

AN INTRODUCTION TO THE
INTERNATIONAL
CRIMINAL COURT

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Creation of the Court

War criminals have been prosecuted at least since the time of the ancient Greeks, and probably well before that. The idea that there is some common denominator of behaviour, even in the most extreme circumstances of brutal armed conflict, confirms beliefs drawn from philosophy and religion about some of the fundamental values of the human spirit. The early laws and customs of war can be found in the writings of classical authors and historians. Those who breached them were subject to trial and punishment. Modern codifications of this law, such as the detailed text prepared by Columbia University professor Francis Lieber that was applied by Abraham Lincoln to the Union army during the American Civil War, proscribed inhumane conduct and set out sanctions, including the death penalty, for pillage, raping civilians, abuse of prisoners and similar atrocities.¹ Prosecution for war crimes, however, was only 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. Historically, the prosecution of war crimes was generally restrained to the vanquished or to isolated cases of rogue combatants in the victor's army. National justice systems have often proven themselves to be incapable of being balanced and impartial in such cases.

The first genuinely international trial for the perpetration of atrocities was probably that of Peter von Hagenbach, who was tried in 1474 for atrocities committed during the occupation of Breisach. When the town was retaken, von Hagenbach was charged with war crimes, convicted and beheaded.² But what was surely no more than a curious experiment in medieval international justice was soon overtaken by the sanctity of State sovereignty resulting from the Peace of Westphalia of 1648. With the

¹ Instructions for the Government of Armies of the United States in the Field, General Orders No. 100, 24 April 1863.

² M. Cherif Bassiouni, 'From Versailles to Rwanda in 75 Years: The Need to Establish a Permanent International Court', (1997) 10 *Harvard Human Rights Journal* 11.

development of the law of armed conflict in the mid-nineteenth century, concepts of international prosecution for humanitarian abuses slowly began to emerge. One of the founders of the Red Cross movement, which grew up in Geneva in the 1860s, urged a draft statute for an international criminal court. Its task would be to prosecute breaches of the Geneva Convention of 1864 and other humanitarian norms. But Gustav Moynier's innovative proposal was much too radical for its time.³

The Hague Conventions of 1899 and 1907 represent the first significant codification of the laws of war in an international treaty. They include an important series of provisions dealing with the protection of civilian populations. Article 46 of the Regulations that are annexed to the Hague Convention IV of 1907 enshrines the respect of '[f]amily honour and rights, the lives of persons, and private property, as well as religious convictions and practice'.⁴ Other provisions of the Regulations protect cultural objects and private property of civilians. The preamble to the Conventions recognizes that they are incomplete, but promises that until a more complete code of the laws of war is issued, 'the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience'. This provision is known as the Martens clause, after the Russian diplomat who drafted it.⁵

The Hague Conventions, as international treaties, were meant to impose obligations and duties upon States, and were not intended to create criminal liability for individuals. They declared certain acts to be illegal, but not criminal, as can be seen from the absence of anything suggesting a sanction for their violation. Yet within only a few years, the Hague Conventions were being presented as a source of the law of war crimes. In 1913, a commission of inquiry sent by the Carnegie Foundation to investigate atrocities committed during the Balkan Wars used the provisions of the Hague Convention IV as a basis for its description of war

³ Christopher Keith Hall, 'The First Proposal for a Permanent International Criminal Court', (1998) 322 *International Review of the Red Cross* 57.

⁴ Convention Concerning the Laws and Customs of War on Land (Hague IV), 3 *Martens Nouveau Recueil* (3d) 461. For the 1899 treaty, see Convention (II) with Respect to the Laws and Customs of War on Land, 32 Stat. 1803, 1 Bevans 247, 91 *British Foreign and State Treaties* 988.

⁵ Theodor Meron, 'The Martens Clause, Principles of Humanity, and Dictates of Public Conscience', (2000) 94 *American Journal of International Law* 78.

crimes.⁶ Immediately following World War I, the Commission on Responsibilities of the Authors of War and on Enforcement of Penalties, established to examine allegations of war crimes committed by the Central Powers, did the same.⁷ But actual prosecution for violations of the Hague Conventions would have to wait until Nuremberg. Offences against the laws and customs of war, known as ‘Hague Law’ because of their roots in the 1899 and 1907 Conventions, are codified in the 1993 Statute of the International Criminal Tribunal for the Former Yugoslavia⁸ and in Article 8(2)(b), (e) and (f) of the Statute of the International Criminal Court.

As World War I wound to a close, public pressure mounted, particularly in England, for criminal prosecution of those generally considered to be responsible for the war. There was much pressure to go beyond violations of the laws and customs of war and to prosecute, in addition, the waging of war itself in violation of international treaties. At the Paris Peace Conference, the Allies debated the wisdom of such trials as well as their legal basis. The United States was generally hostile to the idea, arguing that this would be *ex post facto* justice. Responsibility for breach of international conventions, and above all for crimes against the ‘laws of humanity’ – a reference to civilian atrocities within a State’s own borders – was a question of morality, not law, said the American delegation. But this was a minority position. The resulting compromise dropped the concept of ‘laws of humanity’ but promised prosecution of Kaiser Wilhelm II ‘for a supreme offence against international morality and the sanctity of treaties’. The Versailles Treaty formally arraigned the defeated German emperor and pledged the creation of a ‘special tribunal’ for his trial.⁹ Wilhelm of Hohenzollern had fled to neutral Holland which refused his extradition, the Dutch government considering that the charges consisted of retroactive criminal law. He lived out his life there and died, ironically, in 1941 when his country of refuge was falling under German occupation in the early years of World War II.

The Versailles Treaty also recognized the right of the Allies to set up

⁶ *Report of the International Commission to Inquire into the Causes and Conduct of the Balkan Wars*, Washington: Carnegie Endowment for International Peace, 1914.

⁷ *Violations of the Laws and Customs of War, Reports of Majority and Dissenting Reports of American and Japanese Members of the Commission of Responsibilities, Conference of Paris, 1919*, Oxford: Clarendon Press, 1919.

⁸ Statute of the International Criminal Tribunal for the Former Yugoslavia, UN Doc. S/RES/827, Annex.

⁹ Treaty of Peace between the Allied and Associated Powers and Germany (‘Treaty of Versailles’), (1919) TS 4, Art. 227.

military tribunals to try German soldiers accused of war crimes.¹⁰ Germany never accepted the provisions, and subsequently a compromise was reached whereby the Allies would prepare lists of German suspects, but the trials would be held before the German courts. An initial list of nearly 900 was quickly whittled down to about forty, and in the end only a dozen were actually tried. Several were acquitted; those found guilty were sentenced to modest terms of imprisonment, often nothing more than time already served in custody prior to conviction. The trials looked rather more like disciplinary proceedings of the German army than any international reckoning. Known as the ‘Leipzig Trials’, the perceived failure of this early attempt at international justice haunted efforts in the inter-war years to develop a permanent international tribunal and were grist to the mill of those who opposed war crimes trials for the Nazi leaders. But two of the judgments of the Leipzig court involving the sinking of the hospital ships *Dover Castle* and *Llandoverly Castle*, and the murder of the survivors, mainly Canadian wounded and medical personnel, are cited to this day as precedents on the scope of the defence of superior orders.¹¹

The Treaty of Sèvres of 1920, which governed the peace with Turkey, also provided for war crimes trials.¹² The proposed prosecutions against the Turks were even more radical, going beyond the trial of suspects whose victims were either Allied soldiers or civilians in occupied territories to include subjects of the Ottoman Empire. This was the embryo of what would later be called crimes against humanity. However, the Treaty of Sèvres was never ratified by Turkey, and the trials were never held. The Treaty of Sèvres was replaced by the Treaty of Lausanne of 1923 which contained a ‘Declaration of Amnesty’ for all offences committed between 1 August 1914 and 20 November 1922.¹³

Although these initial efforts to create an international criminal court were unsuccessful, they stimulated many international lawyers to devote their attention to the matter during the years that followed. Baron Descamps of Belgium, a member of the Advisory Committee of Jurists appointed by the Council of the League of Nations, urged the establish-

¹⁰ *Ibid.*, Arts 228–230.

¹¹ *German War Trials, Report of Proceedings Before the Supreme Court in Leipzig*, London: His Majesty’s Stationery Office, 1921. See also James F. Willis, *Prologue to Nuremberg: The Politics and Diplomacy of Punishing War Criminals of the First World War*, Westport, CT: Greenwood Press, 1982.

¹² (1920) UKTS 11; (1929) 99 (3rd Series), DeMartens, Recueil général des traités, No. 12, p. 720 (French version).

¹³ Treaty of Lausanne Between Principal Allied and Associated Powers and Turkey, (1923) 28 LNTS 11.

ment of a ‘high court of international justice’. Using language borrowed from the Martens clause in the preamble to the Hague Conventions, Descamps recommended that the jurisdiction of the court include offences ‘recognized by the civilized nations but also by the demands of public conscience [and] the dictates of the legal conscience of civilized nations’. The Third Committee of the Assembly of the League declared that Descamps’ ideas were ‘premature’. Efforts by expert bodies, such as the International Law Association and the International Association of Penal Law, culminated, in 1937, in the adoption of a treaty by the League of Nations that contemplated the establishment of an international criminal court.¹⁴ But, failing a sufficient number of ratifying States, that treaty never came into force.

The Nuremberg and Tokyo trials

In the Moscow Declaration of 1 November 1943, the Allies affirmed their determination to prosecute the Nazis for war crimes. The United Nations Commission for the Investigation of War Crimes, composed of representatives of most of the Allies, and chaired by Sir Cecil Hurst of the United Kingdom, was established to set the stage for post-war prosecution. The Commission prepared a ‘Draft Convention for the Establishment of a United Nations War Crimes Court’, basing its text largely on the 1937 treaty of the League of Nations.¹⁵ But it was the work of the London Conference, convened at the close of the war and limited to the four major powers, the United Kingdom, France, the United States and the Soviet Union, that laid the groundwork for the prosecutions at Nuremberg. The Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, and Establishing the Charter of the International Military Tribunal (IMT) was formally adopted on 8 August 1945, and was promptly signed by representatives of the four powers. The Charter of the International Military Tribunal was annexed to the Agreement.¹⁶ This

¹⁴ Convention for the Creation of an International Criminal Court, League of Nations OJ Spec. Supp. No. 156 (1936), LN Doc. C.547(I).M.384(I).1937.V (1938).

¹⁵ ‘Draft Convention for the Establishment of a United Nations War Crimes Court’, UN War Crimes Commission, Doc. C.50(1), 30 September 1944.

¹⁶ Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, and Establishing the Charter of the International Military Tribunal (IMT), Annex, (1951) 82 UNTS 279. See Arieh J. Kochavi, *Prelude to Nuremberg, Allied War Crimes Policy and the Question of Punishment*, Chapel Hill and London: University of North Carolina Press, 1998; *Report of Robert H. Jackson, United States Representative to the International Conference on Military Trials*, Washington: US Government Printing Office, 1949.

treaty was eventually adhered to by nineteen other States who, although they played no active role in the Tribunal's activities or the negotiation of its statute, sought to express their support for the concept.

In October 1945, indictments were served on twenty-four Nazi leaders, and their trial – known as the Trial of the Major War Criminals – began the following month. It concluded nearly a year later, with the conviction of nineteen defendants and the imposition of sentence of death in twelve cases. The Tribunal's jurisdiction was confined to three categories of offence: crimes against peace, war crimes and crimes against humanity. The Charter of the International Military Tribunal had been adopted after the crimes had been committed, and for this reason it was attacked as constituting *ex post facto* criminalization. Rejecting such arguments, the Tribunal referred to the Hague Conventions, for the war crimes, and to the 1928 Kellogg–Briand Pact, for crimes against peace.¹⁷ It also answered that the prohibition of retroactive crimes was a principle of justice, and that it would fly in the face of justice to leave the Nazi crimes unpunished. This argument was particularly important with respect to the category of crimes against humanity, for which there was little real precedent. In the case of some war crimes charges, the Tribunal refused to convict after hearing evidence of similar behaviour by British and American soldiers.¹⁸

In December 1945, the four Allied powers enacted a somewhat modified version of the Charter of the International Military Tribunal, known as Control Council Law No. 10.¹⁹ It provided the legal basis for a series of trials before military tribunals that were run by the victorious Allies, as well as for subsequent prosecutions by German courts that continued for several decades. Control Council Law No. 10, which was really a form of domestic legislation because it applied to prosecution of Germans by courts of the civil authorities, largely borrowed the definition of crimes

¹⁷ The Kellogg–Briand Pact was an international treaty that renounced the use of war as a means to settle international disputes. Previously, war as such was not prohibited by international law. States had erected a network of bilateral and multilateral treaties of non-aggression and alliance in order to protect themselves from attack and invasion.

¹⁸ *France et al. v. Goering et al.*, (1946) 22 IMT 203; (1946) 13 ILR 203; (1946) 41 *American Journal of International Law* 172. The judgment itself, as well as the transcript of the hearings and the documentary evidence, are reproduced in a forty-volume series published in English and French and available in most major reference libraries. The literature on the Nuremberg trial of the major war criminals is extensive. Probably the best modern account is Telford Taylor, *The Anatomy of the Nuremberg Trials*, New York: Alfred A. Knopf, 1992.

¹⁹ Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity, 20 December 1945, *Official Gazette of the Control Council for Germany*, No. 3, 31 January 1946, pp. 50–5.

against humanity found in the Charter of the Nuremberg Tribunal, but omitted the latter's insistence on a link between crimes against humanity and the existence of a state of war, thereby facilitating prosecution for pre-1939 crimes committed against German civilians, including persecution of the Jews and euthanasia of the disabled. Several important trials were held pursuant to Control Council Law No. 10 in the period 1946–1948 by American military tribunals. These focused on groups of defendants, such as judges, doctors, bureaucrats and military leaders.²⁰

In the Pacific theatre, the victorious Allies established the International Military Tribunal for the Far East. Japanese war criminals were tried under similar provisions to those used at Nuremberg. The bench was more cosmopolitan, consisting of judges from eleven countries, including India, China and the Philippines, whereas the Nuremberg judges were appointed by the four major powers, the United States, the United Kingdom, France and the Soviet Union.

At Nuremberg, Nazi war criminals were charged with what the prosecutor called 'genocide', but the term did not appear in the substantive provisions of the Statute and the Tribunal convicted them of 'crimes against humanity' for the atrocities committed against the Jewish people of Europe. Within weeks of the judgment, efforts began in the General Assembly of the United Nations to push the law further in this area. In December 1946, a resolution was adopted declaring genocide a crime against international law and calling for the preparation of a convention on the subject.²¹ Two years later, the General Assembly adopted the Convention for the Prevention and Punishment of the Crime of Genocide.²² The definition of genocide set out in Article II of the 1948 Convention is incorporated unchanged in the Statute of the International Criminal Court, as Article 6. But, besides defining the crime and setting out a variety of obligations relating to its prosecution, Article VI of the Convention said that trial for genocide was to take place before 'a competent tribunal of the State in the territory of which the act was committed,

²⁰ Frank M. Buscher, *The US War Crimes Trial Program in Germany, 1946–1955*, Westport, CT: Greenwood Press, 1989. The judgments in the cases, as well as much secondary material and documentary evidence, have been published in two series, one by the United States Government titled *Trials of the War Criminals* (15 volumes), the other by the United Kingdom Government titled *Law Reports of the Trials of the War Criminals* (15 volumes). Both series are readily available in reference libraries. ²¹ GA Res. 96(I).

²² Convention on the Prevention and Punishment of the Crime of Genocide, (1951) 78 UNTS 277.

or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction'. An early draft of the Genocide Convention prepared by the United Nations Secretariat had actually included a model statute for a court, based on the 1937 treaty developed within the League of Nations, but the proposal was too ambitious for the time and the conservative drafters stopped short of establishing such an institution.²³ Instead, a General Assembly resolution adopted the same day as the Convention called upon the International Law Commission to prepare the statute of the court promised by Article VI.²⁴

International Law Commission

The International Law Commission is a body of experts named by the United Nations General Assembly and charged with the codification and progressive development of international law. Besides the mandate to draft the statute of an international criminal court derived from Article VI of the Genocide Convention, in the post-war euphoria about war crimes prosecution the General Assembly had also asked the Commission to prepare what are known as the 'Nuremberg Principles', a task it completed in 1950, and the 'Code of Crimes Against the Peace and Security of Mankind', a job that took considerably longer. Indeed, much of the work on the draft statute of an international criminal court and the draft code of crimes went on within the Commission in parallel, almost as if the two tasks were hardly related. The pair of instruments can be understood by analogy with domestic law. They correspond in a general sense to the definitions of crimes and general principles found in criminal or penal codes (the 'code of crimes'), and the institutional and procedural framework found in codes of criminal procedure (the 'statute').

Meanwhile, in parallel with the work of the International Law Commission, the General Assembly also established a committee charged with drafting the statute of an international criminal court. Composed of seventeen States, it submitted its report and draft statute in 1952.²⁵ A new

²³ William A. Schabas, *Genocide in International Law, The Crime of Crimes*, Cambridge: Cambridge University Press, 2000.

²⁴ 'Study by the International Law Commission of the Question of an International Criminal Jurisdiction', GA Res. 216B(III).

²⁵ 'Report of the Committee on International Criminal Court Jurisdiction', UN Doc. A/2135 (1952).

committee, created by the General Assembly to review the draft statute in the light of comments by Member States, reported to the General Assembly in 1954.²⁶ The International Law Commission made considerable progress on its draft code and actually submitted a proposal in 1954.²⁷ Then, the General Assembly suspended the mandates, ostensibly pending the sensitive task of defining the crime of aggression.²⁸ In fact, political tensions associated with the Cold War had made progress on the war crimes agenda virtually impossible.

The General Assembly eventually adopted a definition of aggression, in 1974,²⁹ but the work did not immediately resume on the proposed international criminal court. In 1981, the General Assembly asked the International Law Commission to revive the work on its draft code of crimes.³⁰ Doudou Thiam was designated the special rapporteur of the Commission, and he produced annual reports on various aspects of the draft code for more than a decade. Thiam's work, and the associated debates in the Commission, addressed a range of questions, including definitions of crimes, criminal participation, defences and penalties.³¹ A substantially revised version of the 1954 draft code was provisionally adopted by the Commission in 1991, and then sent to Member States for their reaction.

But the code did not necessarily involve an international jurisdiction. That aspect of the work was only initiated in 1989, the year of the fall of the Berlin Wall. Trinidad and Tobago, one of several Caribbean States plagued by narcotics problems and related transnational crime issues, initiated a resolution in the General Assembly directing the International Law Commission to consider the subject of an international criminal court within the context of its work on the draft code of crimes.³² Special Rapporteur Doudou Thiam made an initial presentation on the subject in 1992. By 1993, the Commission had prepared a draft statute, this time under the direction of Special Rapporteur James Crawford. The draft statute was examined that year by the General Assembly, which encouraged the Commission to complete its work. The following year, in 1994,

²⁶ 'Report of the Committee on International Criminal Court Jurisdiction', UN Doc. A/2645 (1954).

²⁷ *Yearbook . . . 1954*, Vol. I, 267th meeting, para. 39, p. 131 (ten in favour, with one abstention). On the 1954 draft code in general, see D.H.N. Johnson, 'Draft Code of Offences Against the Peace and Security of Mankind', (1955) 4 *International and Comparative Law Quarterly* 445.

²⁸ GA Res. 897(IX) (1954). ²⁹ GA Res. 3314(XXIX) (1974). ³⁰ GA Res. 36/106 (1981).

³¹ These materials appear in the annual reports of the International Law Commission.

³² GA Res. 44/89.

the Commission submitted the final version of its draft statute for an international criminal court to the General Assembly.³³

The International Law Commission's draft statute of 1994 focused on procedural and organizational matters, leaving the question of defining the crimes and the associated legal principles to the code of crimes, which it had yet to complete. Two years later, at its 1996 session, the Commission adopted the final draft of its 'Code of Crimes Against the Peace and Security of Mankind'.³⁴ The draft statute of 1994 and the draft code of 1996 played a seminal role in the preparation of the Statute of the International Criminal Court. The International Criminal Tribunal for the Former Yugoslavia has remarked that 'the Draft Code is an authoritative international instrument which, depending upon the specific question at issue, may (i) constitute evidence of customary law, or (ii) shed light on customary rules which are of uncertain content or are in the process of formation, or, at the very least, (iii) be indicative of the legal views of eminently qualified publicists representing the major legal systems of the world'.³⁵

The ad hoc tribunals

While the draft statute of an international criminal court was being considered in the International Law Commission, events compelled the creation of a court on an *ad hoc* basis in order to address the atrocities being committed in the former Yugoslavia. In late 1992, as war raged in Bosnia, a Commission of Experts established by the Security Council identified a range of war crimes and crimes against humanity that had been committed and that were continuing. It urged the establishment of an international criminal tribunal, an idea that had originally been recommended by Lord Owen and Cyrus Vance. The proposal was endorsed by the General

³³ James Crawford, 'The ILC's Draft Statute for an International Criminal Tribunal', (1994) 88 *American Journal of International Law* 140; James Crawford, 'The ILC Adopts a Statute for an International Criminal Court', (1995) 89 *American Journal of International Law* 404. For the International Law Commission's discussion of the history of the draft statute, see 'Report of the International Law Commission on the Work of its Forty-Sixth Session, 2 May–22 July 1994', UN Doc. A/49/10, chapter II, paras 23–41.

³⁴ Timothy L. H. McCormack and G. J. Simpson, 'The International Law Commission's Draft Code of Crimes Against the Peace and Security of Mankind: An Appraisal of the Substantive Provisions', (1994) 5 *Criminal Law Forum* 1; John Allain and John R. W. D. Jones, 'A Patchwork of Norms: A Commentary on the 1996 Draft Code of Crimes Against the Peace and Security of Mankind', (1997) 8 *European Journal of International Law* 100.

³⁵ *Prosecutor v. Furundzija* (Case No. IT-95-17/1-T), Judgment, 10 December 1998, para. 227.

Assembly in a December 1992 resolution. The rapporteurs appointed under the Moscow Human Dimension Mechanism of the Conference on Security and Co-operation in Europe, Hans Correll, Gro Hillestad Thune and Helmut Türk, took the initiative to prepare a draft statute. Several governments also submitted draft proposals or otherwise commented upon the creation of a tribunal.³⁶

On 22 February 1993, the Security Council decided upon the establishment of a tribunal mandated to prosecute 'persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991'.³⁷ The draft proposed by the Secretary-General was adopted without modification by the Security Council in its Resolution 827 of 8 May 1993. According to the Secretary-General's report, the tribunal was to apply rules of international humanitarian law that are 'beyond any doubt part of the customary law'.³⁸ The Statute clearly borrowed from the work then underway within the International Law Commission on the statute and the code of crimes, in effect combining the two into an instrument that both defined the crimes and established the procedure before the court. The Tribunal's territorial jurisdiction was confined to the territory of the former Yugoslavia. Temporally, it was entitled to prosecute offences beginning in 1991, leaving its end-point to be established by the Security Council.

In November 1994, acting on a request from Rwanda, the Security Council voted to create a second *ad hoc* tribunal, charged with the prosecution of genocide and other serious violations of international humanitarian law committed in Rwanda and in neighbouring countries during the year 1994.³⁹ Its Statute closely resembles that of the International Criminal Tribunal for the Former Yugoslavia, although the war crimes provisions reflect the fact that the Rwandan genocide took place within the context of a purely internal armed conflict. The resolution creating the Tribunal expressed the Council's 'grave concern at the reports indicating that genocide and other systematic, widespread and flagrant violations of international humanitarian law have been committed in Rwanda', and referred to the reports of the Special Rapporteur for Rwanda of the United

³⁶ For the documentary history of the Yugoslav Tribunal, see Virginia Morris and Michael P. Scharf, *An Insider's Guide to the International Criminal Tribunal for the Former Yugoslavia: A Documentary History and Analysis*, New York: Transnational Publishers, 1995

³⁷ SC Res. 808 (1993).

³⁸ 'Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993)', UN Doc. S/25704. ³⁹ SC Res. 955 (1994).

Nations Commission on Human Rights, as well as the preliminary report of the Commission of Experts, which the Council had established earlier in the year.

The Yugoslav and Rwanda tribunals are in effect joined at the hip, sharing not only virtually identical statutes but also some of their institutions. The Prosecutor is the same for both tribunals, as is the Appeals Chamber. The consequence, at least in theory, is economy of scale as well as uniformity of both prosecutorial policy and appellate jurisprudence. The first major judgment by the Appeals Chamber of the Yugoslav Tribunal, the *Tadic* jurisdictional decision of 2 October 1995, clarified important legal issues relating to the creation of the body.⁴⁰ It also pointed the Tribunal towards an innovative and progressive view of war crimes law, going well beyond the Nuremberg precedents by declaring that crimes against humanity could be committed in peacetime, and by establishing the criminal nature of war crimes during internal armed conflicts.

Subsequent rulings of the *ad hoc* tribunals on a variety of matters fed the debates on the creation of an international criminal court. The findings in *Tadic* with respect to the scope of war crimes were essentially incorporated into the Statute of the International Criminal Court. Other judgments, such as a controversial holding that excluded recourse to a defence of duress,⁴¹ prompted the drafters of the Rome Statute to enact a provision ensuring precisely the opposite.⁴² The issue of ‘national security’ information, ignored by the International Law Commission, was thrust to the forefront of the debates after the Tribunal ordered Croatia to produce government documents,⁴³ and resulted in one of the lengthiest and most enigmatic provisions in the final Statute.⁴⁴ But the Tribunals did more than simply set legal precedent to guide the drafters. They also provided a reassuring model of what an international criminal court might look like. This was particularly important in debates concerning the role of the Prosecutor. The integrity, neutrality and good judgment of Richard

⁴⁰ *Prosecutor v. Tadic* (Case No. IT-94-1-AR72), Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, (1997) 105 ILR 453, (1997) 35 ILM 32.

⁴¹ *Prosecutor v. Erdemovic* (Case No. IT-96-22-A), Sentencing Appeal, 7 October 1997, (1998) 111 ILR 298.

⁴² Rome Statute of the International Criminal Court, UN Doc. A/CONF.183/9 (hereinafter Rome Statute), Art. 31(1)(d).

⁴³ *Prosecutor v. Blaskic* (Case No. IT-95-14-AR108bis), Objection to the Issue of *Subpoenae Duces Tecum*, 29 October 1997, (1998) 110 ILR 677. ⁴⁴ Rome Statute, Art. 72.

Goldstone and his successor, Louise Arbour, answered those who warned of the dangers of a reckless and irresponsible ‘Dr Strangelove prosecutor’.

Drafting of the ICC Statute

In 1994, the United Nations General Assembly decided to pursue work towards the establishment of an international criminal court, taking the International Law Commission’s draft statute as a basis.⁴⁵ It convened an Ad Hoc Committee, which met twice in 1995.⁴⁶ Debates within the Ad Hoc Committee revealed rather profound differences among States about the complexion of the future court, and some delegations continued to contest the overall feasibility of the project, although their voices became more and more subdued as the negotiations pursued. The International Law Commission draft envisaged a court with ‘primacy’, much like the *ad hoc* tribunals that had been set up by the Security Council for the former Yugoslavia and Rwanda. If the court’s prosecutor chose to proceed with a case, domestic courts could not pre-empt this by offering to do the job themselves. In meetings of the Ad Hoc Committee, a new concept reared its head, that of ‘complementarity’, by which the court could only exercise jurisdiction if domestic courts were unwilling or unable to prosecute. Another departure of the Ad Hoc Committee from the International Law Commission draft was its insistence that the crimes within the court’s jurisdiction be defined in some detail and not simply enumerated. The International Law Commission had contented itself with listing the crimes subject to the court’s jurisdiction – war crimes, aggression, crimes against humanity and genocide – presumably because the draft code of crimes, on which it was also working, would provide the more comprehensive definitional aspects. Beginning with the Ad Hoc Committee, the nearly fifty-year-old distinction between the ‘statute’ and the ‘code’ disappeared. Henceforth, the statute would include detailed definitions of crimes as well as elaborate provisions dealing with general principles of law and

⁴⁵ All of the basic documents of the drafting history of the Statute, including the draft statute prepared by the International Law Commission, have been reproduced in M. Cherif Bassiouni, ed., *The Statute of the International Criminal Court: A Documentary History*, Ardsley, NY: Transnational Publishers, 1998.

⁴⁶ Generally, on the drafting of the Statute, see M. Cherif Bassiouni, ‘Negotiating the Treaty of Rome on the Establishment of an International Criminal Court’, (1999) 32 *Cornell International Law Journal* 443.

other substantive matters. The Ad Hoc Committee concluded that the new court was to conform to principles and rules that would ensure the highest standards of justice, and that these should be incorporated in the statute itself rather than being left to the uncertainty of judicial discretion.⁴⁷

It had been hoped that the Ad Hoc Committee's work would set the stage for a diplomatic conference where the statute could be adopted. But it became evident that this was premature. At its 1995 session, the General Assembly decided to convene a 'Preparatory Committee', inviting participation by Member States, non-governmental organizations and international organizations of various sorts. The 'PrepCom', as it became known, held two three-week sessions in 1996, presenting the General Assembly with a voluminous report comprising a hefty list of proposed amendments to the International Law Commission draft.⁴⁸ It met again in 1997, this time holding three sessions. These were punctuated by informal inter-sessional meetings, of which the most important was surely that held in Zutphen, in the Netherlands, in January 1998. The 'Zutphen draft' consolidated the various proposals into a more or less coherent text.⁴⁹ The 'Zutphen draft' was reworked somewhat at the final session of the Preparatory Committee, and then submitted for consideration by the Diplomatic Conference.⁵⁰ Few provisions of the original International Law Commission proposal had survived intact. Most of the Articles in the final draft were accompanied with an assortment of options and alternatives, surrounded by square brackets to indicate a lack of consensus, foreboding difficult negotiations at the Diplomatic Conference.⁵¹ Some important issues such as 'complementarity' – recognition that cases would only be admissible before the new court when national justice systems were unwilling or unable to try them – were largely resolved during the

⁴⁷ 'Report of the Ad Hoc Committee on the Establishment of an International Criminal Court', UN Doc. A/50/22. See Roy Lee, 'The Rome Conference and Its Contributions to International Law', in Roy Lee, ed., *The International Criminal Court, The Making of the Rome Statute, Issues, Negotiations, Results*, The Hague: Kluwer Law International, 1999, pp. 1–39, at p. 7; Tuiloma Neroni Slade and Roger S. Clark, 'Preamble and Final Clauses', in Lee, *ibid.*, pp. 421–50, at pp. 436–7.

⁴⁸ 'Report of the Preparatory Committee on the Establishment of an International Criminal Court', UN Doc. A/51/22.

⁴⁹ 'Report of the Inter-Sessional Meeting from 19 to 30 January 1998 in Zutphen, The Netherlands', UN Doc. A/AC.249/1998/L.13.

⁵⁰ 'Report of the Preparatory Committee on the Establishment of an International Criminal Court, Addendum', UN Doc. A/CONF.183/2/Add.1.

⁵¹ See M. Cherif Bassiouni, 'Observations Concerning the 1997–98 Preparatory Committee's Work', (1997) 25 *Denver Journal of International Law and Policy* 397.

PrepCom process. The challenge to the negotiators at the Diplomatic Conference was to ensure that these issues were not reopened. Other matters, such as the issue of capital punishment, had been studiously avoided during the sessions of the PrepCom, and were to emerge suddenly as impasses in the final negotiations.

Pursuant to General Assembly resolutions adopted in 1996 and 1997, the Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court convened on 15 June 1998 in Rome, at the headquarters of the Food and Agriculture Organization. More than 160 States sent delegates to the Conference, in addition to a range of international organizations and literally hundreds of non-governmental organizations. The enthusiasm was quite astonishing, with essentially all of the delegations expressing their support for the concept. Driving the dynamism of the Conference were two new constituencies: a geographically heterogeneous caucus of States known as the 'like minded'; and a well-organized coalition of non-governmental organizations.⁵² The 'like minded'; initially chaired by Canada, had been active since the early stages of the Preparatory Commission, gradually consolidating its positions while at the same time expanding its membership. By the time the Rome Conference began, the 'like minded caucus' included more than sixty of the 160 participating States.⁵³ The like-minded were committed to a handful of key propositions that were substantially at odds with the premises of the 1994 International Law Commission draft and, by and large, in conflict with the conception of the court held by the permanent members of the Security Council. The principles of the like-minded were: an inherent jurisdiction of the Court over the 'core crimes' of genocide, crimes against humanity and war crimes (and, perhaps, aggression); elimination of a Security Council veto on prosecutions; an independent prosecutor

⁵² On the phenomenal and unprecedented contribution of non-governmental organizations, see William R. Pace and Mark Thieroff, 'Participation of Non-Governmental Organizations', in Lee, *The International Criminal Court*, pp. 391–8; William Bourdon, 'Rôle de la société civile et des ONG', in *La Cour pénale internationale*, Paris: La Documentation française, 1999, pp. 89–96.

⁵³ Andorra, Argentina, Australia, Austria, Belgium, Brunei, Benin, Bosnia-Herzegovina, Bulgaria, Burkina Faso, Burundi, Canada, Chile, Congo (Brazzaville), Costa Rica, Croatia, Czech Republic, Denmark, Egypt, Estonia, Finland, Gabon, Georgia, Germany, Ghana, Greece, Hungary, Ireland, Italy, Jordan, Latvia, Lesotho, Liechtenstein, Lithuania, Luxembourg, Malawi, Malta, Namibia, the Netherlands, New Zealand, Norway, the Philippines, Poland, Portugal, Republic of Korea, Romania, Samoa, Senegal, Sierra Leone, Singapore, Slovakia, Slovenia, Solomon Islands, South Africa, Spain, Swaziland, Sweden, Switzerland, Trinidad and Tobago, United Kingdom, Venezuela and Zambia.

with the power to initiate proceedings *proprio motu*; and the prohibition of reservations to the statute. While operating relatively informally, the like-minded quickly dominated the structure of the Conference. Key functions, including the chairs of most of the working groups, as well as membership in the Bureau, which was the executive body that directed the day-to-day affairs of the Conference, were taken up by its members. Canada relinquished the chair of the like-minded when the legal advisor to its foreign ministry, Philippe Kirsch, was elected president of the Conference's Committee of the Whole.

But there were other caucuses and groupings at work, many of them reflections of existing formations within other international bodies, like the United Nations. The caucus of the Non-Aligned Movement (NAM) was particularly active in its insistence that the crime of aggression be included within the subject matter jurisdiction of the Court. A relatively new force, the Southern African Development Community (SADC), under the dynamic influence of post-*apartheid* South Africa, took important positions on human rights, providing a valuable counter-weight to the Europeans in this field. The caucus of the Arab and Islamic States were active in a number of areas, including a call for prohibition of nuclear weapons, and support for inclusion of the death penalty within the statute. The beauty of the like-minded caucus, indeed the key to its great success, was its ability to cut across the traditional regionalist lines. Following the election of the Labour Government in the United Kingdom, the like-minded caucus even managed to recruit a permanent member of the Security Council to its ranks.

The Rome Conference began with a few days of formal speeches from political figures, United Nations officials and personalities from the growing ranks of those actually involved in international criminal prosecution, including the presidents of the two *ad hoc* tribunals and their Prosecutor.⁵⁴ Then the Conference divided into a series of working groups with responsibility for matters such as general principles, procedure and penalties. Much of this involved details, unlikely to create insurmountable difficulties to the extent that the delegates were committed to the success

⁵⁴ For a detailed discussion of the proceedings at the Rome Conference, see Philippe Kirsch and John T. Holmes, 'The Rome Conference on an International Criminal Court, The Negotiating Process', (1999) 93 *American Journal of International Law* 2; Roy Lee, 'The Rome Conference and Its Contributions to International Law', in Lee, *The International Criminal Court*, pp. 1–39, particularly pp. 21–3; and Philippe Kirsch, 'The Development of the Rome Statute', in Lee, *The International Criminal Court*, pp. 451–61.

of the endeavour. But a handful of core issues – jurisdiction, the ‘trigger mechanism’ for prosecutions, the role of the Security Council – remained under the wing of the Bureau. These difficult questions were not publicly debated for most of the Conference, although much negotiating took place informally.

One by one, the provisions of the statute were adopted ‘by general agreement’ in the working groups, that is, without a vote. The process was tedious, in that it allowed a handful of States or even one of them to hold up progress by refusing to join consensus. The chairs of the working groups would patiently negotiate compromises, drawing on comments by States who often expressed their views on a provision but then indicated their willingness to be flexible. Within a week of the beginning of the Conference, the working groups were forwarding progress reports to the Committee of the Whole, indicating the provisions that had already met with agreement. These were subsequently examined by the Drafting Committee, chaired by Professor M. Cherif Bassiouni, for terminological and linguistic coherence in the various official language versions of the statute.

But as the weeks rolled by, the key issues remained to be settled, of which the most important were the role of the Security Council, the list of ‘core crimes’ over which the court would have inherent jurisdiction and the scope of its jurisdiction over persons who were not nationals of States Parties. These had not been assigned to any of the working groups, and instead were handled personally by the chair of the Committee of the Whole, Philippe Kirsch. With two weeks remaining, Kirsch issued a draft that set out the options on these difficult questions. The problem, though, was that many States belonged to the majority on one question but dissented on others. Finding a common denominator, that is, a workable statute that could reliably obtain the support of two-thirds of the delegates in the event that the draft statute were ever to come to a vote, remained daunting. Suspense mounted in the final week, with Kirsch promising a final proposal that in fact he only issued on the morning of 17 July, the day the Conference was scheduled to conclude. By then it was too late for any changes. Like a skilled blackjack player, Kirsch had carefully counted his cards, yet he had no guarantee that his proposal might meet unexpected opposition and lead, inexorably, to the collapse of the negotiations. Throughout the final day of the Conference delegates expressed their support for the ‘package’, and resisted any attempts to alter or adjust it out

of fear that the entire compromise might unravel. The United States tried unsuccessfully to rally opposition, convening a meeting of what it had assessed as ‘waverers’. Indeed, hopes that the draft statute might be adopted by consensus at the final session were dashed when the United States exercised its right to demand that a vote be taken. The result was 120 in favour, with twenty-one abstentions and seven votes against. The vote was not taken by roll call, and only the declarations made by States themselves indicate who voted for what. The United States, Israel and China stated that they had opposed adoption of the statute.⁵⁵ Among the abstainers were several Arab and Islamic States, as well as a number of delegations from the Commonwealth Caribbean.

In addition to the Statute of the International Criminal Court,⁵⁶ on 17 July, 1998 the Diplomatic Conference also adopted a Final Act,⁵⁷ providing for the establishment of a Preparatory Commission. The Commission was assigned a variety of tasks, of which the most important were the drafting of the Rules of Procedure and Evidence,⁵⁸ which provide details on a variety of procedural and evidentiary questions, and the Elements of Crimes,⁵⁹ which elaborate upon the definitions of offences in Articles 6, 7 and 8 of the Statute. The Commission met the deadline of 30 June 2000 set for it by the Final Act, for the completion of the Rules and the Elements.⁶⁰ Other tasks include drafting an agreement with the United Nations on the relationship between the two organizations, and preparation of a host state agreement with the Netherlands, which is to be the seat of the Court. The Preparatory Commission is to operate until the Statute comes into force, at which point the Assembly of States Parties will be convened. The Assembly will elect the judges and prosecutor, and presumably endorse the work of the Preparatory Commission.

⁵⁵ Lee, *The International Criminal Court*, at pp. 25–6; and Giovanni Conso, ‘Looking to the Future’, in Lee, *The International Criminal Court*, pp. 471–7. For the positions of the United States and China, see UN Doc. A/C.6/53/SR.9.

⁵⁶ The text of the Statute adopted at the close of the Rome Conference contained a number of minor errors, essentially of a technical nature. There have been two attempts at correction: UN Doc. C.N.577.1998.TREATIES-8 (10 November 1998) and UN Doc. C.N.604.1999.TREATIES-18 (12 July 1999). ⁵⁷ UN Doc. A/CONF.183/10.

⁵⁸ Provided for in Art. 51 of the Rome Statute.

⁵⁹ Provided for in Art. 9 of the Rome Statute.

⁶⁰ ‘Report of the Preparatory Commission for the International Criminal Court, Addendum, Finalized Draft Text of the Elements of Crimes’, UN Doc. PCNICC/2000/INF/3/Add.2; ‘Report of the Preparatory Commission for the International Criminal Court, Addendum, Finalized Draft Text of the Rules of Procedure and Evidence’, UN Doc. PCNICC/2000/INF/3/Add.3.

The Statute requires sixty ratifications before it can enter into force. States are also invited to sign the Statute, which is a preliminary step indicating their intention to ratify. They were given until the end of 2000 to do so, and some 139, including the United States, Israel and several Arab and Islamic States, availed themselves of the opportunity to do so. Delays between signature and ratification are to be expected, because most States must undertake significant legislative changes in order to comply with the obligations imposed by the Statute, and it is normal that they will want to resolve these issues before formal ratification. Specifically, they must provide for cooperation with the Court in terms of investigation, arrest and transfer of suspects. Many States now prohibit the extradition of their own nationals, a situation incompatible with the requirements of the Statute. In addition, because the Statute is predicated on 'complementarity', by which States themselves are presumed to be responsible for prosecuting suspects found on their own territory, many must also bring their substantive criminal law into line, enacting the offences of genocide, crimes against humanity and war crimes as defined in the Statute and ensuring that their courts can exercise universal jurisdiction over these crimes.⁶¹

The influence of the Rome Statute will extend deep into domestic criminal law, enriching the jurisprudence of national courts and challenging prosecutors and judges to greater zeal in the repression of serious violations of human rights. National courts have shown, in recent years, a growing enthusiasm for the use of international law materials in the application of their own laws. The Statute itself, and eventually the case law of the International Criminal Court, will no doubt contribute in this area. The International Criminal Tribunal for the Former Yugoslavia, in *Prosecutor v. Furundzija*, described the Statute's current legal significance as follows:

[A]t present it is still a non-binding international treaty (it has not yet entered into force). It was adopted by an overwhelming majority of the States attending the Rome Diplomatic Conference and was substantially endorsed by the General Assembly's Sixth Committee on 26 November

⁶¹ William A. Schabas, 'The Follow Up to Rome: Preparing for Entry into Force of the International Criminal Court Statute', (1999) 20 *Human Rights Law Journal* 157; S. Rama Rao, 'Financing of the Court, Assembly of States Parties and the Preparatory Commission', in Lee, *The International Criminal Court*, pp. 399–420, at pp. 414–20; Bruce Broomhall, 'The International Criminal Court: A Checklist for National Implementation', (1999) 13 *quarter Nouvelles études pénales* 113.

1998. In many areas the Statute may be regarded as indicative of the legal views, i.e. *opinio juris* of a great number of States. Notwithstanding article 10 of the Statute, the purpose of which is to ensure that existing or developing law is not 'limited' or 'prejudiced' by the Statute's provisions, resort may be had *com grano salis* to these provisions to help elucidate customary international law. Depending on the matter at issue, the Rome Statute may be taken to restate, reflect or clarify customary rules or crystallise them, whereas in some areas it creates new law or modifies existing law. At any event, the Rome Statute by and large may be taken as constituting an authoritative expression of the legal views of a great number of States.⁶²

The International Criminal Court is perhaps the most innovative and exciting development in international law since the creation of the United Nations. The Statute is one of the most complex international instruments ever negotiated, a sophisticated web of highly technical provisions drawn from comparative criminal law combined with a series of more political propositions that touch the very heart of State concerns with their own sovereignty. Without any doubt its creation is the result of the human rights agenda that has steadily taken centre stage within the United Nations since Article 1 of its Charter proclaimed the promotion of human rights to be one of its purposes. From a hesitant commitment in 1945, to an ambitious Universal Declaration of Human Rights in 1948, we have now reached a point where individual criminal liability is established for those responsible for serious violations of human rights, and where an institution is created to see that this is more than just some pious wish.

⁶² *Prosecutor v. Furundzija*, *supra* note 35, para. 227. For an example of the draft statute of the court being cited as a guide to evolving customary international law, see the reasons of Justice Michel Bastarache of the Supreme Court of Canada in *Pushpanathan v. Canada (Minister of Citizenship and Immigration)* [1998] 1 SCR 982, at paras 66–8.