminal law. But the point that needs to be clarified is that those attempts were not so substantial, as a Nuremberg-like tribunal was established decades later, while there have been numerous occasions which needed and deserved international attention and concern.

The weak and inconclusive attempts to deal with international crimes have in general been made under the auspices of the United Nations Organization. It has been the center in which those attempts were formulated and developed. However, the dominance of Cold War circumstances and the reluctance of states to cooperate with the organization with regard to its endeavors obstructed the realization of eminent projects and arrangements regarding international criminal matters. Even though the UN has numerous times initiated a process through which an international body to be vested with the authority to prosecute international crimes, those initiatives have in general become unfruitful.

Initially, the work of the UN pertinent to the broadening the scope of international criminal jurisdiction was twofold. On the one hand, the UN dealt with the adoption of a Genocide Convention. The pressure from civil society groups and the horror caused by the genocidal acts

²⁰⁹ *Ibid.*, pp. 36-37.

²¹⁰ "International Military Tribunal for the Far East," p. 186.

²¹¹ Bassiouni, "From Versailles to Rwanda in Seventy-Five Years: The Need to Establish a Permanent International Criminal Court," pp. 38-39.

²¹² *Ibid.*, p. 39.

of the Nazis during WWII were the main motives behind this initiative. On the other hand, the organization also engaged in activities to ensure the establishment of a permanent international criminal court.

To begin with, the UN General Assembly established the International Law Commission²¹³ and then directed to it to formulate the Nuremberg Principles. Its main tasks also included to devise a draft code of offences against the peace and security of mankind.²¹⁴

Upon its establishment, the Commission was invited by the UN General Assembly to work on the “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,”²¹⁵ since the preamble to the resolution recognized that “in the course of development of the international community, there will be an increasing need of an international judicial organ for the trial of certain crimes under international law.”²¹⁶ The Assembly also requested the Commission “to pay attention to the possibility of establishing a Criminal Chamber of the International Court of Justice.”²¹⁷

The Commission started working on that matter in 1949. It appointed two rapporteurs to study the matter, and to prepare and submit to the Commission reports. The rapporteurs reviewed the major works made since the end of WWI on international criminal jurisdiction, including the 1919 Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties and the 1943 UN War Crimes Commission. Upon completion their work, the rapporteurs concluded:

That it is *desirable* to establish a judicial organ for the trial of international crimes, seems to be evidenced by all the facts, declarations, studies, proposals, recommendations, plans and decisions which have marked for a period of over thirty years the birth and growth of the idea of an international criminal jurisdiction. In fact, more than something desirable, it is a thing desired, an aspiration of Governments, institutions, conferences, jurists, statesmen and writers.²¹⁸

The report also provided that creating an international criminal organ referred to in the relevant UN General Assembly Resolution was possible. Having referred to the 1937 Geneva Convention on the trial of persons involved in terrorist acts and the two military tribunals set up to prosecute

²¹³ *Establishment of an International Law Commission*, GA Res. 174(II), UN GAOR, 2nd Sess., UN Doc. A/519 (1947).

²¹⁴ *Formulation of the Principles Recognized in the Charter of the Nuremberg Trial and in the Judgment of the Tribunal*, General Assembly Resolution 177(II), U.N. Doc. A/519 (1948).

²¹⁵ *Study by the International Law Commission of the Question of an International Criminal Jurisdiction*, UN General Assembly Resolution 260 B(III), 3rd Session, U.N. Doc. A/810, December 9, 1948.

²¹⁶ *Ibid.*

²¹⁷ *Ibid.*

²¹⁸ Ricardo J. Alfaro, International Law Commission, *Report on the Question of International Criminal Jurisdiction*, U.N. Doc. A/CN.4/15, reprinted in *The Yearbook of International Law Commission, Volume II*, 1950. The text could also be reached at http://untreaty.un.org/ilc/documentation/english/a_cn4_15.pdf.

wartime crimes following WWII, the rapporteurs contented that the possibility establishing an international criminal organ of penal justice was “demonstrated by actual experience.”²¹⁹

The report made mention of national sovereignty, having considered that it was clearly related to the matter under consideration. The author of the report agreed with the assertion that such a court would mean an impingement on sovereignty. However, he countered the objection regarding sovereignty “with the remark that certain crimes perpetrated by Governments or by individuals as representatives of Governments, could hardly be tried by territorial courts. Only an international court can properly try certain international crimes. Consequently, for the repression of crimes against peace, war crimes, crimes against humanity and genocide, an international court is essential.” He also asserted that absolute sovereignty was not compatible with the organization of the international order at the time, as the state sovereignty was “subordinated to the supremacy of international law.”²²⁰

Special Rapporteur Emil Sanstrom, too, contented that an international criminal court was desirable. However, in his report, he cautioned the practicality and feasibility of such a court. After having reviewed the pros and cons of an international criminal organ, he concluded that “a permanent judicial criminal organ established in the actual organization of the international community would be impaired by very serious defects and would do more harm than good.”²²¹

As seen, both rapporteurs supported the establishment of an international criminal court, while they were of different opinions on the practicality and usefulness of such a court. The underlying point in their approaches was the issue of national sovereignty. Once more, that notion dominated the discussion. It is important to note that even the report prepared by the Commission, an institution at least partially free of concerns over national interests and power politics and of influence by States, referred to national sovereignty as a potential obstacle before the realization of the idea concerned.

In fact, the observations on sovereignty as an obstacle contained in the aforesaid report denote a reality. While the independent institutions, commissions and the like prepare reports that contain novel arrangements, those rarely find acceptance in the venues where delegations of States discuss the relevant matter. This case did not become an exception.

The International Law Commission considered the report submitted by the Special Rapporteurs. In the report prepared by the Commission where several issues and assignments were dealt with, it was stated that some members of the Commission referred to some difficulties that might arise in the process of establishing an international court. The skeptics cautioned that nations would refuse to give up their sovereign rights. However, the majority contented that “while difficulties undeniably existed, they did not constitute an impossibility. If States were free to refuse to

²¹⁹ *Ibid.*

²²⁰ *Ibid.*

²²¹ Emil Sandstrom, International Law Commission, *Report on the Question of International Criminal Jurisdiction*, U.N. Doc. A/CN.4/20, reprinted in *The Yearbook of International Law Commission, Volume II*, 1950. The text could also be reached at http://untreaty.un.org/ilc/documentation/english/a_cn4_20.pdf.

submit to an obligatory international criminal jurisdiction, they had also the power to agree thereto.”²²²

After consideration of the matter, the Commission decided that “international judicial organ for the trial of persons charged with genocide or other crimes over which jurisdiction is conferred upon that organ by international conventions is desirable,” and that the establishment of such an international judicial organ was possible.²²³

The Sixth Committee of the UN General Assembly considered the report of the Commission. The delegates were divided on the matter. Some were of the opinion that the establishment of the court proposed in the Commission’s report was not practical in the environment of the time on the grounds that such a court would impinge upon national sovereignty, that States would resist to surrender their subjects accused of committing the crimes that would fall into the proposed court’s competence, and that the victorious powers, following the termination of the conflict, would be reluctant to submit the enemy combatants to the court.

Some others argued that an international criminal court would contribute to world peace and security. Some of the proponents pointed out that the peoples of the world had favored such a court for a long time and objected the view that such a court would be contrary to the notion of sovereignty, having argued that the voluntarily recognition of the court’s jurisdiction by the States would mean the court’s compatibility with the notion. Consequently, the UN General Assembly decided that a committee composed of members from seventeen Member States shall meet in Geneva to prepare one or more preliminary draft conventions and proposals relating to the establishment of an international criminal court. The Assembly also requested the Secretary-General to submit one or more proposals and draft conventions envisioning the establishment of such a court to the committee.²²⁴

The division over the desirability and practicality of the court continued in the first sessions of the Committee on International Criminal Jurisdiction. Some argued that such a court would “unavoidably become enmeshed in political conflict and controversy and would not enjoy the calm and composure required for fair minded deliberation.”²²⁵ However, the majority supported the opinion advanced by the US representative and drafted a statute for an international criminal court.²²⁶

The purpose for the establishment of the proposed court was stated in the draft statute as “to try persons accused of crimes under international law, as may be provided in conventions or special

²²² Report of the International Law Commission on its Second Session, 5 June to 29 July 1950, Official Records of General Assembly, 5th Session, Supplement No. 12 (A/1316), reprinted in *The Yearbook of International Law Commission, Volume II*, 1950. Also available at http://untreaty.un.org/ilc/documentation/english/a_cn4_34.pdf.

²²³ *Ibid.*

²²⁴ UN General Assembly Resolution, 489(V), 320th meeting, December 12, 1950.

²²⁵ Lippman, “Towards an International Criminal Court,” p. 76.

²²⁶ The Draft Statute appears as Annex I to the Report of the Committee on International Criminal Jurisdiction, U.N. Doc. A/AC.48/4, September 5, 1951, reprinted as “United Nations: Committee on International Criminal Jurisdiction,” *American Journal of International Law*, Vol. 46, Issue 1, Supplement: Official Documents, 1952, pp. 1-11.

agreements among States parties to the present Statute.”²²⁷ The law to be applied by the Court was referred to as international law, including international criminal law, or national laws.²²⁸ One of the most significant provisions of the Court stated that the Court shall be of permanent character. However, the same provision provided that “sessions shall be called only when matters before it require consideration.”²²⁹

The proposed Court would have jurisdiction over natural persons only. However, as far as this jurisdiction is concerned, there would be no privilege or immunity for Heads of States or those who occupy similar positions.²³⁰ However, the jurisdiction of the Court would not be automatic. The Court might be vested with the jurisdiction by States parties to the Statute, by convention, or special agreement or by unilateral declaration.²³¹ The logical consequence of this provision is that the Court could not act unless it was authorized by States Parties. In this regard, the relevant provision stated, “no person shall be tried before the Court unless jurisdiction has been conferred upon the Court by the State or States of which he is a national and by the State or States in which the crime is alleged to have been committed.”²³² The Court’s sphere of influence was further restricted by the provision which states the Court would have no jurisdiction unless the authorization of the UN General Assembly has been obtained.²³³

Relevant to the restrictions imposed upon the proposed Court is also the states ways in the Draft Statute to institute the proceedings before it. In Article 29 of the Draft Statute regulating the access to the Court, it was stated that only the following could institute proceedings before the Court: the UN General Assembly, any organization formed by States and authorized by the UN General Assembly, and a State Party to the Draft Statute which has recognized the competence and jurisdiction of the Court over the offenses that were subject matter of the proceedings.²³⁴

The Draft Statute also provided that the Court might request assistance from States Parties to it in performing its functions. However, the States were not obligated to provide assistance unless “any convention or other instrument in which the State has accepted such obligation” required doing so.²³⁵ This was a clear recognition of States’ privileges and prerogatives in world politics. The Statute itself did not create obligations requiring the States Parties to cooperate with the Court. Instead, it simply reminded the States’ obligations incurred from their previous undertakings under international law.

The limitations applied to the Court also included the narrow competence of the Court in carrying out the convictions it has imposed upon the accused. The Statute provided that the Court’s penalty was subject to the limitations “prescribed in the instrument conferring jurisdiction upon the Court.”²³⁶

²²⁷ *Ibid.*, Article 1.

²²⁸ *Ibid.*, Article 2.

²²⁹ *Ibid.*, Article 3.

²³⁰ *Ibid.*, Article 25.

²³¹ *Ibid.*, Article 26.

²³² *Ibid.*, Article 27.

²³³ *Ibid.*, Article 28.

²³⁴ *Ibid.*, Article 29.

²³⁵ *Ibid.*, Article 31.

²³⁶ *Ibid.*, Article 32.

The Court envisioned by the Draft Statute above was weak in terms of jurisdictional reach. It was formulated so as to balance “the need for an international criminal court against the interests of State sovereignty.”²³⁷ Because States Parties to the Statute were not required to recognize the Court’s jurisdiction and to cooperate with the Court with regard to its work, “a single State would be able to frustrate prosecutions by refusing to recognize the court's jurisdiction.”²³⁸

However, it should be noted that the Committee charged with preparing the Draft Statute recognized that the text it prepared was not final:

The Committee does not wish to give these proposals any appearance of finality. They are offered as a contribution to a study which in the Committee’s opinion has yet to be carried several steps forward before the problem of an international criminal jurisdiction, with all its implications of a political as well as a juridical character, is ripe for decision.²³⁹

Therefore, the Draft Statute was subsequently forwarded to the Governments of States as well as different legal and political units for consideration and evaluation.²⁴⁰ Even some of non-state units opposed the proposed Court. In 1952, the American Bar Association clearly stated its opposition to the draft statute prepared by the Committee on International Criminal Jurisdiction on the ground that “it would be unwise to compromise the principles of territorial jurisdiction and trial by jury.”²⁴¹ Eleven States also submitted critical comments on the Statute.²⁴²

The Sixth Committee considered the report of the aforesaid Committee and the comments made regarding the viability and practicality of that report in November 1952.²⁴³ Supporters of the Court criticized the draft statute, stressing that the text was a very modest step towards the establishment of a permanent international criminal court that would be fully equipped to deal with the worst crimes. However, the opponents argued that States would not be willing to abandon –even partially- their sovereign rights.²⁴⁴

The disagreements and the differences between the positions of the States over the proposed Court were so severe that the Sixth Committee could not have taken decisive steps, and recommended the postponement of the consideration of the report. The UN General Assembly endorsed this recommendation and requested Member States to submit additional comments and views on the draft statute. A separate Committee was subsequently charged with the

²³⁷ Lippman, “Towards an International Criminal Court,” p. 83.

²³⁸ *Ibid.*, p. 84.

²³⁹ George A. Finch, “Draft Statute for an International Criminal Court,” *American Journal of International Law*, Vol. 46, Issue 1, 1952, p. 90.

²⁴⁰ It is interesting to note that some Governments sought assistance from independent bodies on this matter. For instance, the Department of State of the US sent the copies of the Draft Statute and of the Committee’s Report to the American Society of International Law, and invited it to consider those texts and make comments on the matter. *Ibid.*, pp. 90-91.

²⁴¹ Lippman, “Towards an International Criminal Court,” p. 84.

²⁴² Those were Australia, Chile, France, Israel, Netherlands, Norway, Union of South Africa, United Kingdom of Great Britain and Northern Ireland, China and Denmark. See, *ibid.*

²⁴³ 7th Session, GAOR C.6, at 95 (321st-328th meetings).

²⁴⁴ Lippman, “Towards an International Criminal Court,” p. 85.

consideration of the previous comments along with the additional ones that would be submitted by the States.²⁴⁵ Having considered that the number of States having forwarded suggestions and comments on the proposed court was very small, and that there was need for further study on the question of an international criminal jurisdiction, the UN General Assembly decided to appoint a Committee that would “re-examine the draft statute” and to submit a report containing its findings to the General Assembly.²⁴⁶ The Assembly also realized that defining the crime of aggression was too essential in order to reach a solid conclusion with regard to the establishment of an international criminal court. For this reason, at the same session, the Assembly decided to establish a Special Committee of fifteen members that would meet in 1953. This Committee was requested to work on the definition of aggression, and subsequently submit draft definitions of the concept to the General Assembly.²⁴⁷

The Committee that was charged with the re-examination of the draft statute initiated its work in July 1953. Once again, differing views clashed during the debates in the Committee. Some referred to the many obstacles before the establishment of an international criminal court. However, with the support and contention of the majority, the Committee decided to focus on preparing a report evaluating the proposed statute. The debates were mainly about the approaches to be adopted in creating such a court. Those debates culminated in the decision stating that the best method for creating an international criminal court would be a multilateral treaty that would be adopted by an international diplomatic conference to be held under the auspices of the UN.²⁴⁸

Subsequently, the deliberations also resulted in slight modifications in the previously submitted Draft Statute.²⁴⁹ The modified text was then submitted to the Sixth Committee. However, once again the Committee did not actively engage in the process, and avoided confronting the difficulties that would arise from the debates over the establishment of such a court. During the deliberations of the Committee, the traditional objections were once more brought to the fore. Some argued that the international crimes that the proposed court would supposedly prosecute were adequately addressed by national courts and that even if a higher court would be needed, ad hoc tribunals would be perfectly capable of performing this task. Some others referred to the lack of desire and intention of the international community towards the court as proposed in the Report.²⁵⁰

Following the debates, the Committee voted to postpone the consideration of the Report and its content about the establishment of an international criminal court. The UN General Assembly agreed to the postponement and decided in December 1954 to “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 and has taken up again

²⁴⁵ UN General Assembly Resolution 687 (VII), Seventh Session, Resolutions adopted on reports of the Sixth Committee, “International Criminal Jurisdiction,” 408th meeting, U.N. Doc. 2361, December 20, 1952.

²⁴⁶ *Ibid.*

²⁴⁷ *Ibid.*

²⁴⁸ Report of 1953 Committee on International Criminal Jurisdiction, GAOR Supp. (No. 12) U.N. Doc. A/2645 (1954).

²⁴⁹ Lippman, “Towards an International Criminal Court,” p. 87.

²⁵⁰ *Ibid.*, p. 88.

the draft Code of Offences against the Peace and Security of Mankind.”²⁵¹ The proposal was later tabled again in 1957; however, the General Assembly refused to consider the proposal at that time, instead, it preferred to delay it.²⁵² The primary reason for the delay was the disagreement over the definition of the crime of “aggression”.²⁵³ This delay was virtually the end of the endeavors towards the creation of an international criminal court, as the matter has not been brought into the agenda of the UN until 1970s, when studies on defining aggression as well as creating an international institution which was to be vested with the power to address the international crimes were reconvened.

The works on the establishment of an international criminal court have been accompanied by the works by the International Law Commission on the codification of a Draft Code of Offences against the Peace and Security of Mankind, a task, as noted earlier, that was assigned by the UN General Assembly Resolution 177(II).²⁵⁴ The Commission immediately began its work in its first session. A Special Rapporteur was appointed on the subject and invited to submit a working paper to the Commission in its second session. The Rapporteur submitted his report in 1950,²⁵⁵ which was taken by the Commission as a basis for discussion. Following the consideration of the report and the comments and views submitted by the Governments, and the deliberations on the subject, a drafting committee of three prepared a provisional text and referred it to the Commission.²⁵⁶ It endorsed the text and requested the Special Rapporteur of the initial text to work further on the subject and submit a new report to the Commission in its third session. Upon this request, a second draft²⁵⁷ was prepared and subsequently submitted to the Commission for consideration. Taking into account the report and the draft code as well as the comments and observations of the Governments on this report, the Commission adopted a Draft Code of Offences against the Peace and Security of Mankind.²⁵⁸

Article 2 of the Draft Code enumerated the acts regarded as offences against the peace and security of mankind as follows: any acts of aggression, “any threat by the authorities of a State to resort to an act of aggression against another state,” “the preparation of the authorities of a State for the employment of armed force against another state for any purpose” other than collective or national self-defense, “the incursion into the territory of a State from the territory of another State by armed bands,” “the undertaking of encouragement by the authorities of a State of activities calculated to foment civil strife in another State,” the encouragement of terrorist activities by the authorities of a State in another State, acts committed by the authorities of a State violating its obligations under a treaty adopted to ensure international peace and security

²⁵¹ The UN General Assembly Resolution, 898 (IX), “International Criminal Jurisdiction,” Ninth Session, 512th meeting, U.N. Doc. A/2890, December 14, 1954.

²⁵² The UN General Assembly Resolution, 1187(XII), “International Criminal Jurisdiction, Twelfth Session, 727th meeting, U.N. Doc. A/3805, December 11, 1957.

²⁵³ The Assembly in its resolution decided to “defer consideration of the question of an international criminal jurisdiction until such time as the General Assembly takes up again the question of defining aggression and the question of a Draft Code of Offences against the Peace and Security of Mankind.” *Ibid.*

²⁵⁴ See, *footnote* 214.

²⁵⁵ U.N. Doc. No. A/CN.4/25.

²⁵⁶ U.N. Doc. No. A/CN.4/R.6.

²⁵⁷ U.N. Doc. No. A/CN.4/44.

²⁵⁸ Draft Code of Offences against the Peace and Security of Mankind. Reprinted in *Yearbook of International Law Commission*, Volum II, 1951, pp. 134-137. The text reprinted in the Yearbook also included annotations and explanations on the provisions of the Code.

through such restrictions as disarmaments, acts causing annexations of the territories belonging to another state in a manner inconsistent with international law, acts committed by the authorities of a State or by natural persons with intent to destroy a national, religious, racial or ethnic group, and acts in violation of the laws and customs of war.²⁵⁹

Article 3 provided that Heads of States or other government officials were to be held equally responsible for having committed the acts referred to as offences against the peace and security of mankind in the Code. Therefore, the fact that they acted within the framework of their positions was not to relieve them “from responsibility for committing any of the offences” defined in the Code.²⁶⁰ Likewise, the Code did not recognize the defense based on the position as subordinate during the commission of the crime. However, the person concerned was to be held responsible, only if it was possible for him to act contrary to superior orders.²⁶¹ The penalties for the offences contained were to be determined by the tribunal vested with jurisdiction over the accused.²⁶²

The Code under review was a very short one, with 5 articles only. While it addressed war crimes and those that could be regarded under the category of genocide, it did not contain any reference to crimes against humanity. Moreover, it did not envision and refer to an international criminal court that would have the power to prosecute the perpetrators of the offences in defined; instead, it made mention of a tribunal competent to try the accused. Since it did refer to an international one, this tribunal could be a domestic court. An overall examination of the Code would also reveal that it was too much focused on the crime of aggression, a fact indicating that the drafters were much more concerned about the stability in inter-state relations than the international crimes committed by the natural persons. Therefore, the Code essentially preserved the ‘sanctity’ of the notion of national sovereignty. In other words, it was an important, yet a timid step forward towards an international criminal jurisdiction.

The draft code was brought to the agenda of the fifth session of the General Assembly; however, shortly after, it was removed from it and postponed until its seventh session. The Secretary-General requested the comments of the Governments; fourteen Governments acted accordingly and submitted their views. Those views along with the Code itself were included in the agenda of the seventh session of the Assembly; however, once again it decided to postpone it on the grounds that the International Law Commission would continue to work on the matter. In its fifth session, the Commission considered the matter in 1953 and requested the Special Rapporteur to further study on the Code. Upon this request, the Rapporteur devised a third report and submitted it to the Commission.²⁶³ In this report, the Rapporteur discussed the comments and views of the Governments, and accordingly made some modifications on the previously submitted draft code. Taking into account the modified text, the Commission made revisions on the previous code. Overall, the new text was a little more enhanced more than the previous one. For instance, the

²⁵⁹ Article 2, *ibid.*

²⁶⁰ Article 3, *ibid.*

²⁶¹ Article 4, *ibid.* The Article states, “the fact that a person charged with an offence defined in this Code acted in pursuant to order of his government or of a superior does not relieve him from responsibility, provided a moral choice was in fact possible to him.”

²⁶² Article 5, *ibid.*

²⁶³ “Third Report Relating to a Draft Code of Offences against the Peace and Security of Mankind,” U.N. Doc. No. A/CN.4/85.

expression of “shall be punishable” was replaced with the “shall be punished”, in order to emphasize that States themselves were obligated to punish the perpetrators of the offences contained in the Code. The scope of some paragraphs of Article 2, which specified the acts to be punished, was widened so as to make the Code more comprehensive in terms of coverage.²⁶⁴

However, the UN General Assembly refused to consider the above Code by the Resolution No. 897 (IX) in December 1954.²⁶⁵ The primary controversy was on the definition of aggression. The clashing and differing views on the matter resulted in the postponement of the consideration of the Draft Code until a solid approach has been adopted on the problem in regard to the definition of aggression.²⁶⁶ However, the works on the definition of aggression have not been concluded, and even though the related units have spent efforts to reach a generally acceptable definition for the concept, no substantial outcome could have been obtained. For this reason, no Code of Offences against the Peace and Security of Mankind whose codification was linked by the General Assembly to the adoption of a definition for the notion of aggression was codified.

The major political reason behind the failures in the attempts to create an international judicial system in which the perpetrators of the worst crimes would have been effectively punished and the future atrocities of the same kind would have been prevented by the ‘magic’ of deterrence is undoubtedly the outbreak of the Cold War. Power politics and differing and clashing national interests and the strong attachments to the notion of sovereignty by the authorities of the World Governments have become prevalent, making the aforesaid attempts obsolete and meaningless. However, the technical reason is the clear disagreement on the definition of the notion of aggression. Whenever a proposal has been put on the table in order to take decisive steps towards the creation of a system of international criminal jurisdiction, the question of undefined notion of aggression has been cited as an obstacle to move forward.²⁶⁷ A brief survey on the attempts made under the auspices of the UN would demonstrate the clash over the definition of notion of aggression and how this clash hindered any possible breakthroughs pertinent to the advancement in maintaining an international criminal jurisdiction.

²⁶⁴ For further details on the revision made in the Draft Code, see, “Draft Code of Offences Against the Peace and Security of Mankind,” Chapter III, Documents of the Sixth Session, including the Report of the Commission to the General Assembly, *Yearbook of the International Law Commission*, Volume II, 1954, pp. 149-152.

²⁶⁵ “Draft Code of Offences against the Peace and Security of Mankind,” UN General Assembly Resolution 897(IX), 504th meeting, December 4, 1954.

²⁶⁶ *Ibid.* The Resolution reads as follows:

The General Assembly,

Considering that the Draft Code of Offences against the Peace and Security of Mankind, as formulated in Chapter III of the report of the International Law Commission on the work of its sixth session, raises problems closely related to that of the definition of aggression,

Considering that...the General Assembly decided to entrust to a Special Committee of nineteen Member States the task of preparing and submitting to the General Assembly at its eleventh session a detailed report on the question of defining aggression and a draft definition of aggression,

Decides to postpone further consideration of the Draft Code of Offences against the Peace and Security of Mankind until the Special Committee on the question of defining aggression has submitted its report.

²⁶⁷ It should be noted that the concept of aggression is still undefined. Even though the International Criminal Court is authorized to exercise jurisdiction over the crime of aggression under the Rome Statute, because the term has not defined yet, it would be unable to proceed against the perpetrators of that crime until an internationally accepted definition for the notion has been provided and inserted in the text of the Statute.

As noted earlier in the present text,²⁶⁸ on December 20, 1952, the UN General Assembly adopted a resolution establishing a Special Committee of fifteen members, which was to submit to the Assembly “draft definitions of aggression or draft statements of the notion of aggression.”²⁶⁹ The resolution provided that the previous works of the General Assembly as well as of the International Law Commission on international criminal jurisdiction “revealed the complexity of this question and the need for a detailed study of” more intensive and comprehensive efforts and works on the notion of aggression, including the determination of various forms of aggression, of the connection between aggression and international peace and security, of the problems to be raised by the inclusion of the notion in a Draft Code of Offences against the Peace and Security of Mankind, and of the effect of the definition of aggression on the exercise of jurisdiction by various UN organs.²⁷⁰

A similar –in fact almost the same- resolution was passed by the General Assembly on December 4, 1954.²⁷¹ By this resolution, the Assembly established a Special Committee of twenty members that would meet in 1956 and requested it to submit the Assembly “a draft definition of aggression” upon the review and consideration of the previous efforts on the matter.²⁷² The Committee completed its work and submitted the requested report to the Assembly.²⁷³ The Assembly referred to the report as a “valuable work,” yet considered that “twenty-two additional States have recently joined the Organization and that it would be useful to know their views on the matter.”²⁷⁴ Therefore, it asked the Secretary-General to request the views of the new Member States on the subject matter, and subsequently transmit the replies to the committee that “shall study the replies for the purpose of determining when it shall be appropriate for the General Assembly to consider again the question of defining aggression.”²⁷⁵ The Secretary-General was also requested to place the question of defining aggression on the provisional agenda of the Assembly not earlier than the end of 1959.²⁷⁶ However, as noted earlier, the question of definition of aggression was removed from the agenda of the General Assembly. Subsequently, the world community has remained silent on the issue until 1970s.

The adoption of the Genocide Convention in 1948²⁷⁷ was also one of the most important works within the framework of the creation of a system of international criminal jurisdiction led by the UN in the immediate aftermath of WWII. The earliest attempt towards the codification of the Convention is the UN General Assembly Resolution 96(I),²⁷⁸ which provides that the crime of genocide that “shocks the conscience of mankind, results in great losses to humanity in the form

²⁶⁸ See, *footnote 247*.

²⁶⁹ “Question of Defining Aggression,” UN General Assembly Resolution 688(VII), 408th meeting, December 20, 1952.

²⁷⁰ *Ibid.*

²⁷¹ “Question of Defining Aggression,” UN General Assembly Resolution 895(IX), 504th meeting, December 4, 1954.

²⁷² *Ibid.*

²⁷³ *Official Records of the General Assembly, 12th Session, Supp. No. 16*, U.N. Doc. A/3574.

²⁷⁴ “Question of Defining Aggression,” UN General Assembly Resolution 1181(XII), 724th meeting, November 29, 1957.

²⁷⁵ *Ibid.*

²⁷⁶ *Ibid.*

²⁷⁷ Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention), December 9, 1948, 78 U.N.T.S. 1021, approved by UN General Assembly Resolution 260(III), 179th meeting, December 9, 1948.

²⁷⁸ “The Crime of Genocide,” UN General Assembly Resolution No. 96(I), 55th meeting, December 11, 1946.

of cultural and other contributions” made by the groups victimized by that crime.²⁷⁹ Therefore, the Assembly invited the Member States to “enact the necessary legislation for the prevention and punishment of this crime.”²⁸⁰

The Convention is of significance in that it referred to a transnational court that would be vested with the jurisdiction over the prosecution and punishment of the crime of genocide and its perpetrators. Article 6 of the Convention states, “persons charged with genocide or any of the other acts enumerated in article III shall be tried by 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.”²⁸¹ However, the Convention in effect imposes the obligation of preventing the commission of genocide and punishing the perpetrators of that crime on the States Parties.²⁸² Article 5 of the Convention becomes clearer on the imposition of this obligation: “The Contracting Parties undertake to enact, in accordance with their respective Constitutions, the necessary legislation to give effect to the provisions of the present Convention, and, in particular, to provide effective penalties for persons guilty of genocide or any of the other acts enumerated in article III.”²⁸³ In accordance with Article 7, the crime of genocide and other punishable acts under the Convention “shall not be considered as political crimes for the purpose of extradition,” and the States Parties are obliged to “grant extradition in accordance with their laws and treaties in force.”²⁸⁴

So, what could be said of the Genocide Convention is that it is essentially weak in terms of the references it makes to an international judicial organ vested with the jurisdiction over the punishable acts it covers. The chief responsibility is given to the States Parties under the Convention; and the reference to an international penal institution is a modest one. The relevant provision referring to such an institution does not envisage its establishment; instead, it implies if such an institution is created in the future, the punishable acts under the Convention may be prosecuted and tried by that institution.

However, even this relatively weak document has been a source of controversy during the deliberations held for the purpose of drafting a Convention that would address the crime of genocide. This is in fact interesting and even shocking, as the bad memories of WWII were still fresh, and thus, there should have been an intense desire towards the prevention and punishment of the ‘crime of the crimes.’ Today it could be thought that the codification of that Convention was easy and expedite; however, this was not the case. Delegates of Member States were too eager to observe the national interests of the States they represented; and for this reason, they felt they had to closely examine and evaluate every single detail concerning the draft Convention on the Prevention and Punishment of Genocide.

²⁷⁹ *Ibid.*

²⁸⁰ *Ibid.*

²⁸¹ Genocide Convention, Article 6.

²⁸² *Ibid.* Article 1 of the Convention provides, “The Contracting Parties confirm that genocide...is a crime under international law which they undertake to prevent and punish.”

²⁸³ *Ibid.*, Article 5.

²⁸⁴ *Ibid.*, Article 7.

As noted above, the works and efforts addressing the crime of genocide began in the immediate aftermath of the end of WWII. The question was seen so urgent, as the experiences of the war lectured that indifference towards the attempts to exterminate a group as a whole could have in fact caused large scale atrocities. Therefore, at a time when the bad memoirs of the war were still fresh, the representatives of Member States at the beginning adopted a positive and constructive approach towards the attempts on the adoption of a multilateral treaty addressing the crime of genocide. Initially, the UN has been the venue in which those works and efforts have taken place. On November 9, 1946, the UN General Assembly forwarded a resolution drafted by Rafael Lemkin, the coiner of the term of genocide, to the Sixth Committee for consideration. Cuba, India and Panama requested a study that was to be focused on the possibility of declaring genocide an international crime on which the States were to have the authority to prosecute and punish.

Along with the one drafted by Lemkin, the Sixth Committee considered several other proposals and charged a Sub-Committee with preparing a draft resolution based on the proposals submitted. The Sub-Committee's draft was adopted by the Sixth Committee on December 9, 1946, and two days later, the General Assembly adopted the aforementioned resolution²⁸⁵ recommended by the Committee.

The Assembly continued its work on the matter by reaffirming the resolution above and declared that "genocide is an international crime entailing national and international responsibility on the part of individuals and States."²⁸⁶ By the same resolution, the Assembly also requested the Economic and Social Council to continue the work "it has begun concerning the suppression of the crime of genocide."²⁸⁷

The above suggests that the response of the UN to the calls for taking effective steps to address the question of drafting a Genocide Convention was swift. There have been no serious and time-consuming debates during the initial works carried out under the auspices of the UN. The most important reason that could be referred to for this swiftness was the impact of the war on the world community of the time. There was a consensus on the need for establishing an effective mechanism that was to prevent the commission of genocidal acts. Another reason was the fact that the outcomes of the initial steps were not of binding character. Therefore, those who were involved in those endeavors were relatively free to insert some novel arrangements in their proposals that could be seen by the States as impingement on national sovereignty. However, such insertions did not necessarily create deadlocks during the deliberations in the bodies whose decisions were non-binding.

But, as the issue became more concrete, the process slowed down. The Member States adopted a more scrutinizing approach towards the issue that they regarded as delicate. Even though the view that the issue of addressing genocide was an important one which needed international concern and attention was largely shared by Member States, each of them was decisive to retain their sovereign position intact. Therefore, they were too much concerned that the Convention that was to be drafted to address the issue of genocide would have been contrary to their

²⁸⁵ See, *footnote* 278.

²⁸⁶ "Draft Convention on Genocide," U.N. General Assembly 180(II), 123rd meeting, November 21, 1947.

²⁸⁷ *Ibid.*

dominant positions as the agents of world politics. For this reason, the initial swiftness was replaced with a gradual and slow breakthrough that was closely monitored and controlled by the representatives of States.

The initial works and efforts mentioned above resulted in a generally accepted proposal. This proposal for a Convention that was to address the issue of genocide was submitted by the Secretary-General to the UN General Assembly. Under this proposal, States Parties were to be obligated to “pledge themselves to punish any offender under this Convention within any territory under their jurisdiction, irrespective of the nationality of the offender or of the place where the offence has been committed.”²⁸⁸ This necessarily means that any State Party to the Convention was to be required prosecute an individual suspected of having committed the crime of genocide, irrespective of the territory in which the punishable act was committed. If it did not prosecute the offender, it was to be obligated to surrender the suspect to an international court.

In addition to the draft proposed by the Secretary-General, another one prepared by an Ad Hoc Committee was also considered. This one was much more modest than the previous one, as it rejected the principle of universal jurisdiction and recognized the national courts as the primary authorities in proceeding against the crime of genocide. The Ad Hoc Committee draft stated that “persons charged with genocide...shall be tried by a competent tribunal of the State in the territory of which the act was committed or by a competent international tribunal.”²⁸⁹

During the discussions some delegates opposed the concurrent jurisdiction vested in an international court as well as national courts on the grounds that this would impinge upon national sovereignty. Those who were of the dissenting opinion asserted that for this reason a substantial number of States would not ratify the Convention.²⁹⁰

The principles adopted by the Ad Hoc Committee with regard to a Convention addressing the crime of genocide was then transmitted to the Sixth Committee of the UN General Assembly, which accepted the draft of the Committee. Although it broadened the role to be played a future international criminal court, the disagreement over the need for universal jurisdiction was prevalent in the discussions.²⁹¹

Ultimately the Sixth Committee agreed to regard national courts as the primary agents in dealing with the prosecution and punishment of the crime of genocide. Undoubtedly the reference contained in the Genocide Convention was an important step forward. For this reason, the President of the General Assembly hailed its adoption, saying “the supremacy of international law has been proclaimed and a significant advance had been made in the development of international criminal law.”²⁹² However, the failure of the international community in creating a transnational court referred to in the Convention has gradually diminished its significance.

²⁸⁸ 4 U.N. ESCOR at 8, art. VII, U.N. Doc. E/447 (1947) (Draft Convention on the Crime Of Genocide).

²⁸⁹ Ad Hoc Committee on Genocide Report to the Economic and Social Council on the Meetings of the Committee Held at Lake Success, New York, from 5 April to 10 May 1948, 7 U.N. ESCOR Supp. (No. 6) at 7 U.N. ESCOR Ad Hoc Committee at 11, art. VII.

²⁹⁰ *Ibid.* 7th meeting, U.N. Doc. E/AC.25/SR.7.

²⁹¹ 3 U.N. GAOR at art. VI, 10, U.N. Doc. A/760.

²⁹² 3 U.N. GAOR (179th plen. mtg) at 852 (1948).

In addition to the codification of the Genocide Convention, the UN has also engaged in activities that have focused mainly on expanding the scope of existing international treaties on war crimes. Four Geneva Conventions all adopted in 1949 are noteworthy, as they are now regarded as the basis and backbone of international humanitarian law, and customary legal rules given the high number of States Parties to them. Those are the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (I),²⁹³ the Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (II),²⁹⁴ Geneva Convention Relative to the Treatment of Prisoners of War (III),²⁹⁵ and the Geneva Convention relative to the Protection of Civilian Persons in Time of War (IV).²⁹⁶ The first three are the amended versions of the following previously adopted ones respectively: the Geneva Convention of 1929, for the Relief of Wounded and Sick in Armies in the Field, The Hague Convention of 1907, for the Adaptation to Maritime Warfare, and the Geneva Convention of 1929, Relative to the Treatment of Prisoners of War. The fourth Convention on the treatment of the civilians in wartime was entirely new.²⁹⁷

Four Geneva Conventions contain some common articles. Article 2 of all four Conventions provides that the respective convention applies to “all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.” The Convention concerned is still applicable, even if one of the parties does not recognize the state of war. Furthermore, it is commented that the Conventions apply to the armed conflicts that have not been declared by both parties.²⁹⁸ Article 3 provides that the Conventions shall apply to the conflicts that are not of international character. However, the respective article of each Convention states the situations in which the underlying objective and content of the article is to be observed. Article 7 provides that the beneficiaries “may in no circumstances renounce in part or in entirety the rights secured to them” by the respective Convention, as “it is obvious that such persons are in no sense free to act or able to act freely.”²⁹⁹ The most important common article is the one which provides that the respective Convention “shall be applied with the cooperation and under the scrutiny of the Protecting Powers whose duty it is to safeguard the interests of the Parties to the conflict,” since it should be apparent that any party to the conflict cannot be expected to follow the rules contained in the Convention.³⁰⁰

The Geneva Convention (I) in many respects resembles with its predecessor. In addition to some of the articles common to all Geneva Conventions, Convention (I) contains several new ones. For instance, while the earlier one applied only to the members of armed forces or other officials

²⁹³ Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 75 U.N.T.S. 31, *entered into force* Oct. 21, 1950.

²⁹⁴ Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 75 U.N.T.S. 85, *entered into force* Oct. 21, 1950.

²⁹⁵ Geneva Convention relative to the Treatment of Prisoners of War, 75 U.N.T.S. 135, *entered into force* Oct. 21, 1950.

²⁹⁶ Geneva Convention relative to the Protection of Civilian Persons in Time of War, 75 U.N.T.S. 287, *entered into force* Oct. 21, 1950.

²⁹⁷ Raymund T. Yingling and Robert W. Ginnane, “The Geneva Conventions of 1949,” *American Journal of International Law*, Vol. 46, Issue 3, 1952, pp. 393-94.

²⁹⁸ *Ibid.*, p. 394.

²⁹⁹ *Ibid.*, p. 397.

³⁰⁰ *Ibid.*, p. 397.

attached to armies, the protection is extended in the new one, which applies to all personnel recognized as prisoners of war.³⁰¹

The Geneva Convention (II), also known as Maritime Convention, is significantly different from, and in fact a replacement to, its predecessor.³⁰² The Geneva Convention (III) addressing the question of prisoners of war is, too, a significantly improved version of the earlier codification on the same subject matter. The Convention recognizes several categories of prisoners of war, a fact implying that its coverage is much more than the earlier one regulating the same question. The first main category addresses the prisoners of war in traditional sense, that is, those persons who have fallen under the control of the enemy power. In addition, considering the experiences of WWII, the Conference participants decided to include the persons who have been taken under apprehension in occupied or non-belligerent territory.³⁰³ Overall, the new Convention remarkably ameliorates its predecessor, extending the scope of application.³⁰⁴ The Geneva Convention (IV) on protecting the civilians, although a new codification is “an extension...of earlier international rules and practices governing the treatment of alien enemies in a belligerent country and the treatment of the inhabitants of territory under military occupation.”³⁰⁵ However, the Convention does not protect the nationals of any State not party to it.³⁰⁶

The aforementioned four Geneva Conventions have been reinforced later by two additional protocols adopted in 1970s, and one adopted in 2005. Protocol (I) Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts³⁰⁷ has broadened the protection provided to civilians and restricted the means and methods used in the conduct of warfare.³⁰⁸ Protocol (II) Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts³⁰⁹ provides extensive guarantees for those persons who have not taken part in hostilities during armed conflicts that are not of international character and contains rules pertinent to the protection of civilians as well as of the all means necessary for their survival.³¹⁰ Protocol (III) Additional to the Geneva Conventions of 12 August 1949,³¹¹ and Relating to the

³⁰¹ *Ibid.*, p. 398.

³⁰² *Ibid.*, pp. 400-401.

³⁰³ Geneva Convention relative to the Treatment of Prisoners of War, Article 4.

³⁰⁴ For further details, see, Raymund T. Yingling and Robert W. Ginnane, “The Geneva Conventions of 1949,” pp. 401-11.

³⁰⁵ *Ibid.*, p. 411.

³⁰⁶ Geneva Convention relative to the Protection of Civilian Persons in Time of War, Article 4. Paragraph 2 reads as follows: “Nationals of a State which is not bound by the Convention are not protected by it. Nationals of a neutral State who find themselves in the territory of a belligerent State, and nationals of a co-belligerent State, shall not be regarded as protected persons while the State of which they are nationals has normal diplomatic representation in the State in whose hands they are.”

³⁰⁷ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 1125 U.N.T.S. 3, *entered into force* Dec. 7, 1978.

³⁰⁸ *Respect for International Humanitarian Law*, Handbook prepared by some of the members of the Inter-Parliamentary Union’s Committee to Promote Respect for International Humanitarian Law, the International Committee of Red Cross Publication, n.d., p. 18.

³⁰⁹ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 1125 U.N.T.S. 609, *entered into force* Dec. 7, 1978.

³¹⁰ *Respect for International Humanitarian Law*, p. 19.

³¹¹ Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the Adoption of an Additional Distinctive Emblem (Protocol III), available at <http://www.icrc.org/ihl.nsf/FULL/615>.

Adoption of an Additional Distinctive Emblem, a relatively insignificant one in comparison the first two, created an optional emblem, to be used by the International Committee of the Red Cross during their work.³¹²

The Geneva Conventions and additional protocols with over 600 articles are too important in many respects. First of all, they have met a general acceptance by the world community. Today, most of the Member States in the UN are parties to the Conventions. In effect, the Geneva Conventions are regarded as international customary laws, as they are referred to as binding over even non-ratifying States. For instance, the International Court of Justice, in its advisory opinion, provided that the Geneva Conventions, along with The Hague Conventions on the same subject matter as regulated by the first, are fundamental instruments that all States are obligated to observe “whether or not they have ratified the conventions that contain them, because they constitute intransgressible principles on international customary law.”³¹³

Second, those Conventions repaired a paramount defect that had long survived in international humanitarian law. While the earlier codifications had primarily focused on the rules to be observed with reference to the belligerents in the conduct of military operations, the Geneva Conventions contain provisions safeguarding non-belligerents, including civilians and military personnel that do not any longer take part in the armed conflict.

However, as was the case with many multilateral treaties, the implementation of the Geneva Conventions was left to the discretion of the States Parties to them. In other words, while the States are bound by the Geneva Conventions, there is no outside institution or mechanism having the power to monitor the compliance by States Parties to the Conventions. As such, it has been observed that States Parties have been reluctant to incorporate the rules contained in the Convention, or fully comply with them. For instance, the number of references made by the US national courts to the Conventions is very small.³¹⁴

What is more, the adoption of the Geneva Conventions could not be attributed to States’ works and efforts, but to the attempts made by civil organizations. Therefore, the credit in the establishment of a system of international humanitarian law needs to be given to the non-state actors, especially the Red Cross. It has been the leading force and impetus behind the codification of both The Hague and the Geneva Conventions imposing duties on States and individuals that are to be followed during the times of war and peace. The role of the States in the process has been limited, and for the most part, insignificant. Their contribution to the evolution of international humanitarian law has been in the form of responding the calls made by

³¹² *Ibid.*, Article 4, stating, “The International Committee of the Red Cross and the International Federation of Red Cross and Red Crescent Societies, and their duly authorized personnel, may use, in exceptional circumstances and to facilitate their work, the distinctive emblem referred to in Article 2 of this Protocol.” This emblem is known as the red crystal, and created to supplement the previously adopted two emblems, the red cross and red crescent emblems.

³¹³ *Nuclear Weapons Advisory Opinion*, 1996 I.C.J. paragraphs 75, 79 (July 8). There is evidence that States not-party to the Conventions declared they would abide by the rules contained in them. For example, all parties to the hostilities in the Korean War agreed to follow the provisions of the Conventions, even though they were not party to them. See, Howard S. Levie, “History of the Law of War on Land,” *International Review of the Red Cross*, Issue 838, 2000, pp. 339-350.

³¹⁴ David Forsythe, “1949 and 1999: Making the Geneva Conventions relevant after the Cold War,” *International Review of the Red Cross*, Issue 834, 1999, pp. 277-301.

the Red Cross, of participating in the conferences held to draft the documents on the matter, and of accessing the conventions adopted at those conferences.

Since its foundation, the Red Cross has dedicated its works to the widening the scope of international humanitarian law. Its works have intensified on the adoption of new conventions, alterations made in those conventions based on the requirements of the time, and acting as the executive agent of their implementation. As noted, the success obtained at The Hague Conferences was largely due to the organization's efforts. In addition, the adoption of the Convention relating to the Treatment of Prisoners of War between the two world wars safeguarded millions of prisoners during the course of WWII.³¹⁵ Between the two wars, the Committee also drafted several other conventions that were to be discussed in a diplomatic conference convened in 1940; however, the outbreak of the war hindered further progress on the matter.³¹⁶

On February 15, 1945, even before the war officially ended, the Committee forwarded its intention of revising the existing conventions to the governments. Upon the receipt of the welcoming responses from the governments, the Committee dedicated itself to the collection of relevant data, and other related activities. Its works lasted for four years, culminating in the revised conventions and entirely new drafts that were to be discussed in a diplomatic conference with the participation of governmental delegates.³¹⁷

During the deliberations, the input supplied by the Committee had a great impact on the adoption of the conventions. The Committee staff has patiently and carefully collected data from the field and the places affected by the war. It also managed to obtain other information and data from various sources, including governments, individuals, and prisoners of war.³¹⁸ In other words, the Committee was by all means ready for the conference held as a result of its efforts.

The Committee then first convened the Commissions of Experts, the first of which met in Geneva in October 1945 with a very limited scope, and comprised of Medical Commissions that performed the duty of examining sick or wounded during the war. The treaty provisions relating to the repatriation of prisoners of war or their accommodation in neutral countries were revised in this meeting. It was followed by the drafting of an agreement on the same subject.³¹⁹

The second one was the Preliminary Conference of National Red Cross Societies for the Study of the Conventions and of various problems relative to the Red Cross. The meeting was held in Geneva between July 26 and August 3, 1946, with the participation of 145 delegates from 50 countries, who forwarded their views regarding the drafts and proposals. Accordingly, the Committee devoted the following months to close examination of the inputs and then re-organized all necessary data pertinent to the content of the conventions to be adopted.³²⁰

³¹⁵ Jean S. Pictet, "The New Geneva Conventions for the Protection of War Victims," *American Journal of International Law*, Vol. 45, Issue 3, 1951, pp. 462-63.

³¹⁶ *Ibid.*, p. 463.

³¹⁷ *Ibid.*, p. 464.

³¹⁸ *Ibid.*, p. 465.

³¹⁹ *Ibid.*, p. 465.

³²⁰ *Ibid.*, pp. 465-66.

The Committee then turned to the governments and submitted its works to the Conference of Government Experts for the Study of the Conventions for the Protection of War Victims, held in Geneva in April 1947, with the attendance of 70 official representatives from fifteen countries. The Conference studied the views submitted by the Committee, its proposals and those transmitted by several governments and adopted a preliminary Draft Convention for the Protection of Civilians in Time of War. The opinions of the non-participant governments were also obtained via the leading role of the Committee. After having consulted with some major civil society organizations, including the International Union for Child Welfare and the International Labor Office, the Committee completed the Draft Conventions in early 1948.³²¹

The Drafts were discussed in the Seventeenth International Red Cross Conference, held in Stockholm in August 1948, with the attendance of the representatives from 50 governments and 52 national Red Cross Societies. The Conference endorsed the proposed draft conventions, which were then taken as the sole working documents in the Diplomatic Conference that officially adopted them.³²²

The community of States as well as the inter-governmental organizations, including the UN, has remained silent and reluctant to make progress on the establishment an international criminal court throughout the course of 1960s and 1970s. What is more, there have been no significant breakthrough and contribution made to the international criminal legal system as a whole that could have expanded the scope of international criminal liability of the natural persons. The Convention on the Prevention and Punishment of Genocide and the four Geneva Conventions addressing wartime atrocities in particular have remained the most outstanding components of the international humanitarian law during this period. The absence of an international criminal court, along with the underdeveloped international criminal system, has been one of the most important sources of chaos and anarchy in the international criminal system. So, the Cold War conditions, which created an anarchic and state-centric international political order, also dictated its terms to the international criminal law system. Especially for this reason, in the absence of a universal criminal legal jurisdiction, individual States have sought their own ways to deal with the criminal acts and their perpetrators that entailed individual criminal liability. The Eichmann case, which is further elaborated later in the present text, is exemplary in this regard.

However, the reluctance of States towards the creation of a strong international criminal jurisdiction does not necessarily mean that the international community as a whole was adopting a similar path. Although not strongly, the ‘unofficial’ components and units of the world community have made several attempts even in the era of silence of 1960s and 1970s. Essentially, “interest in an international court during this period was kept alive by numerous scholars and non-governmental organizations.”³²³

In 1971, the World Peace Through Law Center organized a world conference in Belgrade in which one session was devoted to the discussions over the creation of a permanent international criminal court. The International Criminal Court Committee also called the UN to proceed with the establishment of such a court, by separating it from the attempts towards the codification of a

³²¹ *Ibid.*, p. 466.

³²² *Ibid.*, p. 467.

³²³ MacPherson, “Building an International Criminal Court for the 21st Century,” p. 12.

convention or similar machinery for the purpose of defining and effectively addressing the crime of aggression, which has been, and apparently would continue to be, a matter of paramount controversy among States. Another call was also made to the professional associations and other relevant groups to act to convince States for the establishment of a permanent international court. The Belgrade World Conference resolved that “consideration should be given to the creation of a penal panel to resolve inter-State jurisdictional conflicts; hear claims involving “special environments” over which no State is able to claim jurisdiction; and to provide an alternative forum to States which do not desire to undertake prosecutions.”³²⁴ Shortly after, another conference with a remarkable attendance was held under the sponsorship of the Foundation for the Establishment of an International Criminal Court. The conference, called the Wingspread Conference, formulated a draft statute containing a number of international punishable acts and proposed an international panel which was to be vested with jurisdiction over the crimes specified in the draft statute. However, States were recognized the right to choose specified crimes over which the proposed panel was to be able to proceed.³²⁵

The only official attempt made towards the creation of an international criminal court in the 1960s and 1970s was the efforts associated with the adoption of the International Convention on the Suppression and Punishment of the Crime of Apartheid.³²⁶ The Convention recognizes the crime of apartheid as a crime against humanity.³²⁷ It also provides a broad range of acts that fall into the definition of the notion of apartheid.³²⁸ The individuals, members of organizations and representatives of any State Party, “whether residing in the territory of the State in which the acts are perpetrated or in some other State,” shall be held responsible for the commission of the crime of apartheid, whenever they “commit, participate in, directly incite or conspire in the commission of the acts” mentioned in the Convention, and “directly abet, encourage or co-operate in the commission of the crime of apartheid.”³²⁹ Under the Convention, States are obligated to address the prevention and punishment of the crime of apartheid.³³⁰

As was the case with the Genocide Convention, the Apartheid Convention too referred to an international criminal court for the purpose of prosecuting the crime of apartheid. Article 5 of the Convention provided that the individuals accused of having committed the punishable acts under

³²⁴ L. Kos-Rabcewicz Zubkowski, “The Creation of an International Criminal Court,” in M. Cherif Bassiouni (ed.), *International Terrorism and Political Crimes* (1975), pp. 519, 521, cited in Lippman, “Towards an International Criminal Court,” p. 91.

³²⁵ *Ibid.*, pp. 523-25, cited in Lippman, “Towards an International Criminal Court,” pp. 91-92.

³²⁶ The International Convention on the Suppression and Punishment of the Crime of Apartheid, G.A. Res. 3068 (XXVIII), 28 U.N. GAOR, Supp. (No.30) 75, U.N. Doc. A/9030 (1974).

³²⁷ *Ibid.*, Article 1. “The States Parties to the present Convention declare that apartheid is a crime against humanity and that inhuman acts resulting from the policies and practices of apartheid and similar policies and practices of racial segregation and discrimination.”

³²⁸ *Ibid.*, Article 2. It states that the crime of apartheid applies to, amongst others, the following acts: “Denial to a member or members of a racial group or groups of the right to life and liberty of person,” “Deliberate imposition on a racial group or groups of living conditions calculated to cause its or their physical destruction in whole or in part,” “Exploitation of the labour of the members of a racial group or groups, in particular by submitting them to forced labour,” and “Persecution of organizations and persons, by depriving them of fundamental rights and freedoms, because they oppose apartheid.”

³²⁹ *Ibid.*, Article 3.

³³⁰ *Ibid.*, Article 4. States Parties to the Convention are required to take any legislative and other measures necessary to suppress and prevent “any encouragement of the crime of apartheid,” and also in case such a crime has been committed, to adopt any measures necessary to prosecute, try and punish the perpetrators of the crime.

the Convention might be prosecuted and tried by a domestic court of any State Party to the Convention or by an international criminal tribunal vested with the jurisdiction by the States Parties willing to do so.³³¹ However, because the court referred to in the Convention was not established, the international jurisdiction it envisaged “was never implemented.”³³²

However, in 1979, the UN Commission on Human Rights took action to ensure the implementation of the Convention. The first step was the adoption of a resolution charging the Ad Hoc Working Group of Experts on South Africa and the Special Committee Against Apartheid to study the matter, including the possibility of establishing an international jurisdiction as provided by the Apartheid Convention.³³³ Professor M. Cherif Bassiouni, a prominent scholar of international criminal law, was appointed by the General Assembly as Expert Consultant to the Group.

Accordingly, Bassiouni and Professor Daniel Derby prepared a report on an international criminal court,³³⁴ which the Ad Hoc Working Group adopted; however, it did not proceed further with regard to this report. Bassiouni and Derby authored a draft convention which was to address the crime of apartheid by establishing an international penal tribunal for the purpose of suppressing and punishing that crime.³³⁵ The Draft Convention provided a tribunal vested with the jurisdiction over the violations of the Apartheid Convention, and regarded the individuals, along with the States, as criminally liable for the acts falling into the category of apartheid.³³⁶ The proposed tribunal was of significance, since it was to be vested with universal jurisdiction with respect to the prosecution, trial and punishment of those who were accused of having committed the crime of apartheid and other punishable acts under the Convention.³³⁷

However, as might be expected, such a novel and advanced proposal did not meet acceptance by the States. The UN has not done anything further with the draft as well as the proposed tribunal, and it “has not been acted upon.”³³⁸ In short, “the post-war period thus failed to fulfill the promise of Nuremberg. Absent a direct demand for action, the international community was unable to release its embrace of the status quo.”³³⁹

During 1970s, there have also been some other attempts that could be considered within the context of the evolution of international criminal jurisdiction and individual liability, less important and significant than those towards the codification of an Apartheid Convention envisaging an international criminal court authorized to deal with the respective crime with

³³¹ *Ibid.*, Article 5.

³³² Bassiouni, “Establishing an International Criminal Court: Historical Survey,” p. 61.

³³³ G.A. Res. 34/24, ann. 1, 34 U.N. GAOR, U.N. Doc. A/34/618 (1979).

³³⁴ For further details on this endeavor, see the following article authored by the owners of the report: M. Cherif Bassiouni & Daniel H. Derby, “Final Report on the Establishment of an International Criminal Court for the Implementation of the Apartheid Convention and Other Relevant International Instruments,” 9 *Hofstra Law Review*, Vol. 9, Issue, 1981, pp. 523.

³³⁵ Draft Convention on the Establishment of an International Penal Tribunal for the Suppression and Punishment of the Crime of Apartheid and other International Crimes, U.N. Doc. E/CN.4/AC/22CRP.19/Rev.1 (10 December 1980).

³³⁶ *Ibid.*, Article 4.

³³⁷ *Ibid.*, Article 4(3).

³³⁸ Bassiouni, “Establishing an International Criminal Court: Historical Survey,” p. 61.

³³⁹ Lippman, “Towards an International Criminal Court,” p. 94.

universal jurisdiction. Those attempts were mainly focused on the codification of conventions on the issue of terrorism. The first of those was the Convention for the Suppression of Unlawful Seizure of Aircraft, also known as Hijacking Convention.³⁴⁰ The Convention criminalizes the acts that fall into the category of hijacking and the accomplishment to those acts.³⁴¹ Under the Convention, the States Parties are obliged to “make the offence punishable by severe penalties.”³⁴² To this end, States Parties to the Convention that have apprehended the offenders are required to either extradite them or prosecute the offences.³⁴³ Considering that addressing this crime requires international cooperation, the Convention also imposes obligations on States Parties to assist each other in both implementing the Convention and bringing the accused into custody and eventually establishing prosecution against them.³⁴⁴

The second one is the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation.³⁴⁵ It criminalizes any acts that are likely to endanger the safety of the aircraft, including placing an explosive on it, and holds both the offenders and their accomplices liable for the commission of a crime punishable under international law.³⁴⁶ As is the case with the Hijacking Convention, this one also requires States Parties to make the offences mentioned in it severely punishable acts.³⁴⁷ Again, the States Parties that have the offenders in custody are obliged under this Convention to either extradite or prosecute them.³⁴⁸

The third one is the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents.³⁴⁹ The Convention provides that a Head of State, a Minister for Foreign Affairs, a representative or official of a state or of an international organization who is entitled to special protection from attack under international law are persons that are to be categorized as internationally protected persons.³⁵⁰ It also lists the acts against those persons that are to be made punishable by States Parties.³⁵¹ In case such an offence is committed in the jurisdiction of any State Party, it is to be required to extradite the offender, or submit the case “without exception whatsoever and without undue delay” to “its competent authorities for the purpose of prosecution.”³⁵²

³⁴⁰ The Convention for the Suppression of Unlawful Seizure of Aircraft, 860 U.N.T.S. 105, *entered into force* Oct. 14, 1971.

³⁴¹ *Ibid.*, Article 1.

³⁴² *Ibid.*, Article 2.

³⁴³ *Ibid.*, Article 7. It reads as follows: “The Contracting State in the territory of which the alleged offender is found shall, if it does not extradite him, be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case to its competent authorities for the purpose of prosecution. Those authorities shall take their decision in the same manner as in the case of any ordinary offence of a serious nature under the law of that State.”

³⁴⁴ *Ibid.*, Article 6 and 8.

³⁴⁵ Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, 974 U.N.T.S. 178, *entered into force* January 26, 1973.

³⁴⁶ *Ibid.*, Article 1. It contains a long list of acts that could be regarded as offences punishable under the Convention.

³⁴⁷ *Ibid.*, Article 3.

³⁴⁸ *Ibid.*, Article 7.

³⁴⁹ Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, GAOR 3166(XVIII), *entered into force*, February 20, 1977.

³⁵⁰ *Ibid.*, Article 1.

³⁵¹ *Ibid.*, Article 2.

³⁵² *Ibid.*, Article 7.

The fourth one is the International Convention against the Taking of Hostages.³⁵³ The Convention provides that the acts that are regarded as the offences of hostage-taking under it are punishable, and that any person committing the offence, and participating as an accomplice in the commission of the crime of hostage-taking.³⁵⁴ The State Parties to the Convention undertake to take the necessary measures to make the acts recognized as hostage-taking under the Convention punishable under their domestic legislation.³⁵⁵ The States Parties are also required to provide any assistance with respect to the prosecution and punishment of the perpetrators of the offences punishable under the Convention.³⁵⁶

Even though the aforesaid Conventions on various forms of terrorism creates individual criminal responsibility for the perpetrators of the offences punishable under those Conventions, none of them refers to an international criminal court that is to be established for the purpose of prosecuting and punishing the those offences. In other words, the implementation of those Conventions is entirely left to the States Parties, and no sanction against the States Parties that do not comply with the provisions of the Conventions is provided. Moreover, it should be noted the adoption of those Conventions was relatively easy, as the regulations contained in those treaties are not so controversial with respect to the question of national sovereignty.

Arguably, a much more important codification than the four conventions on terrorism mentioned above that was made in 1970s is the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity.³⁵⁷ It fills a significant void in the international humanitarian law, as the former instruments created to impose individual criminal responsibility on those who have committed war crimes did not contain any provision with regard to statutory limitation. Considering this shortcoming and that “war crimes and crimes against humanity are among the gravest crimes in international law,” and recognizing the necessity to affirm “the principle that there is no period of limitation for war crimes and crimes against humanity, and to secure its universal application,” the Convention provides that no statutory limitations shall apply to war crimes and crimes against humanity “whether committed in time of war or in time of peace.”³⁵⁸ It also imposes obligations on the States Parties to adopt any measures “necessary to ensure that statutory or other limitations shall not apply to the prosecution and punishment of the crimes referred to” in it, and “where they exist, such limitations shall be abolished.”³⁵⁹

A later attempt was made in order to reaffirm the above Convention. The General Assembly adopted the Principles of International Co-Operation in the Detection, Arrest, Extradition and

³⁵³ International Convention against the Taking of Hostages, G.A. Res. 146 (XXXIV), U.N. GAOR, 34th Session, Supp. No. 46, at 245, U.N. Doc. A/34/46 (1979), *entered into force* June 3, 1983.

³⁵⁴ *Ibid.*, Article 1.

³⁵⁵ *Ibid.*, Article 2.

³⁵⁶ *Ibid.*, Article 11. It reads as follows: “States Parties shall afford one another the greatest measure of assistance in connexion with criminal proceedings brought in respect of the offences set forth in article 1, including the supply of all evidence at their disposal necessary for the proceedings.”

³⁵⁷ Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, G.A. res. 2391 (XXIII), annex, 23 U.N. GAOR Supp. (No. 18) at 40, U.N. Doc. A/7218 (1968), *entered into force* Nov. 11, 1970.

³⁵⁸ *Ibid.*, Article 1.

³⁵⁹ *Ibid.*, Article 4.

Punishment of Persons Guilty of War Crimes and Crimes against Humanity³⁶⁰ in 1973 to ensure that the perpetrators of war crimes and crimes against humanity would not go unpunished. The Resolution declares that the respective crimes “shall be subject to investigation and the persons against whom there is evidence that they have committed such crimes shall be subject to tracing, arrest, trial and, if found guilty, to punishment.”³⁶¹ It also provides that while the States have the right to prosecute and punish its own nationals for the commission of war crimes and crimes against humanity,³⁶² they are to cooperate through bilateral and multilateral treaties for the purpose of preventing the commission of those crimes,³⁶³ and to “assist each other in detecting, arresting and bringing to trial persons suspected of having committed such crimes and, if they are found guilty, in punishing them.”³⁶⁴

However, while the two attempts mentioned above are noteworthy steps in the evolution of international humanitarian law, their effectiveness and legitimacy rests upon the willingness of States Parties to cooperate and comply with the provisions contained in it.

iv. The Period Beginning from the End of Cold War to Present:

It has been a fashion among the students of International Relations and of International Law, as well as the strategists, analysts and pundits of all kind to make reference to the end of Cold-War as a significant historical turning point, the beginning of an abrupt and remarkable transformation of world politics and a clear departure from the previous international political and economic order. Numerous terms have been coined in the context of adequately explaining the new tendency. Among others, perhaps the most popular ones are “the new world order,” “globalization,” “global governance,” “interdependency,” “hegemony” and so forth.

However, while those have been useful for the most part, as far as the evolution of international criminal jurisdiction is concerned, the business has been as usual for a while. It would be contestable to argue that the end of Cold War would have facilitated the development of international criminal law, if the notorious atrocities had not been experienced in Former Yugoslavia and Rwanda. While the removal of the tension between the two major power blocks very much contributed to the evolution of various branches of international law, including international human rights law, the States remained the primary authorities to implement the rules of international criminal law.

Of course, this does not necessarily mean that there have not been any attempts towards improving the reach and scope of international criminal jurisdiction. However, the important point that needs to be emphasized here is that there is no clear evidence sufficient to attribute those attempts to the ease of the tension between the two major blocks that dominated the world politics for a significant period of time. Instead, the needs and necessities that the technological

³⁶⁰ Principles of International Co-Operation in the Detection, Arrest, Extradition and Punishment of Persons Guilty of War Crimes and Crimes against Humanity, G.A. res. 3074 (XXVIII), 28 U.N. GAOR Supp. (30A) at 78, U.N. Doc. A/9030/Add.1 (1973).

³⁶¹ *Ibid.*, paragraph 1.

³⁶² *Ibid.*, paragraph 2.

³⁶³ *Ibid.*, paragraph 3.

³⁶⁴ *Ibid.*, paragraph 4.

advances have brought to the fore was the chief coercion behind the States' efforts to invoke at least some elements of international criminal jurisdiction.

Especially the revolutionary changes in the communication technology, while being beneficial in many respects, had a great impact on the transformation in the characteristics of the crime. The commission of some certain crimes became much easier, due to the ease of the communication and travel. The new conditions created an environment where terrorists and international criminal organizations had the opportunity to carry on their activities across the continents, outdated the theory and practice of sovereignty and border protection. The territorial criminal jurisdiction could no longer be applicable for those kinds of crimes, as the easiness in the move of the criminals would make it impossible for any given State to prosecute and punish the perpetrators of the crimes committed within its territory.

The exercise of extraterritorial jurisdiction which offered to any State to extend its jurisdiction for the purpose of prosecuting an individual it deemed responsible for committing a crime within its territory to even outside its territory proved to be problematic; and the practice of extradition also did not work out.³⁶⁵ The failure of the aforesaid methods occasionally resulted in unlawful attempts for the purpose of bringing the criminals to trial. For instance, while the US practiced the method of abduction, at least some scholars legitimized assassination in the absence of an effective method for ensuring the prosecution of those who were accused of committing international crimes.³⁶⁶ Therefore, the States were compelled to cooperate and subsequently establish an international criminal jurisdiction that would make the prosecution and punishment of such criminals possible.

So this is how the developments that were closely related to the international criminal jurisdiction, and that coincided with the end of Cold War began. First, law enforcement bodies of nation-states sought cooperation through entering into various cooperative agreements and other means of collaboration. However, those attempts did not change the existing system of international criminal law. Although there have been calls for the creation of an international criminal court,³⁶⁷ "the problem of establishing an effective enforcement regime remained."³⁶⁸

³⁶⁵ Lippman, "Towards an International Criminal Court," pp. 94-95.

³⁶⁶ *Ibid.*, p. 95. Lippman gives an example: Louis Rene Beres, "Iraqi Crimes and International Law: The Imperative to Punish," *Denver Journal of International Law and Policy*, Vol. 21, Issue 2, 1992, p. 335.

³⁶⁷ For instance, Bassiouni, referring to the need for an international criminal court that was to address especially such transnational crimes as terrorism, drug-trafficking and the like, made his call in the following fashion: We no longer live in a world where narrow conceptions of jurisdiction and sovereignty can stand in the way of an effective system of international cooperation for the prevention and control of international and transnational criminality. If the United States and the Soviet Union can accept mutual verification of nuclear arms controls, then surely they and other countries can accept a tribunal to prosecute not only drug traffickers and terrorists, but also those whose actions constitute such international crimes as aggression, war crimes, crimes against humanity and torture... The permanency of an international criminal tribunal acting impartially and fairly irrespective of whom the accused may be is the best policy for the advancement of the international rule of law and for the prevention and control of international and transnational criminality... It is unconscionable at this stage of the world's history, and after so much human harm has already occurred, that abstract notions of sovereignty can still shield violators of international criminal law or that the limited views and lack of vision and faith by government officials can prevent the establishment of such an important and needed international institution. The time has come for us to think and act in conformity with the values, ideals and goals we profess. M. Cherif Bassiouni, "The Time has Come for an International Criminal Court," *Indiana International and Comparative Law Review*, Vol. 1, Issue 1, 1991, pp. 33-35.

³⁶⁸ Lippman, "Towards an International Criminal Court," p. 96.

Concurrently, the UN has also got involved in the process again, recognizing the need for addressing the growing concern on the negative impact of transnational crimes. However, this time, “the focus was not on war crimes and genocide, but on terrorism and narcotics trafficking.”³⁶⁹ This exactly why the United States as well as the Soviet Union supported the establishment of an international tribunal for the purpose of addressing such crimes as terrorism and drug trafficking. But, the Soviet Union insisted that the proposed court’s jurisdiction would be confined to the crimes falling into the category of terrorism.³⁷⁰ A number of States joined the aforesaid two in supporting the creation of such a court.³⁷¹ In 1989, under the leadership of the Prime Minister of Trinidad and Tobago, seventeen Caribbean and Latin American States expressed their support towards the court and subsequently requested the General Assembly to proceed with considering the possibility of creating a permanent international criminal court that was to be authorized to exercise jurisdiction over the crimes of drug trafficking.³⁷²

The UN’s response to the requests made by the States requesting further consideration of the establishment of an international tribunal with the jurisdiction over narcotics trafficking and other related crimes was swift. First, in 1988, the UN General Assembly invited the International Law Commission to continue its work on drafting a Code of Crimes against the Peace and Security of Mankind,³⁷³ a task that has been off the table for decades. Then, in 1989, it also requested the International Law Commission to prepare a report on the possibility of an international criminal jurisdiction for the prosecution of those who are responsible for committing crimes related drug-trafficking.³⁷⁴

At the same time, the International Institute of Higher Studies in Criminal Sciences, an NGO, in cooperation with the United Nations Crime Prevention Branch and the Italian Ministry of Justice, charged a committee of experts with preparing another draft statute. The Committee, chaired by Professor Bassiouni, submitted the draft statute, which in fact was based on the draft proposal he had submitted in 1981, to the Eighth United Nations Congress on Crime Prevention and the Treatment of Offenders.³⁷⁵ The Eighth Congress recognized the need for an international criminal court, and partially endorsed the proposal.³⁷⁶ However, it ceased further consideration of the draft statute, so once more the attempt towards the creation of an international criminal court became fruitless.

³⁶⁹ MacPherson, “Building an International Criminal Court for the 21st Century,” p. 12.

³⁷⁰ *Ibid.*, p. 13.

³⁷¹ However, it should be noted that the majority of States, especially Western countries was opposed to the creation of such a court at that time. See, Sharon A. Williams, “The Rome Statute on the International Criminal Court: From 1947-2000 and Beyond,” *Osgoode Hall Law Journal*, Vol. 38, Issue 2, 2000, p. 303.

³⁷² *Ibid.*, p. 13.

³⁷³ “Draft Code of Crimes against the Peace and Security of Mankind,” UN General Assembly Resolution 43/164, 43rd Session, 76th meeting, December 9, 1988.

³⁷⁴ “International Criminal Responsibility of Individuals and Entities Engaged in Illicit Trafficking of Narcotic Drugs Across National Frontiers and Other Transnational Criminal Activities: Establishment of an International Criminal Court with Jurisdiction over Such Crimes,” UN General Assembly Resolution 44/39, 44th Session, 72nd meeting, December 4, 1989.

³⁷⁵ “Draft Statute: International Criminal Tribunal,” U.N. GAOR, 45th Sess., U.N. Doc. A/Conf. 144/NGO.7 (1990).

³⁷⁶ Report of the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, U.N. GAOR, 45th Sess., U.N. Doc. A/Conf. 144/28 (1990), cited in Bassiouni, “From Versailles to Rwanda in Seventy-Five Years: The Need to Establish a Permanent International Criminal Court,” pp. 55-56.

But the ILC continued its efforts, discussed the details of a possible international criminal tribunal, and subsequently decided to carry on the discussions on the question along with the 1991 Draft Code of Crimes.³⁷⁷ The ILC's further efforts on the question that would then have led to the adoption of Rome Statute are discussed below. The early 1990s are of importance in terms of the evolution of international criminal law, as two ad hoc international criminal tribunals with broad authorities have been created to effectively address the massive killings in Former Yugoslavia and Rwanda. Those two institutions were of course not on the agenda of global policy-makers; however, the circumstances dictated to take action on the matters.

The tragedy in Former Yugoslavia started in early 1991, shortly after its dissolution. Within a very short time, the break-up process proved to be violent, seriously affecting the security of millions of civilians. During the civil war, the commission of atrocities, ranging from plain killings to torture to death in various forms, from forced migration to systematic rapes, employed by especially the Serbians as a means of humiliation and ethnic cleansing, was too apparent; yet the community of States preferred not to intervene for a long time. In particular, the European States did not want the US to get involved in the matter, which they saw as a European question. Therefore, the European actors spent efforts to achieve a resolution on the matter.³⁷⁸ However, all attempts led by the European institutions and individual actors turned to be a big failure and disappointment.

Eventually, the UN Security Council decided to engage with the question, whose deadlock might have caused serious damage to the organization, and negatively affected its legitimacy as the overseer of the global peace and security. On September 25, 1991, the Council acknowledged the seriousness of the problem and expressed its concern that “the continuation of this situation constitutes a threat to international peace and security.”³⁷⁹ While it supported the efforts led by the European states, it also decided that “all States shall, for the purposes of establishing peace and stability in Yugoslavia, immediately implement a general and complete embargo on all deliveries of weapons and military equipment to Yugoslavia until the Security Council decides otherwise following consultation between the Secretary-General and the Government of Yugoslavia.”³⁸⁰

However, this attempt neither sufficed to end the conflict, nor alleviated the degree of violence. For this reason, the Council took a further step and reminded the warring parties that they were obligated under international humanitarian law to observe the provisions of Geneva Conventions of 1949 and that persons who committed, or the commission of grave breaches of the Conventions were to be held individually responsible.³⁸¹ The warning did not work out, and numerous reliable reports continued to submit evidence of widespread atrocities of various kinds,

³⁷⁷ Report of the International Law Commission, U.N. GAOR, 46th Sess., Supp. No. 10, at 198, U.N. Doc. A/46/10 (1991).

³⁷⁸ The events in former Yugoslavia gained large publicity, largely because those were “occurring in Europe, which had twice endured World Wars. The Western powers could not ignore what was occurring in their back yard, as they might have had it been happening elsewhere.” MacPherson, “Building an International Criminal Court for the 21st Century,” p. 13.

³⁷⁹ UN Security Council Resolution S/RES/713 (1991).

³⁸⁰ *Ibid.*, para 6.

³⁸¹ UN Security Council Resolution S/RES/764 (1992), para. 10.

most of them falling into the category of grave breaches of international humanitarian law. On August 13, 1992, the Council, referring to the practice of “ethnic cleansing,” strongly condemned the violations of international humanitarian law within the territory of former Yugoslavia.³⁸² By the same resolution, it also decided that “all parties and others concerned in the former Yugoslavia, and all military forces in Bosnia and Herzegovina, shall comply with the provisions of the present resolution, failing which the Council will need to take further measures under the Charter.”³⁸³

Further, on October 6, 1992, the Security Council decided to establish a Commission of Experts to investigate and collect evidence of the atrocities committed during the civil war.³⁸⁴ The Resolution adopted for the aforesaid purpose set the Commission’s mandate as follows:

[The Security Council] *Requests* the Secretary-General to establish, as a matter of urgency, an impartial Commission of Experts to examine and analyse the information submitted pursuant to resolution 771 (1992) and the present resolution, together with such further information as the Commission of Experts may obtain through its own investigations or efforts, of other persons or bodies pursuant to resolution 771 (1992), with a view to providing the Secretary-General with its conclusions on the evidence of grave breaches of the Geneva Conventions and other violations of international humanitarian law committed in the territory of the former Yugoslavia.³⁸⁵

The Commission of Experts’ work culminated in 65,000 pages of documents, video records of over 300 hours, and 3300 pages of analysis.³⁸⁶ All this information was annexed to the Final Report prepared by the Commission³⁸⁷ and then transmitted to the then-established Tribunal’s Prosecutor.

However, it should be noted that the work of the Commission has not been so easy, despite that it was established under the UN’s sponsorship. It did not receive any funding from the UN, which it strongly needed to carry out the field investigation. Ultimately, it had to seek external resources to complete its work. In the preparation of its report, the Commission also had to rely on the information and data provided by the International Human Rights Law Institute (IHRLI) of DePaul University in Chicago, directed by Professor Bassiouni.³⁸⁸ The report contains in general terms the following conclusions:

³⁸² United Nations Security Council Resolution 771 (Concerning Information on Violations of International Humanitarian Law in the Territory of the Former Yugoslavia), S.C. res. 771, 47 U.N. SCOR at 25, U.N. Doc. S/RES/771 (1992), para. 2.

³⁸³ *Ibid.*, para. 7.

³⁸⁴ United Nations Security Council Resolution 780 (Establishing a Commission of Experts to Examine and Analyze Information Submitted Pursuant to Resolution 771), S.C. res. 780, 47 U.N. SCOR at 36, U.N. Doc. S/RES/780 (1992).

³⁸⁵ *Ibid.*, para. 2.

³⁸⁶ Bassiouni, “From Versailles to Rwanda in Seventy-Five Years: The Need to Establish a Permanent International Criminal Court,” p. 40.

³⁸⁷ Final Report of the Commission of Experts Established pursuant to Security Council Resolution 780 (1992), U.N. SCOR, 47th Sess., Annex, U.N. Doc. S/1994/674 (1994); Annexes to the Final Report, U.N. SCOR, 47th Sess., U.N. Doc. S/1994/674/Add.2 (1994).

³⁸⁸ Bassiouni, “From Versailles to Rwanda in Seventy-Five Years: The Need to Establish a Permanent International Criminal Court,” p. 41.

Reports received and investigations conducted by the Commission indicate that the level of victimization in this conflict has been high. The crimes committed have been particularly brutal and ferocious in their execution. The Commission has not been able to verify each report; however, the magnitude of victimization is clearly enormous.

The Commission finds significant evidence of and information about the commission of grave breaches of the Geneva Conventions and other violations of international humanitarian law which have been communicated to the Office of the Prosecutor of the International Tribunal.

... The practices of “ethnic cleansing,” sexual assault and rape have been carried out by some of the parties so systematically that they strongly appear to be the product of a policy. The consistent failure to prevent the commission of such crimes and the consistent failure to prosecute and punish the perpetrators of these crimes, clearly evidences the existence of a policy by omission. The consequence of this conclusion is that command responsibility can be established.

The Commission is shocked by the high level of victimization and the manner in which these crimes were committed, as are the populations of all the parties to the conflict. The difference is that each side sees only its own victimization, and not what their side has done to others.³⁸⁹

The Commission’s work was a real success. However, as it was conducting the investigations in the field, it became a real threat to the prospect for a political settlement, a resolution very much desired by the leading powers of world politics, including the US and the EU. Because the evidence and information collected by the Commission was substantiating the crimes committed in a large scale requiring international criminal prosecution before an international penal tribunal, there would be no room left for negotiating with those who were perhaps criminals. For this reason, “it became politically necessary to terminate the work of the Commission while attempting to avoid the negative consequences of such a direct action.”³⁹⁰

Subsequently, although the Security Council did not terminate the work of the Commission,³⁹¹ measures in various forms were taken to prevent its working effectively. Bassiouni, who witnessed this obstruction in the first hand as the Chairman of the Commission, explains it as follows:

An administrative decision was taken –probably at the behest, but certainly with the support of, some of the Permanent Members- leaving no legal trace of the deed. Thus, the Chairman was administratively notified that the Commission should end its work by

³⁸⁹ *Ibid.*, Part V. General Conclusions and Recommendations.

³⁹⁰ Bassiouni, “From Versailles to Rwanda in Seventy-Five Years: The Need to Establish a Permanent International Criminal Court,” p. 41.

³⁹¹ S.C. Res 827, U.N. SCOR, 48th Sess., at preamble, U.N Doc. S/RES/827 (1993). It states, “the Commission of Experts established pursuant to resolution 780 (1992) should continue on an urgent basis the collection of information relating to evidence of grave breaches of the Geneva Conventions and other violations of international humanitarian law as proposed in its interim report.”

April 30, 1994. When the Commission's mandate was terminated, it still had over \$ 250,000 in a trust fund and had not yet completed its Final Report. Between April 30 and December 31, 1994, the Chairman completed the Final Report and the Annexes and then continued to work until July 1995 to see that they were published by the United Nations.³⁹²

The reason as to why the Security Council, at least some of its members, wanted to proceed with terminating the work of the Commission is not very clear. Such a question becomes more relevant, considering that the Council decided to establish an international criminal tribunal in order to address the question of the commission of atrocities in Former Yugoslavia. Shortly after the Commission submitted its interim report,³⁹³ in its Resolution 808 (1993), the Council decided that “an international criminal tribunal shall be established for the prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991.”³⁹⁴

Under that resolution, the Secretary-General was requested to submit a report on the subject of the possibility of creating such an international tribunal as envisaged in the resolution to the Council within sixty days.³⁹⁵ Accordingly, Secretary-General prepared the requested report, in which a draft Statute for the tribunal and detailed commentaries on the content of the Statute were provided.³⁹⁶ In general terms, the Secretary-General’s proposal contained a recommendation stating that the Security Council was to establish an international criminal tribunal in connection with its authority under Chapter VII of the UN Charter in relation to prevent threats to the international peace and security.³⁹⁷ Security Council approved the proposed Statute submitted by the Secretary-General without change, and adopted Resolution 827, by which the Tribunal was established.³⁹⁸ The Resolution also provided full cooperation from all States,³⁹⁹ and urged “States and intergovernmental and non-governmental organizations to

³⁹² Bassiouni, “From Versailles to Rwanda in Seventy-Five Years: The Need to Establish a Permanent International Criminal Court,” p. 42.

³⁹³ Interim Report of the Commission of Experts Established pursuant to Security Council Resolution 780 (1992), U.N. SCOR, 48th Sess., Annex, at 20, U.N. Doc. S/25274 (1993).

³⁹⁴ S.C. Res. 808, U.N. SCOR, 48th Sess., U.N. Doc. S/RES/808 (1993). The Council determined that the situation in the territory of Former Yugoslavia constituted a threat to international peace and security thereby requiring effective action to “put an end to such crimes and to take effective measures to bring to justice the persons who are responsible for them.” Accordingly, the Council expressed its conviction that in order to address the situation in former Yugoslavia, “the establishment of an international tribunal would enable this aim to be achieved and would contribute to the restoration and maintenance of peace.”

³⁹⁵ *Ibid.*, preamble.

³⁹⁶ Report of the Secretary-General pursuant to paragraph 2 of Security Council Resolution 808 (1993), U.N. SCOR, 48th Sess., U.N. Doc. S/25704 (1993).

³⁹⁷ *Ibid.*

³⁹⁸ S.C. Res 827, U.N. SCOR, 48th Sess., at preamble, U.N Doc. S/RES/827 (1993). The Council decided “to establish an international tribunal for the sole purpose of prosecuting persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia between 1 January 1991 and a date to be determined by the Security Council upon the restoration of peace and to this end to adopt the Statute of the International Tribunal annexed to the above-mentioned report.” *Ibid.*, paragraph 2. The Council also requested the Secretary-General to the judges of the Tribunal, once they have been elected, “any suggestions received from the States for the rules of procedure and evidence.” *Ibid.*, paragraph 3.

³⁹⁹ *Ibid.*, paragraph 4, which states, “all States shall cooperate fully with the International Tribunal and its organs in accordance with the present resolution and the Statute of the International Tribunal and that consequently all States

contribute funds, equipment and services to the International Tribunal, including the offer of expert personnel.⁴⁰⁰ The Tribunal entered into force on May 25, 1993.⁴⁰¹ Subsequently, its judges were elected on September 15, 1993, and the Prosecutor assumed the office on August 15, 1994.⁴⁰²

Under Article 1 of its Statute, the Tribunal “shall have the power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991 in accordance with the provisions of the present Statute.”⁴⁰³ The Statute provided that individuals, including Heads of States, shall be held criminally

shall take any measures necessary under their domestic law to implement the provisions of the present resolution and the Statute, including the obligation of States to comply with requests for assistance or orders issued by a Trial Chamber.”

⁴⁰⁰ *Ibid.*, paragraph 5.

⁴⁰¹ However, it should be noted that the establishment of the Tribunal was not without controversy, as there was not a firm consensus on the matter. For instance, not all of the permanent members in the Security Council favored that action. The opposing members were of the view that such a tribunal would be “potentially disruptive of negotiations for a political settlement of the conflict.” Some insisted that the Tribunal should be established under the auspices of the General Assembly, and should not be under the control of the Security Council. Some also proposed that a multilateral treaty should be accorded for the purpose of establishing the tribunal. Although the minority favored a permanent international criminal court, “the political advantages of controlling ad hoc institutions by the Security Council prevailed.” See, Bassiouni, “From Versailles to Rwanda in Seventy-Five Years: The Need to Establish a Permanent International Criminal Court,” p. 44.

⁴⁰² The Tribunal established for the purpose of prosecuting the crimes committed in former Yugoslavia has drawn significant attention and interest from academics. Therefore, many works have appeared on the matter. See, among others, George H. Aldrich, “Jurisdiction of the ICTY,” *American Journal of International Law*, Vol. 90, Issue 1, 1996, pp. 64-69; Louise Arbour, “The International Tribunals for Serious Violations of International Humanitarian Law in the Former Yugoslavia and Rwanda,” *McGill Law Journal*, Vol. 46, Issue 1, 2000, pp. 195-201; Louise Arbour and Aryeh Neier, “History and Future of the International Criminal Tribunals for the Former Yugoslavia and Rwanda,” *American University International Law Review*, Vol. 13, Issue 6, 1998, pp. 1495-1508; M. Cherif Bassiouni and Peter Manikas, *The Law of the International Criminal Tribunal for the Former Yugoslavia* (Irvington-on-Hudson, NY: Transnational Publishers, 1996); Morten Bergsmo, “International Criminal Tribunal for the Former Yugoslavia: Recent Developments,” *Human Rights Law Journal*, Vol. 15 (1994), pp. 405-410; Gideon Boas, “Creating Laws of Evidence for International Criminal Law: The ICTY and the Principle of Flexibility,” *Criminal Law Forum*, Vol. 12, Issue 1, 2001, pp. 41-90; Anne Bodley, “Weakening the Principle of Sovereignty in International Law: The International Criminal Tribunal for the Former Yugoslavia,” *New York University Journal of International Law and Politics*, Vol. 2 1998, pp. 417-471; Matthew M. DeFrank, “ICTY Provisional Release: Current Practice, a Dissenting Voice, and the Case for a Rule Change,” *Texas Law Review*, Vol. 80, Issue 6, 2002, pp. 1429-63; Mark A. Drumbl, “Looking Up, Down and Across: The ICTY’s Place in the International Legal Order,” *New England Law Review*, Vol. 37, Issue 4, 2003, pp. 1037-1057; William J. Fenrick, “The Application of the Geneva Conventions by the International Criminal Tribunal for the Former Yugoslavia,” *International Review of the Red Cross*, Vol. 81, Issue 834, 1999, pp. 317; Sharon A. Healey, “Prosecuting Rape under the Statute of the War Crimes Tribunal for the Former Yugoslavia,” *Brooklyn Journal of International Law*, vol. 21, Issue 2, 1995, pp. 327-383; Andreas Laursen, “NATO, the War over Kosovo, and the ICTY Investigation,” *American University International Law Review*, Vol. 17, Issue 4, 2002, pp. 765-814; Eric Rosand, “The Rights to Compensation in Bosnia: An Unfulfilled Promise and a Challenge to International Law,” *Cornell International Law Journal*, Vol. 33, Issue 1, 2000, pp. 113-158; Mark Thieroff and Edward Amley, “Proceeding to Justice and Accountability in the Balkans: the ICTY and Rule 61,” *Yale Journal of International Law*, Vol. 23, Issue 1, 1998, pp. 231-274; Cécile Tournaye, “Genocidal Intent before the ICTY,” *International and Comparative Law Quarterly*, Vol. 52, Issue 2, 2003, pp. 447-462 and Colin Warbrick, “Cooperation with the ICTY,” *International and Comparative Law Quarterly*, Vol. 45, Issue 4, 1996, pp. 947-954.

⁴⁰³ Article 1 of the Statute of the International Tribunal, annexed to Report of the Secretary-General pursuant to paragraph 2 of Security Council Resolution 808 (1993).

responsible for the commission of acts for which the Tribunal was vested with jurisdiction.⁴⁰⁴ The jurisdiction of tribunal in general covered grave breaches of the Geneva Conventions of 1949,⁴⁰⁵ violations of the laws or customs of war,⁴⁰⁶ genocide,⁴⁰⁷ crimes against humanity.⁴⁰⁸ The Tribunal is to exercise concurrent jurisdiction with domestic courts;⁴⁰⁹ however, it enjoys supremacy over the latter.⁴¹⁰ The Statute provides that an independent prosecutor “shall be responsible for the investigation and prosecution of persons responsible for serious violations of international humanitarian law.”⁴¹¹ Under the Statute, the Prosecutor shall act independently and carry out his or her duties as a separate organ of the Tribunal. The independence of the Prosecution is further reinforced by the affirmation that “he or she shall not seek or receive instructions from any Government or from any other source.”⁴¹² However, he or she shall be appointed by the Security Council,⁴¹³ a fact that is likely to affect the independence of the Office.

Nevertheless, the Prosecutor was recognized broad authorities under the Statute. He or she is vested with the power to initiate investigations, and decide “whether there is sufficient basis to proceed.”⁴¹⁴ The power that the Prosecutor shall have under the Statute also includes questioning suspects, victims and witnesses, collecting “collect evidence and to conduct on-site investigations.”⁴¹⁵ He or she could proceed further, preparing “an indictment containing a concise statement of the facts and the crime or crimes with which the accused is charged under the Statute.”⁴¹⁶ However, the Statute requires the Prosecutor to submit the indictment to the Trial

⁴⁰⁴ *Ibid.*, Article 7. Article 7(1) states, “A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 5 of the present Statute, shall be individually responsible for the crime.” Heads of States are not immune to prosecution by the Tribunal in accordance with Article 7(2): “The official position of any accused person, whether as Head of State or Government or as a responsible Government official, shall not relieve such person of criminal responsibility nor mitigate punishment.”

⁴⁰⁵ *Ibid.*, Article 2.

⁴⁰⁶ *Ibid.*, Article 3.

⁴⁰⁷ *Ibid.*, Article 4.

⁴⁰⁸ *Ibid.*, Article 5.

⁴⁰⁹ *Ibid.*, Article 9(1): “The International Tribunal and national courts shall have concurrent jurisdiction to prosecute persons for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1 January 1991.”

⁴¹⁰ *Ibid.*, Article 9(2): “The International Tribunal shall have primacy over national courts. At any stage of the procedure, the International Tribunal may formally request national courts to defer to the competence of the International Tribunal in accordance with the present Statute and the Rules of Procedure and Evidence of the International Tribunal.”

⁴¹¹ *Ibid.*, Article 16(1).

⁴¹² *Ibid.*, Article 16(2).

⁴¹³ *Ibid.*, Article 16(3): “The Prosecutor shall be appointed by the Security Council on nomination by the Secretary-General. He or she shall be of high moral character and possess the highest level of competence and experience in the conduct of investigations and prosecutions of criminal cases.”

⁴¹⁴ *Ibid.*, Article 18(1): “The Prosecutor shall initiate investigations ex-officio or on the basis of information obtained from any source, particularly from Governments, United Nations organs, intergovernmental and non-governmental organizations. The Prosecutor shall assess the information received or obtained and decide whether there is sufficient basis to proceed.”

⁴¹⁵ *Ibid.*, Article 18(2).

⁴¹⁶ *Ibid.*, Article 18(4).

Chamber for review. Further action is subject to the Chamber's approval of the indictment transmitted by the Prosecutor to it.⁴¹⁷

The Statute provides that the Tribunal's decisions of convictions are to be taken by the majority of judges of the Trial Chamber.⁴¹⁸ Although the Tribunal is of international character, the Statute provides that the penalties to be imposed on the criminals shall be determined upon the Tribunal's "recourse to the general practice regarding prison sentences in the courts of the former Yugoslavia."⁴¹⁹ The recognition of the possibility of pardon to be granted to the convicted persons⁴²⁰ also seems to be a paramount defect in the Statute.

It should be noted that the creation of the Tribunal was a remarkable step forward within the context of improving the international criminal jurisdiction. It, at least partially, ended the tradition of impunity for war crimes and other serious violations of established and well-respected international legal norms. And the end of impunity was ascertained and fortified by the Tribunal to the Heads of States, who had long been recognized privileges under diplomatic customs and international legal rules, including non-prosecution. The establishment of the Tribunal ensured that "the question is no longer whether leaders should be held accountable, but rather how can they be called to account."⁴²¹ However, probably the most important and noteworthy achievement of the Tribunal is the indictment of a Head of State, Slobodan Milosevic, by the Prosecutor of the Tribunal, on the grounds that he had committed crimes requiring international criminal prosecution while he was in power.

Notwithstanding its achievements, the Tribunal has been impaired by several yet substantial deficiencies that could be referred to within the context of how the political considerations have once again prevailed and negatively affected the whole process. The first one is its subordination to the UN Security Council, where the major powers are entitled to proceed with their own agenda and in accordance with their own interests and considerations. As a general rule, an international criminal tribunal, as a judicial organ, has to be independent of political influence and other external pressures.

In theory, the independence of the Yugoslavia Tribunal has been ensured by the creation of an independent office for prosecution. The Statute of the Tribunal openly states that the Prosecutor shall have the power to proceed independently of political pressure. Although several articles of the Statute reaffirm his or her independence, the Prosecutor's appointment by the UN Security Council is a matter that could be questioned in regards to the fairness of the Tribunal.

The Tribunal's financial independence from the Security Council is also referred to as another support for the argument that it is not under the control of the Council. Article 32 of the Statute

⁴¹⁷ *Ibid.*, Article 19(1).

⁴¹⁸ *Ibid.*, Article 23(2).

⁴¹⁹ *Ibid.*, Article 24(1).

⁴²⁰ *Ibid.*, Article 28: "If, pursuant to the applicable law of the State in which the convicted person is imprisoned, he or she is eligible for pardon or commutation of sentence, the State concerned shall notify the International Tribunal accordingly. The President of the International Tribunal, in consultation with the judges, shall decide the matter on the basis of the interests of justice and the general principles of law."

⁴²¹ "Bringing Justice to the Former Yugoslavia the Tribunal's Core Achievements," <http://www.un.org/icty/cases-e/factsheets/achieve-e.htm>.

states that “the expenses of the International Tribunal shall be borne by the regular budget of the United Nations in accordance with Article 17 of the Charter of the United Nations.”⁴²² However, although this provision may seem to be ensuring its independence at the first sight, it is in fact open to controversy. Prof. Bassiouni contends that the case should have been just the opposite:

If the Security Council had funded the Tribunal through its peacekeeping budget, the Tribunal would not have needed to go through the various stages of the General Assembly's budget procedures. At that time the General Assembly's budget was severely reduced, and as a result the Tribunal has been inadequately funded since its inception. The exercise of administrative and financial control over the Tribunal by U.N. headquarters' personnel subordinates important decisions concerning personnel, travel, and witness protection to New York. These arrangements hamper, delay, and frustrate the work of the Tribunal, particularly the investigatory and prosecutorial efforts.⁴²³

What is more important is that the Tribunal has remained inactive for one year since its establishment, as the Prosecutor has not been appointed until 1995. The Council's engagement was already prolonged, considering that the atrocities began in 1991, while its consideration of the matter in 1993. Furthermore, neither the Government of Serbia and Montenegro, nor that of the Bosnian Serb de facto government recognized the competence of the Tribunal. Of course, they did not cooperate with it with regard to the investigations and indictments of the accused.⁴²⁴ However, despite their non-cooperative attitudes, no effective measures have been taken against those Governments for the purpose of ensuring the apprehension of the war criminals. As a result of this reluctance, “once again the pursuit of a political settlement prevails over justice.”⁴²⁵

However, despite the politicized process in which the Tribunal of war crimes committed in the territory of former Yugoslavia was established, it later benefited the establishment of the International Criminal Tribunal for Rwanda (ICTR).⁴²⁶ The experience earned during its

⁴²² Article 32 of the Statute of the International Criminal Tribunal for Former Yugoslavia.

⁴²³ Bassiouni, “From Versailles to Rwanda in Seventy-Five Years: The Need to Establish a Permanent International Criminal Court,” p. 44.

⁴²⁴ *Ibid.*, p. 45.

⁴²⁵ *Ibid.*

⁴²⁶ For details and comprehensive analyses on ICTR see, among others, the following: Howard Adelman and Astri Suhrke, *The Path of a Genocide: The Rwanda Crisis from Uganda to Zaire* (New Brunswick, NJ: Transaction Publishers, 1999); Payam Akhavan, “Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?” *American Journal of International Law*, Vol. 95, Issue 1, 2001, pp. 7-31; Amnesty International, *Rwanda: The Hidden Violence: “Disappearances” and Killings Continue* (New York: Amnesty International, 1998); Amnesty International, *Rwanda: Ending the Silence* (New York: Amnesty International, 1997); Amnesty International, *Rwanda: Crying Out for Justice* (New York: Amnesty International, 1995); Louise Arbour, “History and Future of the International Criminal Tribunals for the Former Yugoslavia and Rwanda,” *American University International Law Review*, Vol. 13, Issue 6, 1998, pp. 1495-508; Michael Barnett, *Eyewitness to a Genocide: The United Nations and Rwanda* (New York: Cornell University Press, 2002); Stuart Beresford, “In Pursuit of International Justice: The First Four-year Term of the International Criminal Tribunal for Rwanda,” *Tulsa Journal of Comparative & International Law*, vol. 8, Issue 1, 2000, pp. 99-132; Evelyn Bradley, “In Search for Justice: A Truth and Reconciliation Commission for Rwanda,” *Journal of International Law and Practice*, Vol. 7, Issue 2, 1998, pp. 129-58; Christina M. Carroll, “An Assessment of the Role and Effectiveness of the International Criminal Tribunal for Rwanda and the Rwandan National Justice System in Dealing with the Mass Atrocities of 1994,” *Boston University International Law Journal*, Vol. 18, Issue 2, 2000, pp. 163-200; Rocco P. Cervoni, “Beating Plowshares into Swords: Reconciling the Sovereign Right to Self-determination with Individual Human Rights through an

establishment made the ICTY a precedent for the ICTR.⁴²⁷ In other words, the Rwanda Tribunal was established by the UN Security Council “on the strength” of the ICTY experience.⁴²⁸ The influence of this strength was so substantial that, as one observer succinctly puts, “it is questionable whether the Rwanda Tribunal would have been established without the Yugoslav precedent.”⁴²⁹ When the commission of atrocities in Rwanda began, the international community already had the experience of ICTY to deal with the new situation. Therefore, with this experience at hand, it was easier and swifter for the international institutions having the primary responsibility to maintain international peace and security to take further effective actions in regards to the genocidal acts and other forms of atrocities committed in Rwanda.

The tension and rift that have long been influential between the major tribes of Rwanda⁴³⁰ was transformed into a horrifying conflict shortly after the murder of Rwandan President in an aircraft crash, heralding one of the worst genocidal campaigns of the century.⁴³¹ The UN

International Criminal Court: The Lessons of the Former Yugoslavia and Rwanda as a Frontispiece,” *St. John's Journal of Legal Commentary*, Vol. 12, Issue 2, 1997, pp. 477-534; Erin Daly, “Between Punitive and Reconstructive Justice: The Gacaca Courts in Rwanda,” *New York University Journal of International Law and Politics*, Vol. 34, Issue 2, 2002, pp. 355-96; Adama Dieng, “International Criminal Justice: From Paper to Practice: A Contribution from the International Criminal Tribunal for Rwanda to the Establishment of the International Criminal Court,” *Fordham International Law Journal*, Vol. 25, Issue 3, 2002, pp. 688-707; Scott Feil and Romeo Dallaire, *Preventing Genocide: How the Early Use of Force Might Have Succeeded in Rwanda* (New York: Carnegie Corporation, 1998); Llezlie L. Green, “Gender Hate Propaganda and Sexual Violence in the Rwandan Genocide: An Argument for Intersectionality in International Law,” *Columbia Human Rights Law Review*, Vol. 33, Issue 3, 2002, pp. 733-76; Yacob Haile-Mariam, “The Quest for Justice and Reconciliation: The International Criminal Tribunal for Rwanda and the Ethiopian High Court,” *Hastings International and Comparative Law Review*, Vol. 22, Issue 4, 1999, pp. 667-745; Nina H.B. Jorgensen, “A Reappraisal of the Abandoned Nuremberg Concept of Criminal Organisations in the Context of Justice in Rwanda,” *Criminal Law Forum*, Vol. 12, Issue 3, 2001, pp. 371-406; Jean Marie Kamatali, “Freedom of Expression and its Limitations: The Case of the Rwandan Genocide,” *Stanford Journal of International Law*, Vol. 38, Issue 1, 2002, pp. 57-77; Andrew N. Keller, “Punishment for Violations of International Criminal Law: An Analysis of Sentencing at the ICTY and ICTR,” *Indiana International & Comparative Law Review*, Vol. 12, Issue 1, 2001, pp. 53-74; Guenael Mettraux, “Crimes against Humanity in the Jurisprudence of the International Criminal Tribunals for the Former Yugoslavia and for Rwanda,” *Harvard International Law Journal*, Vol. 43, Issue 1, 2002, pp. 237-316; Bernard Muna, “The Rwanda Tribunal and its Relationship to National Trials in Rwanda,” *American University International Law Review*, Vol. 13, Issue 6, 1998, pp. 1469-93 and Alex Obote-Odora, “Drafting of Indictments for the International Criminal Tribunal for Rwanda,” *Criminal Law Forum*, Vol. 12, Issue 3, 2001, pp. 335-58.

⁴²⁷ Legal Advisor to the International Criminal Tribunals for Former Yugoslavia and Rwanda, Payam Akhavan states that “the Rwanda Tribunal was established because of the precedential effect of the Yugoslav Tribunal.” Payam Akhavan, “The International Criminal Tribunal for Rwanda: The Politics and Pragmatics of Punishment,” *American Journal of International Law*, Vol. 90, Issue 3, 1996, p. 501.

⁴²⁸ Bassiouni, “Establishing an International Criminal Court: Historical Survey,” p. 57. Some scholars contend that the UN Security Council’s swifter action in the case of Rwanda could be attributed to the success of ICTY. For instance, MacPherson argues that “the Security Council felt compelled to do the same the following year when faced with ever-greater ethnic violence and death in Rwanda,” and subsequently “established a tribunal to deal with that situation.” MacPherson, “Building an International Criminal Court for the 21st Century,” p. 14.

⁴²⁹ Daphna Shraga and Ralph Zacklin, “The International Criminal Tribunal for Rwanda,” *European Journal of International Law*, Vol. Issue p.

⁴³⁰ It is asserted that the conflict between the Hutus and the Tutsis has been indispensable part of the daily life in Rwanda ever since the Tutsi royal family was overthrown in 1959. Massive atrocities have been committed in 1959, 1963, 1966, 1973, and since 1990 almost annually. *Ibid.*, p.

⁴³¹ For a brief historical survey of the tension between the tribes and ethnic groups as well as the campaign of genocide see, for example, the following: Alexandra A. Miller, “From the International Criminal Tribunal for Rwanda to the International Criminal Court: Expanding the Definition of Genocide To Include Rape,” *Pennsylvania*

Security Council's response was relatively swift, considering that the first serious step was taken on May 17, 1994, about a month later than the aircraft crash of April 1994.⁴³² By Resolution 918 (1994), the UN Security Council decided that "all States shall prevent the sale or supply to Rwanda by their national or from their territories or using their flag vessels or aircraft of arms and related material of all types, including weapons and ammunition, military vehicles and equipment, paramilitary police equipment and spare parts."⁴³³

Subsequently, the Secretary-General prepared a comprehensive report on the situation in Rwanda, where he observed that "the magnitude of the human calamity that has engulfed Rwanda might be unimaginable but for its having transpired. On the basis of evidence that has emerged, there can be little doubt that it constitutes genocide, since there have been large-scale killings of communities and families belonging to a particular group."⁴³⁴ The commission of the crime of genocide was also admitted and referred to as a matter of concern by the Security Council Resolution 925 (1994).⁴³⁵

This was followed by Resolution 935 (1994), whereby the Council requested the Secretary-General to establish an impartial Commission to examine and analyze the information submitted to it, and it may obtain through its own investigations, "with a view to providing the Secretary-General with its conclusions on the evidence of grave violations of international humanitarian law committed in the territory of Rwanda, including the evidence of possible acts of genocide."⁴³⁶ The mandate of the Commission was further expanded by the Secretary-General to study the possibility of the matter of an international criminal panel to be vested with the authority of prosecuting the accused.⁴³⁷

On October 4, 1994, the Commission of Experts submitted an interim report to the Secretary-General,⁴³⁸ where it concluded that the Rwandan conflict was a non-international one. It further provided based on the evidence and information it collected that both parties to the conflict had seriously violated the rules and norms set by various instruments of international humanitarian law.⁴³⁹ The Commission also found evidence that Hutus had carried out genocidal acts against the Tutsi minority.⁴⁴⁰ Accordingly, it suggested that those who were responsible for the crimes

State Law Review, Vol. 108, Issue 1, 2003, pp. 350-57 and Beresford, "In Pursuit of International Justice: The First Four-year Term of the International Criminal Tribunal for Rwanda," pp. 100-104.

⁴³² In fact, the President of the Security Council condemned all breaches of international humanitarian law in Rwanda on April 30, 1994, three weeks later than the beginning of the atrocities. Statement by the President of the UN Security Council, UN Doc. S/PRST/1994/21, April 30, 1994.

⁴³³ UN Security Council Resolution 918 (1994), UN Doc. S/RES/918, May 17, 1994, at paragraph 13.

⁴³⁴ Report of the Secretary-General on the Situation in Rwanda, UN Doc. S/1994/640 (1994), para. 36.

⁴³⁵ UN Security Council Resolution, 925 (1994), UN Doc. S/RES/925 (1994), June 8, 1994.

⁴³⁶ UN Security Council Res. 935, U.N. SCOR, 49th Sess., U.N. Doc. S/RES/935 (1994).

⁴³⁷ Report of the Secretary-General on the Establishment of the Commission of Experts pursuant to paragraph 1 of Security Council Resolution 935 (1994), UN Doc. S/1994/879 (1994).

⁴³⁸ Preliminary Report of the Independent Commission of Experts, U.N. Doc. S/1994/1125 (1994).

⁴³⁹ *Ibid.*

⁴⁴⁰ *Ibid.*

committed during the course of conflict “be brought to justice before an independent and impartial international criminal tribunal.”⁴⁴¹

The Secretary-General endorsed the recommendation in regards to bringing the perpetrators of the crimes committed during the conflict before an international tribunal. This endorsement was transmitted to the Security Council by a report on October 6, 1994.⁴⁴² The Commission of Experts also submitted its final report to the Secretary-General on November 29, 1994,⁴⁴³ after the Tribunal was set up.

Even though those two reports constituted the legal ground of the Tribunal established to deal with the international crimes committed in Rwanda, and especially the first resulted in the establishment of the Tribunal itself, the Commission of Experts was criticized for being a big failure. Unlike the one appointed in the context of ICTY, this time, the Commission of Experts was given a limited mandate, an indication demonstrating the UN’s unwillingness to substantiate the commission of large-scale atrocities. Moreover, the Commission was unable to carry out detailed investigations, as it had four months for such a work, “which was not long enough for the Commission to effectively fulfill its investigatory mandate.” Furthermore, it had no financial and technical means allocated to its mandate. As a result, “the three-man Commission spent a total of one week in the field, and conducted no investigations. Its report was patterned on the Final Report of the Commission of Experts for the Former Yugoslavia, but necessarily lacked the thoroughness of the latter. The Rwanda Commission Report was based on reports made by other bodies, and other media and published reports.”⁴⁴⁴ The practical consequence was then that the International Criminal Tribunal for Rwanda did not have much information and evidence to substantiate the charges directed against those individuals allegedly responsible for the commission of various international crimes.

Following the Commission’s report, the UN Security Council adopted Resolution 955 (1994) on November 8, 1994, by which it established an international tribunal for the purpose of prosecuting the international crimes perpetrated in Rwanda.⁴⁴⁵ Having determined that the situation in Rwanda “continues to constitute a threat to international peace and security,” and believed that “the establishment of an international tribunal for the prosecution of persons responsible for genocide and the other above-mentioned violations of international humanitarian law will contribute to ensuring that such violations are halted and effectively redressed,” decided that “to establish an international tribunal for the sole purpose of prosecuting persons responsible for genocide and other serious violations of international humanitarian law committed in the

⁴⁴¹ *Ibid.* However, in its report, the Commission stated its preference of the expansion of the jurisdiction of the ICTY for the purpose of addressing the crimes committed within the territory of Rwanda over the creation of a new international penal institution.

⁴⁴² Progress Report of the Secretary-General on the United Nations Assistance Mission for Rwanda, U.N. Doc. S/1994/1133 (1994). Reminding the Commission’s preference in regards to the international tribunal, Secretary-General’s report did not contain any specific recommendation, leaving the matter to the Security Council’s discretion.

⁴⁴³ Final Report of the Independent Commission of Experts established in accordance with Security Council Resolution 935 (1994), P 65, U.N. Doc. S/1994/1405 (1994).

⁴⁴⁴ Bassiouni, “From Versailles to Rwanda in Seventy-Five Years: The Need to Establish a Permanent International Criminal Court,” p. 46.

⁴⁴⁵ S.C. Res. 955, U.N. SCOR, 49th Sess., U.N. Doc. S/RES/955 (1994).

territory of Rwanda and Rwandan citizens responsible for genocide and other such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994.”⁴⁴⁶ By the resolution, the Council also required States to provide cooperation on this matter,⁴⁴⁷ and called all other international actors, including inter-governmental and non-governmental organizations to make contributions in order to facilitate the work of the Tribunal.⁴⁴⁸ The Statute of the Tribunal was annexed to the text of the resolution.

The Statute provided that the Tribunal shall have temporal jurisdiction over the crimes prosecutable in accordance with it.⁴⁴⁹ The Tribunal’s jurisdiction enables it to prosecute the crimes of genocide,⁴⁵⁰ and crimes against humanity.⁴⁵¹ Because the conflict in Rwanda was characterized as a non-international one, no provision on the violations of the laws and customs of war and the rules and norms of 1949 Geneva Conventions applying to international conflicts was included in the Statute.⁴⁵² However, the Statute provided that violations of the common articles to the 1949 Geneva Conventions and of 1977 Additional Protocol II were to be prosecuted.⁴⁵³

Under the Statute, individuals responsible for committing the respective crimes referred to by it were to be criminally liable.⁴⁵⁴ The jurisdiction of the Tribunal was to reach the Rwandan citizens only, and was only exercisable within the territory of Rwanda.⁴⁵⁵ As was in case of ICTY, ICTR was also to exercise concurrent jurisdiction with domestic courts.⁴⁵⁶ The remainder articles, too, have great resemblances with the corresponding ones of the Statute of ICTY.

Some referred to ICTR as an example of success. For instance, Associate Legal Officer in ICTY, Stuart Beresford argues that “although it has essentially operated in the shadow of the Yugoslavia Tribunal since its inception, the achievements the Tribunal has made in the pursuit of

⁴⁴⁶ *Ibid.*

⁴⁴⁷ The relevant provision reads as follows: the UN Security Council decided that “all States shall cooperate fully with the International Tribunal and its organs in accordance with the present resolution and the Statute of the International Tribunal and that consequently all States shall take any measures necessary under their domestic law to implement the provisions of the present resolution and the Statute, including the obligation of States to comply with requests for assistance.” *Ibid.*, paragraph 2.

⁴⁴⁸ The relevant provision is as follows: the Council urged “States and intergovernmental and non-governmental organizations to contribute funds, equipment and services to the International Tribunal, including the offer of expert personnel.” *Ibid.*, paragraph 3.

⁴⁴⁹ Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States, between 1 January 1994 and 31 December 1994, annexed to S.C. Res. 955 (1994). Article 1: “The International Tribunal for Rwanda shall have the power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994, in accordance with the provisions of the present Statute.”

⁴⁵⁰ *Ibid.*, Article 2.

⁴⁵¹ *Ibid.*, Article 3.

⁴⁵² Bassiouni, “Establishing an International Criminal Court: Historical Survey,” p. 47.

⁴⁵³ *Ibid.*, Article 4.

⁴⁵⁴ *Ibid.*, Article 6.

⁴⁵⁵ *Ibid.*, Article 7.

⁴⁵⁶ *Ibid.*, Article 8.

international justice has enabled it to take its own place in the chronicles of the development of international humanitarian law.” He attributes this success to the support provided by the international community to the Tribunal.⁴⁵⁷

However, the dissenting opinions take several points into consideration. First of all, the Tribunal is not a real success, as it was in fact the Government of Rwanda who demanded its establishment.⁴⁵⁸ However, as the negotiations over the terms of the Tribunal proceeded, the disparities between the Government’s expectations and the Council’s intentions became apparent. The Rwandan Government favored an institution with a broadly defined jurisdiction, while the one established had a very narrow one in terms of both the prosecutable crimes and the territory where the Tribunal was able to exercise its jurisdiction as well as the scope of penalties to be imposed upon the criminals. For instance, the Rwandan Government wanted the death penalty to be included in the impossible penalties, while the Council opposed to it.⁴⁵⁹

Conclusion

There are a lot of things that one could infer from the evolution of international criminal law which was surveyed above. However, the following are meant to be the highlights only, and of course not representative and reflective of the whole picture.

- 1- The study of the history of international criminal law clearly demonstrates that the international community, with its all components, including nation-states, involved, has always shown interest towards establishing concrete and strong institutions and mechanisms for the purpose of ensuring the prosecution and punishment of the criminals responsible for the commission of crimes that are deemed international ones under international law in general, and particularly creating a permanent international penal tribunal with universal jurisdiction to address the question of preventing the commission of the crimes in the aforesaid kind, and in cases of their commission, of punishing the perpetrators.

Moreover, this interest is not peculiar to the twentieth century only, where the commission of such international crimes as genocide, crimes against humanity and war crimes has been widespread and more influential and damaging than ever. In fact, it is almost as old as the human being itself, though the evidence available at hand permits us to trace this interest back to only several centuries ago.

⁴⁵⁷ Beresford, “In Pursuit of International Justice: The First Four-year Term of the International Criminal Tribunal for Rwanda,” p. 132.

⁴⁵⁸ Statement Dated 28 September 1994 on the Question of Refugees and Security in Rwanda, U.N. SCOR, 49th Sess., Annex, at 2, U.N. Doc. S/1994/1115 (1994), cited in Madeline H. Morris, “The Trials of Concurrent Jurisdiction: The Case of Rwanda,” *Duke Journal of Comparative and International Law*, Vol. 7, Issue 2, 1997, p. 353.

⁴⁵⁹ Bassiouni, “From Versailles to Rwanda in Seventy-Five Years: The Need to Establish a Permanent International Criminal Court,” p. 48.

Yet even the limited search facilities and capabilities are indicative enough of the fact that the idea, and even desire, to maintain an international order where justice is achieved through holding the those individuals committing the worst crimes responsible for their acts, and bringing them before an impartial international penal body has always been existent.

- 2- However, it should be noted that while one could easily prove the perpetual existence of the aforesaid interest, it is also true that the most substantial and concrete attempts towards the transformation of the interest into solid measures have been made after serious global events that affected the international community as a whole. Needless to say, the world wars are exemplary in this regard.

Although there are a lot of examples that could be cited as proofs for the above argument, several ones are noteworthy. The Hagenbach case, referred to by some as the first international trial, is surely the first one. The commission of atrocities that deeply wounded the conscious of the international society led to an outcry even as early as fifteenth century, when wars, and of course deaths associated with those wars, were seen inevitable.

The second one is the first proposal for a permanent international criminal court by Gustave Moynier. Even though previously he was not in favor of such an institution, the horrifying outcome of the Franco-Prussian War changed his mind. Although it is not possible to speculate that he would not have advanced this proposal in the absence of such a concrete reason, it is very likely that he was affected by it.

The end of WWI saw a much more intense and solid interest towards the creation of an international penal institution for the purpose of prosecuting the persons responsible for the commission of crimes during the war. The absence of such an institution was strongly felt, and a promising enthusiasm emerged soon after the end of the war.

Likewise, WWII was preceded by serious attempts made to prevent future commission of the crimes similar to those committed during the war. This time those attempts resulted in such more visible and concrete outcomes as Nuremberg Trials, and the adoption of the principles set out during those trials by the UN as a guide for future references.

- 3- However, the revival of the interest by the international community towards the establishment of an international criminal tribunal following the global wars has never been sufficient to achieve satisfactory results. Despite the enthusiasms and numerous attempts made in this context, once the horrifying impact of the war lost its strength, those attempts and enthusiasm were immediately replaced with reluctance and ignorance.

Moynier's proposal was never seriously taken into consideration and it has over the time become a courageous and yet unfruitful attempt that is today referred to by the students of international criminal law with respect and admiration. As a consequence, it took its place in the history only as the first proposal for an international criminal court.

The attempts to prosecute, try and probably punish the perpetrators of the international crimes committed during WWI have also failed in that the prosecutions had never taken place. Even though the establishment of an international tribunal was envisaged even during the war, those individuals responsible for such crimes have for the most part gone unpunished. The excitement and determination prevalent during the war to achieve justice has lost its impact, and soon after the healing of the wounds caused by the war was left to the slow passage of time.

With some exceptions, the immediate aftermath of WWII witnessed almost the same developments. While the war was still being fought, voices from Great Britain, France and the United States stated a determination to punish the perpetrators of the crimes committed during the war. They were promising in that the determination involved was indicative that this time the perpetrators would not have gone unpunished. However, a few of those perpetrators were brought before competent tribunals. What is more, a few of those brought to the justice were in fact found guilty of war crimes and other forms of international crimes.

- 4- The reluctance of international community and the lack of will to address the commission of such serious crimes as genocide and war crimes led to the reiteration of the past atrocities. It is interesting to note that while there has been substantial progress in many fields, the situation concerning the civil casualties during wars has not been improved significantly. Even though the international political order has over the time remarkably enhanced, it became apparent that this order was unable to prevent the occurrences of large scale atrocities. Genocides, campaigns for killings have been witnessed even as late as 1990s.

However, this time the major means for the commission of atrocities were not the inter-state wars. While previous large scale atrocities had been committed during war times, since the end of WWII the internal conflicts as well as repressive regimes have been the major sources of killings and other forms of violations.

As the cases of Chile, Cambodia and Argentina demonstrate, the repressive governments could easily be brutal to even their own subjects on the grounds of political opposition. It should be noted that the brutalities committed by those governments against their own nationals occurred despite the existence of numerous international legal documents imposing obligations with regard to the protection of their own subjects upon the States. However, in the absence of an effective enforcement mechanism, those instruments have proven to be useless in those cases.

Exactly the same could be said for the genocidal campaigns initiated almost simultaneously in Former Yugoslavia and Rwanda. In those cases too the victimized groups were affected by internal conflicts.

- 5- Upon the examination of evolution of international criminal law and individual criminal responsibility, the question of why there has always been reluctance to address the commission of large scale atrocities, even in the presence of a strong desire and interest

towards the creation of an international mechanism for this purpose, becomes relevant and even necessary. Even though that might seem to be a contradiction, in fact there is a simple and clear explanation for that. States have always been more concerned about the preservation of their sovereign positions in world politics than the engagement in such international problems as commissions of genocides and war crimes.

As the above survey demonstrates, in countless occasions States have shown that they were interested in the prosecution and punishment of those individuals responsible for the commission of international crimes only to the extent that the engagement would not negatively affect their prerogatives as a sovereign unit.

Thus, it is evident that sovereignty has been the key concept in understanding the ineptness and sometimes indifference of the States in addressing the question of international criminal jurisdiction. Especially the objections raised by the representatives of States during the deliberations in the UN against the proposals for the maintenance of an international legal order equipped with universal jurisdiction in prosecuting and punishing the perpetrators of the worst crimes are noteworthy in this regard.

It is obvious that States have regarded an institution vested with the authority to prosecute and punish the individuals regardless of their nationality or the territory they are apprehended in as a threat and intrusion to the international order based on the mutual recognition of territorial sovereignty. They have been especially keen in the particular case of individual criminal responsibility, as it was seen as the States' domain. In other words, while States have tended to act flexibly in some other matters, they wanted the question of prosecuting the criminals to remain at their sole discretion.

- 6- However, it should also be noted that despite the resistance of the states to the establishment of an effective system of international criminal jurisdiction on the grounds that such an attempt would substantially damage the nation-state's dominant position in world politics, numerous successes have been achieved. In other words, although states could have managed to retain their sovereign positions, at least to some extent, they had to make concessions in response to the demands voiced by the large masses of international community.

Therefore, the progress that has been made over centuries cannot be overlooked for that the permanent international criminal court is for some part the culmination of that progress. The attempts made in late nineteenth century served as a basis for the later ones. The accrued experience during this time should have contributed to the idea of creating an international penal tribunal raised in the immediate aftermath of WWI for the purpose of addressing the massacres directed against the civilians during the war. It could be argued that in the absence of previously codified legal documents and adopted principles, such an idea could not even have been voiced. The same could be said for the developments after the end of WWII. The experience of Nuremberg and Tokyo Trials borrowed a great deal from the past; and in this vein, one could easily find numerous references made in the Nuremberg process as a whole to the previously adopted principles and documents.

Likewise, one could not underestimate the significance of Nuremberg Trials despite many deficiencies associated with it. Even though they have remained forgotten for almost five decades, they have been the point of departure in addressing the genocides and other international crimes perpetrated in Rwanda and Former Yugoslavia.

- 7- However, given that nation-states have consistently demonstrated strong attachment to the notion of national sovereignty and principle of non-intervention to internal matters of other sovereign states in the venues where the question of a universal criminal jurisdiction has been deliberated, it is not possible to attribute the above incremental development and partial achievement to sovereignty-based international order. Rather, the insistence and patience of civil society actors is a better explanation for the gains of international society with regard to the evolution of international criminal law and individual criminal accountability.

The involvement of private actors, ranging from outstanding individuals with no organizational attachments to internationally recognized non-governmental organizations, in the processes where the instruments of international criminal law have been codified is indicative of the influence of civil society sector on the development of a more individual-oriented order. The contributions and inputs made by various civil society organizations to the all stages of treaty-making relevant to international criminal law, including preparation, drafting, revision and codification, are therefore what we should regard the determinative if not the sole factors in the creation of what could be called a partially successful system of international criminal jurisdiction.

Once more, it should be recalled that the first proposal for an international criminal court was made by an individual, Gustave Moynier of Red Cross. The Hague Conventions of 1899 and 1907, the predecessors of modern international humanitarian law, were attended by hundreds of civil society organizations. Raphael Lemkin is today still being remembered and respected for his tireless efforts pertinent to the coinage of the term genocide and the recognition of the crime of genocide as a punishable act under international law. There are a lot more examples that could be mentioned in this regard. However, a last one might be sufficient: without Bassiouni's perseverance and attempts that he made in his individual capacity despite consistent obstruction in forms of bureaucratic and financial obstacles created by the UN, and that resulted in a huge collection of evidence substantiating the commission of international crimes in Former Yugoslavia, it is not possible to say that the success in the experience of ICTY could have been achieved.

- 8- However, notwithstanding the extensive involvement of civil society actors in the processes where the issue of universal criminal jurisdiction has been debated, their influence has been proven to be limited. This is reflected in the failure of creating a permanent international penal institution to be vested with the power to prosecute the individuals responsible for committing the worst crimes regardless of their nationality and the venue they have been apprehended. Due to the limited influence and pressure exerted by the 'outside' actors, nation-states, for the most part, have been able to shape the outcome in accordance with their own positions and agendas.

Of course, the above argument does not mean a denial of the significant contribution of civil society. However, the point that needs to be underlined is that the success achieved has often not been in proportion to the level of participation of civil society actors in the deliberations. They have had limited access to the treaty-making processes, relatively little influence of delegations of nation-states, and most importantly, many times their recommendations have easily been turned down, sometimes with no explanation.

The best explanation for the limited influence described above is the uncoordinated efforts led by various civil society actors. They have often failed to agree on a commonly acceptable agenda, and thus created a joint platform for coming together and develop coordinated efforts that could have an impact of the behaviors of states' delegates.

- 9- The historical survey above demonstrates that the question of international criminal jurisdiction has been dealt with differing approaches by different actors and institutions at different stages. While the matter has been discussed in multilateral conferences at the beginning, at the later stages such intergovernmental organizations as the League of Nations and the UN have been included in the process. Although the method of multilateral conferences too has been used, the UN has been the primary actor and venue in discussing and addressing the issue since its creation.

The creation of the UN has been a facilitating factor in the development of a more comprehensive international criminal law, since in the previous 'system', gathering the States together had proven to be difficult. In order to discuss an issue relevant to international criminal jurisdiction, a lengthy and painstaking procedure had to be followed. Therefore, for the most time, the States had needed to be convinced, often by civil society actors.

However, since its creation, the UN has been the primary venue for the discussions pertinent to the matter. Over the time, a pattern has been formed with regard to the engagement in any current issue relevant to the international criminal accountability. The pattern is in general terms as follows:

First, the issue is taken up by the UN General Assembly. It usually decides to appoint a special committee charged to further review and study the matter, and then submit a report summarizing its work and recommendations to the Assembly. The Assembly then also includes the Secretary-General in the process. The matter is discussed in a session by the Assembly, where it considers the recommendations contained in the report submitted by the special committee. The representatives of governments recommend revisions to the proposal concerned. Then, if an agreement is reached, the proposal comes into reality.

In more serious situations that need to be urgently addressed, the Security Council usually takes the lead, acting in accordance with its mandate to maintain peace and security in the world. In such situations, the initiative is almost entirely left to the Council, and such secondary actors as the special committees, the General Assembly, the Secretary-General and even the States other than those having permanent seats in the Council assume the role of assisting the Council in its work.

10- However, while such UN organs acting relatively free of political considerations as the ILC have tended to be progressive with regard to the question of international criminal jurisdiction, other ones, especially the UN Security Council has often prioritized the political consequences rather than achievement of justice when addressing the issue at hand. In other words, the Council's involvement in particular international problems consisting of an international criminal law component has in general been politically motivated.

Despite that the commission of genocides was plain and evident in the cases of Rwanda and Former Yugoslavia, the Council has adopted an evasive approach in dealing with the situations. It seems that in both cases political considerations have been prevalent in the UN Security Council's actions. For the permanent members, the political stability in the regions where those incidents had occurred was more important than the pursuit of justice.

Similarly, the ILC has in general made proposals concerning particular subjects of international criminal law where it set out relatively advanced principles. However, when those proposals have been considered in the relevant organs where national interests' influence was clear and evident, those proposals have either been turned down, or significantly altered so that the novel arrangements contained therein have lost their power and probable impact.