CHAPTER-I
EVOLUTION OF THE WAR CRIMES LEGAL REGIME TILL THE
NUREMBERG TRIALS

The new concept of war that grew in prominence in the first decades of the twentieth
century did not postulate a war of aggression as an international crime imputable to
states: it also introduced the possibility of individuals being indicted for this and other
international crimes; the same has played a stellar role in moulding international criminal
justice.(Sands,2003: p136)

International law typically governs the rights and responsibilities of states; criminal law,
on the contrary, is paradigmatically concerned with prohibitions addressed to individuals,
violations of which are subject to penal action by a stat. The development of a body of
international criminal law which imposes responsibilities directly on individuals and
punishes violations through international mechanisms is relatively recent.

International criminal law developed from various sources. War crimes originate from
‘the laws and customs of war’, which accord certain protections to individuals in conflict
situations. Genocide and crimes against humanity evolved to protect individuals from
gross human rights abuses including those committed by their own governments. With
the possible exception of the crime of aggression with its focus on inter-state conflict, the
concern of international criminal law is now with the individual and with their protection
from wide-scale atrocities.

Laws and customs regulating warfare may be traced back to ancient times. While such
norms have varied between civilizations and centuries, and were often shockingly lax by
modern standards, it is significant that diverse cultures around the globe have recorded
agreements, religious edicts, and military instructions laying out some rudimentary
ground rules for military conflict. In recent centuries, military codes -such as the Lieber
Code promulgated during the American Civil War - have refined and developed these
customs.(Zolo, 2009: p86)
Codification and progressive development at the international level was spurred in part by the efforts of one individual. In 1859, Henri Dunant, a businessman from Geneva, witnessed the aftermath of the Battle of Soiferino, and was shocked by the horrors of wounded soldiers left to die on the battlefield. He published a poignant and evocative account of the carnage, urging measures to reduce such unnecessary suffering. This appeal led promptly to the creation of the International Committee of the Red Cross in 1863 and the adoption of the first Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field in 1864 (Zolo, 2009: p87).

Since then, there have been many treaties developing international humanitarian law (IHL). These are sometimes divided into 'Geneva law', which primarily focuses on protecting civilians and others who are not active combatants (such as the sick and wounded), and 'Hague law', which regulates specific means and methods of warfare, with a view to reducing unnecessary destruction and suffering. Among the most significant in the latter category are the 1907 Hague Regulations, which recognized that 'the right of belligerents to adopt means of injuring the enemy is not unlimited', and laid down many provisions on the means and methods of warfare that are now recognized as customary law. The four Geneva Conventions of 1949, adopted in response to the inhumanities of the Second World War, considerably added to and updated previous Geneva Conventions. (Sands, 2003: p135) The 1949 Conventions deal with sick and wounded in the field ('GC I'), the wounded, sick and shipwrecked at sea ('GC IF'), prisoners of war ('GC III') and civilians ('GC IV'). In 1977, these rules were again updated by two Additional Protocols, the first concerning international armed conflicts ('AP I') and the second, non-international (hereafter, for the sake of brevity, 'internal') armed conflicts ('AP II'). AP I combines elements of Hague law and Geneva law, making this traditional distinction less relevant. (Sands, 2003: p135)

Other significant treaty developments have strengthened the protection of cultural property, the prohibition or regulation of certain weapons (such as biological and chemical weapons and anti-personnel mines), and the prohibition on the use of child soldiers.
The provisions of the 1907 Hague Regulations as well as much of the 1949 Geneva Conventions have come to be recognized as customary law; hence they apply regardless of whether parties to the conflicts have ratified those conventions. Some, but not all, provisions of the Additional Protocols have obtained recognition as customary law. (Sands, 2003: p 137)

**Key principles of humanitarian law**

The resulting principles may be summarized in different ways, but key elements include:

- non-combatants are to be spared from various forms of harm; this category includes not only civilians but also former combatants, such as prisoners of war and fighters rendered *hors d'combat* because they are wounded, sick, shipwrecked or have surrendered;
- combatants must distinguish between military objectives and the civilian population, and attack only military objectives (the principle of distinction);
- in attacking military objectives, combatants must take measures to avoid or minimize collateral civilian damage and refrain from attacks that would cause excessive civilian damage (the principle of proportionality);
- there are restrictions on the means and methods of war, to reduce unnecessary suffering and to maintain respect for humanitarian principles. (Sands, 2003: p138)

IHL is triggered by the outbreak of armed conflict and seeks to regulate the conduct of such conflict. The goal of abolishing warfare altogether is left to other legal and political domains. (Cryer, 2006: p 88)

Indeed, a fundamental principle of IHL is the complete separation of the *jus ad bellum* (the law regarding resort to armed conflict) and the *jus in belli* (the law governing conduct during the armed conflict). In previous centuries, some scholars had suggested that the party fighting a ‘just’ war should benefit from more permissive IHL provisions. The obvious difficulty with this proposition is that both sides claim to be fighting with just cause, leading to confusion and obfuscation as to the applicable rules. Moreover, the victims of armed conflict still need protection regardless of the purpose of the conflict. **Jus ad bellum** considerations have no bearing on (the interpretation or application of IHL in a conflict, and hence it cannot be argued, for
example, that a war was unjustified and therefore that all killings of combatants were war crimes or that all it lacks were disproportionate.” The question whether resorting to force was legal or illegal is addressed under other law such as the UN Charter (Sands, 2003: p155).

The effort to regulate the exceptional situation of armed conflict is rife with difficulty. Indeed, war in many ways seems to be the antithesis of law, leading to the mistaken saying that *silent enim leges inter arma* (law is silent in war). Normal rules - including the fundamental legal and moral prohibitions on killing and destruction - are largely displaced in armed conflict, and combatants cannot be punished for lawful acts of war. Nonetheless, the eruption of armed conflict does not create a legal vacuum. (Cryer, 2006: p 87) Militaries are still subject to discipline, and compliance with IHL norms is required. However, enforcement of international norms, which can be challenging in the best of circumstances, is all the more difficult in the context of a struggle for dominance among armed groups. International criminal justice is one means of deterring violations and educating people that some basic laws apply in all circumstances. (Sands, 2003: p157)

Permeating the development and interpretation of IHL and war crimes law is the tension between military and humanitarian considerations. Combatants may put too great a weight on military imperatives at the expense of humanitarian considerations. Conversely, those fortunate enough not to have been involved in conflict may discount or neglect military considerations when making assertions about IHL and war crimes law. Either oversight would hinder appreciation and understanding of the law. When appraising war crimes law, it is important to consider the chaotic situations faced in armed conflict and the requirements of military strategy and tactics. In war, parties are permitted to apply decisive force in order to overcome their enemies as rapidly and efficiently as possible and with as few losses as possible. Destruction and death will occur even in lawfully conducted conflict. Mistakes may occur, with tragic consequences, without necessarily amounting to war crimes. Soldiers and commanders operating in circumstances of fatigue, stress, the chaos of combat and continuous fear of death are entitled to clear and practical rules. (Cryer, 2006: p88)
While IHL involves a balancing of military and humanitarian considerations, it is also clear that the weight assigned to these considerations has been shifting over the years in a progressive direction. This process has been aptly referred to as 'the humanization of humanitarian law'. Many factors have contributed to this process, including the increasing emphasis in international law and international relations on protecting human beings as opposed to an exclusive focus on State interests. (Cryer, 2006:p88) The result has been stricter rules of conduct, protecting more classes of victims and applying in more circumstances, including during internal armed conflicts.

While egregious violations remain common in many conflicts, the practice among many States has been to place greater and greater weight on humanitarian considerations. The phenomena of mass media, democratization and globalization mean that images of civilian suffering are more readily available (although censorship and propaganda remain ubiquitous). Technological advances have raised expectations about precision attacks. (Sands,2003:p162) Those who plan operations know that incidents causing significant civilian casualties can erode support from domestic populations, coalition partners and the international community. Anecdotal evidence also indicates that awareness of international criminal justice institutions is inducing greater compliance among military leaders. Conversely, the difficulties of 'asymmetric' warfare against non-State actors with no regard for humanitarian law have led some governments.

War crimes law is, in effect, a set of secondary rules that criminalize a subset of the primary rules found in IHL. The major question is which of the rules of IHL constitutes a criminal offence when violated. (Arbour,2002: p45)

Some treaties, such as the Geneva Conventions, expressly criminalize violations of identified fundamental provisions. War crimes may also be found in customary law even in the absence of a treaty provision criminalizing the norm. For example, the Nuremberg Tribunal held that key provisions of the 1907 Hague Regulations reflected customary law and that violations amounted to crimes, even though the Hague Regulations did not expressly criminalize such violations. (Arbour,2002: p45)
Since war crimes are serious violations of IHL, it is often necessary to refer to the relevant principles of IHL to interpret international criminal law in this area. War crimes law is addressed to individuals, and sets out offences amounting to the most serious crimes of concern to the international community as a whole, and can culminate in imprisonment as a war criminal. For these reasons, similar provisions may warrant a more restrictive interpretation in the context of war crimes law, consistent with the seriousness of war crimes law and general principles of criminal law (Arbour, 2002: p46). For example, IHL requires that, before any sentencing of protected persons, a party must provide a fair trial affording all indispensable judicial guarantees. (Cryer, 2006:p90) A minor breach of even one such right would fall below this standard and violate IHL, requiring an appropriate remedy. However, it would be incorrect to say that as a consequence all involved in the trial are thereby rendered war criminals. For the purpose of war crimes law, it is necessary to look at the cumulative effect of shortcomings to see whether there was a deprivation of fair trial amounting to a war crime. Similarly, as noted by Lauterpacht, there may be acts of warfare for which the state of international law is uncertain or controversial, yet criminal proceedings would be a questionable method for resolving unsettled questions of bona fide controversy. Instead, adjudication under IHL and compensation is the more appropriate avenue to settle such controversies. (Sands, 2003:p164)

A war crime is a serious violation of the laws and customs applicable in armed conflict" (also known as international humanitarian law), giving rise to individual criminal responsibility under international law. The law of war crimes is based on international humanitarian law. Unlike crimes against humanity, war crimes have no requirement of widespread or systematic commission. A single isolated act can constitute a war crime. For war crimes law, it is the situation of armed conflict that justifies international concern. (Arbour, 2002: p44) Traditionally, neither IHL nor war crimes law applied in non-international armed conflicts. Before the advent of human rights law, States were regarded as entitled to deal with their own citizens more or less as they pleased, including in situations of rebellion and insurrection. This was an 'internal affair', in which other States should have no say.
States sought to preserve latitude in putting down rebels, and they did not wish to bestow any possible recognition on rebel groups. Exceptionally, States involved in intense internal conflicts occasionally recognized a situation of 'belligerency', in which case IHL was applied to the conflict.

During the negotiation of the four Geneva Conventions of 1949, several delegations pressed for recognition of rules in internal conflicts, a proposal strongly opposed by others. After intense discussions, agreement was reached to include in each Convention a common Article - Article 3 - laying out some very basic norms recognized to apply even in internal armed conflicts. Even this very modest provision was an achievement.

Regulation of internal armed conflict was expanded significantly in AP II of 1977. Again, the negotiation was difficult, with many States opposing regulation. Agreement was reached on a short list of provisions, expanding upon and developing those rules in common Article 3 but still falling far short of that applicable to international armed conflict. (Cryer, 2006:p88)

The essential element for any war crime is the nexus with armed conflict. It is the insecure and volatile situation of armed conflict that warrants international interest and gives rise to international jurisdiction over the crime. Whereas early IHL depended on a declaration of a state of war, this was problematic in that parties to conflict might raise formalistic arguments denying a state of war. Current IHL and war crimes law focus on the objective existence of armed conflict, even if one or both of the parties deny the state of war. (Cryer, 2006:p92)

The state of armed conflict does not end with each particular ceasefire; rather, it continues until the 'general close of military operations'. According to Tribunal jurisprudence, the state of armed conflict extends 'until a general conclusion of peace is reached, or in the case of internal armed conflict, until a peaceful settlement is achieved'. The state of conflict may also be ended by a decisive close of military operations even without an agreement. The state of armed conflict also applies during occupation, that is to say when territory is placed under the authority -of a hostile army. (Cryer, 2006)

_Nexus between crime and conflict_
In order to constitute a war crime, conduct must be linked to an armed conflict. The term 'in the context of refers to the temporal and geographic context in a broad sense: the conduct occurred during an armed conflict and on a territory in which there is an armed conflict." This requirement is very general, since a state of armed conflict is recognized throughout the territory, beyond the time and place of the hostilities. There is no need for military activities at the time and place of the crime; crimes can be temporally and geographically remote from the actual fighting."

The law of war crimes does not govern only members of armed forces or groups and their leaders. The fact that a perpetrator is a member of an armed force does help to establish the nexus to armed conflict, but it is not a requirement. The conduct of civilians can be a war crime even if it is not imputable to a party to the conflict, provided that the nexus requirement is met. (Cryer, 2006)

The definitions of many war crimes include certain criteria with respect to the victim (or object) of the crime. For example, for grave breaches of the Geneva Conventions, the crime must affect 'protected persons or objects'. Protected persons include civilians, prisoners of war and combatants who are no longer able to fight because they are sick, wounded or shipwrecked. Similarly, common Article 3 protects 'persons no longer taking active part in hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention or other cause'. (Cryer, 2006) These restrictions are necessary because some acts, such as wilful killing, are not a crime when committed against a combatant.

Other war crimes specify a particular victim or object of the crime (for example civilian population, civilian objects, persons involved in humanitarian assistance, undefended towns, etc.). Some war crimes regulate battlefield conduct, to reduce unnecessary suffering of combatants, and hence even combatants are protected as victims of the crime.

Because IHL originally developed as a series of reciprocal promises between parties to a conflict, most of IHL regulates conduct towards those affiliated with the 'enemy'. For this reason, many war crimes require that the victim be 'in the hands of or 'in the power of an adverse party.
At the heart of war crimes law is a series of prohibitions of violence against and mistreatment of non-combatants (including civilians, prisoners of war and wounded or sick former combatants). These prohibitions are derived from the basic principle that non-combatants must be treated humanely. While these provisions are legally and conceptually straightforward, they are frequently violated in armed conflict, sometimes as practice or policy and sometimes as acts of individual soldiers. Deliberate and blatant violations of these provisions make up the majority of war crimes charges that have been brought in national and international jurisdictions.

The war crime of murdering or wilfully killing protected persons is well-recognized in international and internal armed conflict. Killing of *combatants* is of course permitted in lawfully conducted operations; moreover, civilians may also die as a consequence of military actions against military objectives, and such deaths must be assessed using the more specific tools of the prohibition on disproportionate collateral damage. While the international armed conflict provisions refer to 'wilful killing' and the internal armed conflict provisions refer to 'murder', the basic elements of the crime are the same, and correspond to those for the crime against humanity of murder. (Cryer, 2006)

Torture, inhuman treatment, mutilation, and biological, medical or scientific experiments are also prohibited in any armed conflict. Different instruments present the crimes with different structures, but the basic prohibitions are the same.

In addition to prohibiting violence against and mistreatment of protected persons, war crimes law also protects other rights of persons. For example, several provisions protect liberty and mobility rights. In international conflicts, the unlawful deportation, transfer or confinement of civilians is a grave breach. In internal conflicts, there is a more modest prohibition, on displacement of the civilian population for reasons unrelated to the conflict. Since IHL permits the transfer and/or confinement of civilians under certain conditions, it is necessary to refer to IHL to determine whether a particular act is unlawful. The taking of hostages is a war crime in international or internal conflicts. (Cryer, 2006).
To demonstrate how the mechanisms for enforcement of humanitarian law have evolved over the past hundred years, one should begin by examining the status of war crimes law before the advent of the Nuremberg and Tokyo Tribunals.

A century ago, the laws of war—and indeed all of international humanitarian law—were largely uncodified. Until the mid-nineteenth century, the laws of war existed solely as custom, evidenced in national laws, military manuals, and religious teachings. The second half of the nineteenth century witnessed the beginning of a trend toward codification. This period was marked by the 1856 Paris Declaration on Maritime Law, the 1864 Geneva Convention on wounded soldiers, and the 1868 St. Petersburg Declaration barring the use of certain small explosive projectiles. Yet it was not until the turn of the twentieth century, at the 1899 and 1907 Hague Peace Conferences, that the modern law of war and war crimes began to take shape. Spurred by fears that modern weapons technology would permit wars to get out of hand, delegates first met at The Hague in 1899 in response to a call from the Russian tsar. Though conferences discussed disarmament in addition to the laws of war, the conference produced agreements only on the latter subject, including a convention on maritime war and the Convention with Respect to the Laws and Customs of War on Land—the first general, multilateral codification of the laws of land war. Far more productive than the 1899 conference, the 1907 conference concluded ten agreements on the laws of war, including the Fourth Hague Convention—a revamped version of the 1899 Convention with Respect to the Laws and Customs of War on Land. While the law of war developed significantly over the course of the two Hague Conferences, mechanisms to enforce that law did not keep pace with it. Even though the acts proscribed by the Hague Conventions on land warfare had "long been treated as criminal acts for which members of the armed forces or civilians" could be "held individually responsible," the 1899 Convention contained no provisions on the punishment of violations, and the Fourth Hague Convention of 1907 made no allowance for the imposition of individual criminal responsibility upon persons responsible for violations of either its provisions or those of its annexed regulations. Instead, the Convention specified as the chief form of punishment the payment of compensation by states. Moreover, it required states to
negotiate the amount of compensation owed as a result of a violation, and these negotiations proved long and complex. Not surprisingly, the Fourth Hague Convention's provision on compensation was criticized as having little deterrent effect. Other means of enforcing the laws and customs of war at the turn of the century also lacked teeth. States could try their own nationals for war crimes, but they rarely did so. (Meron, 1998) And although an aggrieved state could take military action against the offending state, such reprisals were criticized for simply escalating the hostilities. Even if a belligerent state wished to prosecute foreign war criminals, its entitlement to jurisdiction over captured enemy combatants was uncertain, and in any event the act-of-state defense traditionally immunized heads of state from prosecution in foreign courts. As a result, combatants accused of war crimes were ordinarily relieved of prosecution rather than subjected to an indictment. World War I and Its Aftermath War crimes law sprang to the fore at the end of World War I. Even as the war raged, commentators began calling for justice to be done in the wake of the atrocities. At an international law conference in London in 1916, one observer pledged that "the public opinion of the civilized world will not rest satisfied unless, upon the termination of the conflict, not only the instigators but also the actual perpetrators of the more heinous offences against the usages of war are brought to trial before some impartial tribunal. The process of establishing a legal framework to address the atrocities began shortly after the war. At its first plenary meeting in January 1919, the Paris Peace Conference appointed a multinational commission to inquire into the war's causes and consequences. (Meron, 1998) The establishment of such a commission had been advocated chiefly by British prime minister Lloyd George, who sought to set new international precedent on aggressive warfare. U.S. president Woodrow Wilson opposed the creation of a commission, but Lloyd George's view, which was supported by the Belgians and the French, prevailed, and the Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties—the first modern international investigative body of its kind—was formed. After two months of secret meetings, the commission issued its final report, which deter- mined that Germany and Austria-Hungary bore primary responsibility for the war. It criticized Bulgaria and Turkey for supporting the German and Austrian aggression, and found that all of these states had practiced "barbarous or illegitimate methods" of warfare. Seeking a precise classification
of the criminal acts committed by officials from these states, the commission prepared a
catalog of thirty-two offenses that it denoted as falling within the meaning of war crimes.
These included, among others, murders and massacres, torture of civilians, rape, and
internment of civilians under inhuman conditions. However, an annex that listed instances
in which the Central Powers and their allies had committed such offenses described the
acts in question as violations of "the Laws and Customs of War and the Laws of
Humanity." Among the listed atrocities were some committed by Turkish and German
forces against Turkish subjects (Armenians), and some by Austrian forces against
Austrian subjects. These acts were probably the ones that, in the commission's view, had
violated the "laws of humanity" and not the "laws of war." (Meron, 1998) Having
concluded that officials and soldiers from Germany, Austria-Hungary, Bulgaria, and
Turkey had committed illegal acts, the commission recommended the creation of an
inter-national tribunal to try officials responsible for some of the worst offenses. The
commission also concluded that criminal liability should extend to all persons responsible
for war crimes, including heads of state; in its words, a prohibition on the prosecution of
heads of state who were guilty of war crimes "would shock the conscience of civilized
mankind." In a memorandum, the United States objected to many of the most significant
aspects of the commission's report. According to the Americans, the commission should
not have concerned itself with violations of the "laws of humanity" because these laws
were vague and "varied with the individual." Therefore, trying anyone for violations of
such laws would contravene the principle of legality, or nullum crimen sine lege. Of
course, by the time the Nuremberg trials got under way nearly three decades later, the
American position on this point had turned 180 degrees: the Nuremberg indictments
charged both war crimes and crimes against humanity. Supported by the Japanese, the
American members of the commission in 1919 also challenged the notion that a head of
state could be placed on trial, while the British suggested that the Americans were simply
afraid that the U.S. president would be incriminated some day. Additionally, the United
States objected to the concept we now refer to as "command responsibility," a position on
which it reversed itself in the wake of World War II. The American representatives did
agree with the recommendation that criminal charges not be brought for acts that had
provoked the war, including breaches of neutrality. On this position, the United States
later reversed itself twice, strongly advocating the inclusion of "crimes against peace" in the Nuremberg and Tokyo Charters, and then opposing the inclusion of the crime of aggression in the Statute of the International Criminal Court (ICC). (Meron, 1998) Not only did it object to important recommendations by the commission on legal doctrine; it also objected to one of the commission's most significant practical recommendations: that an international tribunal try the offenders. (Meron, 1998) Expressing concerns that would echo eighty years later, the Americans protested the creation of an international criminal court "for which there is no precedent, precept, practice, or procedure." (Meron, 1998) Instead, the Americans argued, military commissions or tribunals should try the offenders. On June 28, 1919, several months after the commission filed its report, the Treaty of Versailles was signed. The Treaty contained several critical provisions relating to wartime conduct. The first concerned the responsibility of the Kaiser. Despite the American and Japanese objections, Great Britain remained convinced that a head of state should be liable for crimes of war- and that Kaiser Wilhelm, in particular, should be prosecuted to deter future aggression. Britain's insistence carried the day sort of. Article 227 of the Treaty provided that "the Allied and Associated Powers publicly arraign William II of Hohenzollern, formerly German Emperor, for a supreme offence against international morality and the sanctity of treaties," and it specified that "[a] special tribunal will be constituted to try the accused." (Meron, 1998) For the first time, a treaty thus addressed the individual responsibility of a head of state for initiating and conducting what we now call a crime of aggression or crime against peace.

In the light of the above discussions, one can argue that war crimes law deals with the criminal responsibility of individuals for serious violations of international humanitarian law. National laws have long provided for prosecution of war crimes. For example, the Lieber Code recognized criminal liability of individuals for violations, and similar provisions are in military manuals of many countries. Following some prominent historical examples of war crimes prosecutions, and after abortive efforts to conduct international trials at the end of the First World War, the Nuremberg Charter gave form to the international law of war crimes. Article 6(b) of the Charter included: 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 labour or for any 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. (Meron, 1998)...

Within the scope of war crimes' the Nuremberg Tribunal included key provisions of the Hague Regulations, which gave rise to individual criminal responsibility under customary law. The same requires a detailed discussion of the legal proceedings of the trial.

The Nuremberg trials:

Just over sixty years ago, the international community, seeking to heal the wounds of a brutal war, embarked on a bold legal experiment. For the first time in history, legal mechanisms were invoked to bring to justice the perpetrators of war crimes and crimes against humanity in international tribunals specifically established for that purpose. The trials at Nuremberg and Tokyo were extraordinary and risky; and, above all, unique in their time. In his eloquent opening statement for the prosecution at Nuremberg, Justice Robert Jackson called attention to the trial’s novelty: "That four great nations, flushed with victory and stung with injury stay the hand of vengeance and voluntarily submit their captive enemies to the judgment of the law is one of the most significant tributes that Power has ever paid to Reason." (Vardarajan, 1998) Indeed, the idea of bringing perpetrators of war crimes before a tribunal was so novel, so contrary to ordinary practice, that it almost never happened. At Yalta, Stalin suggested that fifty thousand people should simply be killed after the war, and Churchill "thought a list of the major criminals... should be drawn up here .... [and] they should be shot once their identity is established." Yet the American government forcefully advocated that trials be conducted, not by national courts of the vanquished states or any victorious power, but by an international court. In the end, the Allies agreed, and they set up proceedings in which
judges rigorously examined whether the actions of individual accused amounted to offenses under international law. Although many of the accused were convicted, some were acquitted, much to the shock of numerous people who expected the trials to be mere formalities preceding declarations of predetermined guilt. The integrity of the proceedings and the determination of the fates of Nazi and Japanese leaders by evaluating their actions against accepted, objective standards of conduct may also be one of the reasons why Germans and Japanese overwhelmingly accepted that the officials who were eventually punished were in fact guilty and deserving of sanction. Moreover, as Professor Herbert Wechsler, a participant in the Nuremberg trials, observed, the fact that the trials occurred, publicly aired the actions of the accused, and resulted in punishments for the guilty may have helped to stave off unauthorized acts of retribution against those believed to have been Nazis. By many measures, then, the Nuremberg and Tokyo Tribunals were a success, which partly explains why the concept of international criminal tribunals seems less radical to us today. To be sure, the tribunals had their shortcomings, some of which are endemic to courts themselves. On the whole, however, the Nuremberg experiment in particular proved to be, as Justice Jackson had hoped, a triumph of reason. And in time that triumph allowed the international community—with painful slowness, but eventually—to follow the lead of the Nuremberg and Tokyo Tribunals and establish the international criminal courts that now sit at The Hague and elsewhere. There are obvious differences between the modern international courts and the post-World War II tribunals. One of the principal criticisms leveled against the earlier tribunals, for instance, was (and still is) that they were an exercise in victors' justice—a trial of the losers by and for the winners. Justice Jackson acknowledged that criticism in his opening statement. But he explained that "[t]he worldwide scope of the aggressions carried out by these men has left but few real neutrals." (Vardarajan, 1998)

Nuremberg and Tokyo International Tribunals

It was only after the Second World War that a movement started up within the international community which clearly began to shape a deeper consciousness of the need to prosecute serious violations of the laws of war [12], with regard both to the traditional responsibility of States [13] and to the personal responsibility of individuals [14]. The horrible crimes committed by the Nazis and the Japanese led to a quick conclusion of
agreements among the Allied Powers and to the subsequent establishment of the Nuremberg and Tokyo International Military Tribunals “for the trial of war criminals whose offences have no particular geographical location whether they be accused individually or in their capacity as members of organisations or groups or in both capacities” [15]. These special jurisdictions also took into account the new categories of crimes against humanity [16] and crimes against peace.

Article 6 of the Charter of the Nuremberg International Military Tribunal established the legal basis for trying individuals accused of the following acts:

— *Crimes against peace* : the planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties [17], agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing.

— *War crimes* : violations of the laws and customs of war. A list follows with, inter alia, murder, ill-treatment or deportation into slave labour or for any other purpose of the civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, the killing of hostages, the plunder of public or private property, the wanton destruction of cities, towns or villages, or devastation not justified by military necessity.

— *Crimes against humanity* : murder, extermination, enslavement, deportation, and other inhuman 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.

As far as jurisdiction rationae personae is concerned, it covered “leaders, organisers, instigators and accomplices” who had taken part in the formulation or execution of a common plan or conspiracy to commit any of those crimes: all of them were considered for “all acts performed by any persons in the execution of such plan”.

In October 1945, as he awaited trial as a major war criminal, Robert Ley wrote a long and cogent repudiation of the right of the recently victorious Allies to try German leaders for war crimes. The Indictment served on Ley, and others, on 19 October 1945 claimed that
'[a] 11 the defendants ... formulated and executed a common plan or conspiracy to commit Crimes against Humanity as defined'. Ley continued: 'Where is this plan? Show it to me. Where is the protocol or the fact that only those here accused met and said a single word about what the indictment refers to so monstrously? Not a thing of it is true.'

A few days later, Ley committed suicide in his cell rather than face the shame of a public trial.

The unease about the legal basis of the trial was not confined to those who were to stand before it. Legal opinion in Britain and the United States was divided on the right of the victors to bring German leaders before a court for war crimes. The Nuremberg Military Tribunal was, as Ley realised, an experiment, almost an improvisation. For the first time the leaders of a major state were to be arraigned by the international community for conspiring to perpetrate, or causing to be perpetrated, a whole series of crimes against peace and against humanity. For all its evident drawbacks, the trial proved to be the foundation of what has now become a permanent feature of modern international justice.

The idea of an international tribunal to try enemy leaders for war crimes arrived very late on the scene. During the war, the Allied powers expected to prosecute conventional war crimes, from the machine-gunning of the survivors of sunken ships to the torture of prisoners-of-war. For this there already existed legal provision and agreed conventions. Yet these did not cover the prosecution of military and civilian leaders for causing war and encouraging atrocity in the first place. Axis, elites came to be regarded by the Allies as the chief culprits, men, in Churchill's words, 'whose notorious offences have no special geographical location'. (Sands, 2003:) The greatest difficulty arose over the issue of the treatment of civilians. Enemy generals and admirals might be prosecuted as simple war criminals if the case could be proved that they ordered crimes to be committed. But civilian leaders were different. There was no precedent for judicial proceedings against them since the campaign to 'hang the Kaiser' in 1919 came to naught, and was in any event directed at the supreme military commander, not a civilian head of state).

When the British government began to think about the issue in 1942, the only realistic solution seemed to be to avoid a trial altogether and to subject enemy leaders to a quick despatch before a firing-squad. 'The guilt of such individuals', wrote the Foreign Secretary, Anthony Eden, in 1942, 'is so black that they fall outside and go beyond the
It was Winston Churchill, Britain's wartime prime minister, who arrived at a solution. He revived the old-fashioned idea of the 'outlaw', and proposed that enemy leaders should simply be executed when they were caught. The idea of summary execution (at six hours' notice, following identification of the prisoner by a senior military officer) became the policy of the British government from 1943 until the very end of the war. Five years before, in 1938, outlawry had finally been abolished as a concept in English law by the Administration of Justice Act. (Sands, 2003)

British preference for summary execution was based partly on the genuine, but almost certainly mistaken, belief that public opinion would expect nothing less, and partly on the fear that a Hitler trial would give the dictator the opportunity to use the court case as a rallying point for German nationalism. American lawyers rehearsed a possible Hitler trial, and found to their discomfiture that he would have endless opportunity for making legal mischief, and, at worst, might argue himself out of a conviction. This would make the trial a mockery, and earn the incredulous hostility of public opinion. In America, Churchill won the support of the President, Franklin Roosevelt, and his hardline Treasury Secretary, Henry Morgenthau. But opinion in Washington was divided. The veteran Secretary of War, Henry Stimson, was opposed to summary justice. He favoured a tribunal that reflected Western notions of justice: 'notification to the accused of the charge, the right to be heard, and to call witnesses in his defence.' The War Department believed that it was important for the Allied war effort to demonstrate that democratic notions of justice would be dispensed even for men like Hitler. (Sands, 2003:p)

The tide was turned from an unusual quarter. In the Soviet Union, jurists insisted that the full penalty could only be imposed on German leaders after there had been a trial. Their experience of the show trials of the 1930s persuaded them that justice had to be popular, visible justice. Soviet spokesmen universally expected German war criminals to be found guilty and executed, as they had expected purge victims to confess their guilt and be shot in the Great Terror. American officials who were keen to avoid the Churchill line latched on to Soviet insistence on the need for a trial, and an unlikely alliance of Communist lawyers and American liberals was mobilised to protest summary justice and to insist on a judicial tribunal. The argument was clinched only by the death of Roosevelt. His successor, Harry Truman, a former small-town judge, was adamant that a trial was both
necessary and feasible. (Sands, 2003) When the major powers met in San Francisco in May 1945 to set up the United Nations, the issue was an urgent agenda item. The British were outmanoeuvred by the American-Soviet alliance and agreement was reached that Axis leaders should be tried by a military tribunal for crimes as yet unspecified. The idea that the trial should be conducted before a military court reflected the prevailing convention that war crimes were a military affair, but in practice the larger part of the subsequent trial was organised and prosecuted by civilian lawyers and judges.

Truman proceeded at once to appoint an American prosecution team under the leadership of the New Deal lawyer Robert H. Jackson, who had cut his teeth on fighting America's powerful industrial corporations in the 1930s under Roosevelt's antitrust legislation. Jackson was the principal architect of the trial and the decisive figure in holding together an unhappy alliance of Soviet, British and French jurists, who represented the only other United Nations states to be allowed to participate in the tribunal. The Soviet prosecution team favoured a trial but treated the proceedings as if the outcome were a foregone conclusion, a show-trial. French lawyers were unhappy with a tribunal whose main basis was to be Anglo-Saxon common law instead of Roman law, and whose procedures were foreign to French legal practice. Above all, the British accepted the idea of a trial with great reluctance. They remained sceptical that a proper legal foundation could be found in existing international law, and doubted the capacity of the Allied prosecution teams to provide solid forensic evidence that Axis leaders had indeed committed identifiable war crimes. British leaders were much more squeamish than the Americans about sitting side-by-side with representatives of a Soviet Union whose own responsibility for aggression and human rights violations was popular knowledge. The driving force behind the tribunal was the American prosecution team under Jackson. Without them, an international war crimes tribunal might never have been assembled. (Sands, 2003)

The preparation of the tribunal exposed the extent to which the trial was in effect a 'political act' rather than an exercise in law. When the American prosecution team was appointed in May 1945, there was no clear idea about who the principal war criminals would be, nor a precise idea of what charges they might face. A list of defendants and a list of indictable charges emerged only after months of argument, and in violation of the traditions of justice in all the major Allied powers. The choice of defendants was the
product of a great many different strands of political argument, and was not, as had been expected, self-evident. Some of those eventually charged at Nuremberg, like Hitler's former Economics Minister, Hjalmar Schacht, were given no indication for six months that they might find themselves in the dock. Schacht himself had been taken into Allied custody straight from a Nazi concentration camp. (Sands, 2003)

Quite how arbitrary the choice eventually was can be demonstrated by a remark made by Britain's attorney-general at a meeting in June 1945 to draw up yet another list of defendants: 'The test should be: Do we want the man for making a success of our trial? If yes, we must have him.' The task of assigning responsibility was made more difficult by the death or suicide of the key figures. Hitler killed himself on 30 April 1945; Heinrich Himmler, head of the SS and the managing-director of genocide, killed himself in British custody in May; Joseph Goebbels died with Hitler in the bunker; Benito Mussolini was executed by partisans shortly before the end of the war. This last death accelerated the decision to abandon altogether the idea of putting Axis leaders in the dock. Italian names had been included on the early lists of defendants, but by June they had been removed. Italian war criminals were turned over to the Italian government for trial. Italy was now a potential ally of the West. Other Axis allies, like Admiral Horthy of Hungary, were also quietly dropped from the list. By mid-summer all the prosecuting powers had come to accept that they would try only a selection of German political and military leaders. (Sands, 2003)

This decision still begged many questions. In 1945, the international community faced for the very first time the issue of bringing to trial the government of one of its renegade members. In theory the entire governmental and military apparatus could be arraigned: if some were guilty, then, as Robert Ley complained in his tirade against the legal basis of the trial, all were guilty. The early American lists did include a hundred names or more. The British prosecution team, under Sir David Maxwell Fyfe, favoured a smaller and more manageable group, and for much of the summer expected to try only half-a-dozen principal Nazis, including Hermann Goring, the selfstyled 'second man in the Reich'. At one point, the British team argued for a single, quick trial using the portly Goring as symbol for the dictatorship. The chief difficulty in drawing up an agreed list of defendants derived from different interpretations of the power-structure of the Third
Reich. In 1945, the view was widely held that Hitlerism had been a malign extension of the old Prussia of militarism and economic power. The real villains, on this account, were to be found among the Junker aristocracy and the industrial bosses, who were Nazism's alleged paymasters. Clement Attlee, Churchill's deputy prime minister, and then premier himself following Labour's election victory in July 1945, argued forcefully that generals and business leaders should be dragged into the net. 'Officers who behave like gangsters', wrote an uncharacteristically intemperate Attlee, should be shot.' He called for a cull of German businessmen 'as an example to the others'.

These views did not go uncontested. The indictment of large numbers of senior officers was regarded as a dangerous precedent, which might allow even the defeated enemy the opportunity to argue that Allied military leaders were just as culpable. The decision to include German bombing as part of the indictment was quietly dropped for just such reasons. The issue of economic criminals was equally tendentious. While Soviet lawyers, British socialists and Jackson's team of New Dealer lawyers saw nothing unjust about including industrial magnates at Nuremberg, they were opposed by those who saw business activity as independent of politics and war-making. Even Albert Speer, Hitler's armaments minister and overlord of the war economy, was argued about. He was, one British official suggested, 'essentially an administrator', not a war criminal. This tendency to see economic leaders as functionaries rather than perpetrators probably saved Speer from hanging when the trial ended in 1946.

The many arguments over whom to indict betrayed a great deal of ignorance and confusion on the Allied side about the nature of the system they were to put on trial. Only gradually over the summer, and thanks to a wealth of intelligence gathering and interrogation, did a clearer picture emerge. But there still remained significant gaps. Knowledge of the extent and character of the Holocaust was limited to information supplied by Jewish organisations. The chief managers of genocide, the Gestapo chief, Heinrich Müller, and his deputy, Adolf Eichmann, were missing from most lists of potential defendants. Because he made more noise than the other party fanatics, the prosecution chose Julius Streicher, editor of the scurrilous anti-semitic journal Der Sturmer, as the representative of Nazi racism. Yet Streicher had held no office in the SS racist apparatus, knew nothing of the details of the Holocaust, and had lived in disgrace
since 1940 after Hitler had sacked him as Gauleiter of Franconia on corruption charges. Full interrogation testimony on the Holocaust and its perpetrators was received only days before the start of the trial in November 1945, when it at last became clear that the men the Allies should have been hunting were still at large.

The final agreed list of twenty-two defendants represented a series of compromises. The original six British names were never in question: Goring, the foreign minister Joachim von Ribbentrop, interior minister Wilhelm Prick, labour front leader Robert Ley, Ernst Kaltenbrunner, head of the security apparatus, and the party's chief ideologue, Alfred Rosenberg. Other names were added as representative of important aspects of the dictatorship. The idea of representation was without question legally dubious, but it resolved many of the disputes between the Allies over how large the eventual trial should be. Streicher stood for anti-semitism; Hitler's military chef de cabinet, Wilhelm Keitel, and his deputy for operations, Alfred Jodl, stood for German militarism; the unfortunate Schacht and his successor as economics minister, Walther Funk, were made to represent German capitalism. Jackson insisted that Gustav Krupp, the one industrial name well-known everywhere outside Germany, should also be included, despite his age and his debilitated condition. But he was too ill to attend, and Jackson's efforts to extend the principle of representation by simply requiring Krupp's son, Alfried, to attend in his place was too much for the other prosecution teams, and the trial went ahead with no Prussian 'iron baron' in the courtroom.

Others were included for a variety of reasons. Karl Dcmitz, head of the German navy and Hitler's brief successor as chancellor, had his name added at the Potsdam conference, when it was brought up by the Soviet Foreign Minister. Only days before, the British prosecution had warned that the Donitz case was so weak that he would probably be acquitted, an outcome regarded candidly as 'disastrous to the whole purpose of the trial'. The Soviet Union did not want to be alone in presenting none of its Nazi prisoners at Nuremberg, and in August insisted that Admiral Erich Raeder and an official of Goebbels' propaganda ministry, Hans Fritsche, should also be included. The remaining group of Nazi ministers and officials were deemed to have done enough to merit their inclusion, but the final list left out men like Otto Thierack, the SS minister of the interior and former head of the Nazi People's Court, and the SS general, Kurt Daluege, head of
the Order Police and an important figure in the apparatus of repression and genocide. Both were in Allied captivity. To ensure that even these men would eventually stand trial in a series of subsequent tribunals, the Allied prosecutors, at Jackson's prompting, agreed to arraign a number of organisation as well as individuals. It was hoped that, by declaring the organisations criminal, further trials of individuals now classified as *prima facie* criminals could be speeded up. This was a device of doubtful legality, since it placed much of the basis of war crimes trials on retrospective justice, but nonetheless alongside the twenty-two defendants at Nuremberg stood metaphorically the SS, the SA, the Gestapo and the rest of the German cabinet and military high command. (Sands, 2003:p180) The framing of the charges was a little less arbitrary. Here there was no precedent at all. The war crimes defined at the end of the First World War and subject to common agreement included crimes that had evidently been perpetrated by the Nazi system: 'systematic terrorism', 'torture of civilians', 'usurpation of sovereignty' and so on. The difficulty in this case was to define crimes in terms that could be applied to the men in the dock, few of whom could be shown beyond any reasonable doubt to have directly ordered or perpetrated particular crimes, even if they served a criminal regime. *The main charge was deemed to be the waging of aggressive war as such, but this had never been defined as a crime in international law, even if its prosecution might give rise to specific criminal acts. War was regarded as legally neutral, in which both sides enjoyed the same rights, even in cases of naked aggression. To define the war-making acts of the Nazi government as crimes required international law to be written backwards. Even more problematic was the hope that the crimes perpetrated against the German people by the dictatorship, and the persecution and extermination of peoples on grounds of race, could also be included in any final indictment. This violated the principle in international law that the internal affairs of a sovereign state were its own business, however unjustly they might be conducted. Here, too, legal innovation was a pre-condition for trial.*

The radical solution proposed by Jackson and the American prosecution team was to include all the actions deemed to be criminal under the single heading of a conspiracy to wage aggressive and criminal war. This tautological device was first thought up in November 1944 by an American military lawyer, Murray Bernays. It had obvious merits beyond that of simplicity. Bernays concluded that a conspiracy to wage aggressive war
could rightfully include everything the regime had done since coming to power on 30 January 1933. It could include the deliberate repression of the German people, the plans for rearmament, the persecution of religious and racial minorities, as well as the numerous crimes committed as a consequence of the launching of aggressive war in 1939. Moreover, conspiracy removed the central legal problem that defendants could claim obedience to higher orders in their defence, or that Hitler (who at that point was still alive, and expected to be the chief defendant) could claim immunity as sovereign head of state. Conspiracy caught everyone in the net, regardless of their actual responsibility for specific acts.

The idea of conspiracy remained the essence of the American prosecution case right through to the trial itself. In May 1945, the American War Department drew up a memorandum for Jackson setting out the case that the major war criminals collectively 'entered into a common plan or enterprise aimed at the establishment of complete domination of Europe and eventually the world'. In June, Jackson reported to President Truman his belief that the German leadership had indeed operated with a 'master plan', in which everything from the indoctrination of German youth to the muzzling of the trade unions had served the central grotesque ambition to wage criminal war on the world. The conspiracy charge neatly removed the need to define new categories of crime for the other policies pursued by the regime, since they could, Jackson believed, all be subsumed under the heading of the master plan.

The conspiracy thesis provoked both scepticism and unease among the other prosecution teams. The first problem was simply one of evidence. The central document in the American case was Hitler's Mein Kampf, which was naively considered to be an outline of the future foreign policy of Hitler's Germany. (Sands, 2003:p176) A British Foreign Office analysis of the content of the book, written in June 1945, was forced to conclude that the book 'does not reveal the Nazi aims of conquest and domination fully and explicitly'. The British argued that the Nazis were 'supreme opportunists', and thought it highly unlikely that the prosecution could make a conspiracy theory work, not only in law, but in terms of the available evidence. The second problem was the absence of any legal foundation for the charge of conspiring to wage aggressive war. Jackson insisted that such a foundation existed in the Kellogg-Briand Pact signed in Paris in 1928 by
sixty-five signatory powers. The Pact was a statement of intent rather than a binding international convention, but the intent was clear enough: to renounce war as a means of settling disputes, except in the case of self-defence. It was signed by Germany, Japan, Italy and the Soviet Union, all of whom undertook wars of aggression at some point in the decade that followed. Its American sponsors declared that signature of the Pact heralded 'the outlawry of war'; this interpretation sustained Jackson's later argument that, under its terms, 'aggressive war-making is illegal and criminal'.

There were problems too with the French and Soviet approach to the trials. In neither state did the legal tradition support the idea of conspiracy. Whereas in Anglo-Saxon law it was possible to declare all those complicit with a conspiracy as equally responsible in law, in French and Soviet (and German) law the defendant had to be charged with a specific crime in which he had directly participated. The French preferred a trial based on particular atrocities and acts of terrorism, but this would have prevented the prosecution of most of those who ended up in the dock at Nuremberg. The Soviet legal experts, who had first invented the term 'crimes against peace', used later in the Indictment, were very concerned that 'conspiracy to wage aggressive war' should be confined only to the Axis states, and only to specific instances of violation: Poland in 1939, the Soviet Union in 1941, and so on. This anxiety masked more than legal niceties. If Jackson succeeded in making the waging of aggressive war into a substantive crime in international law, then the Soviet Union was equally guilty in its attacks on Poland in September 1939 and on Finland three months later. Jackson knew this. In his personal file on 'Aggression' were the terms of the German-Soviet agreement of 1939, dividing Poland. It was kept in the file and never presented at Nuremberg. The Soviet authorities ordered any discussion of aggression against Poland removed from the opening address of the Soviet prosecutor, and the Soviet courtroom team was under specific instructions to shout down any attempt by the defendants to raise awkward issues of Soviet-German collaboration.

The result of these many objections was a compromise. Jackson agreed that the charge of conspiracy should only apply to specific acts of Axis aggression, and that other charges should be brought separately, not simply placed under the umbrella of a general conspiracy. But this still left the difficulty of how to include the terror and racism of the
regime in any indictment. None of the prosecution teams wanted to focus only on the waging of war, and the crimes that resulted directly from it. In particular, the American and British prosecutors wanted to include Nazi anti-semitism as an indictable offence. The difficulty in doing so was highlighted when an academic judgment was sought on how to define Nazi racial and national persecution in law. Rafael Lemkin coined a new term 'genocide' to describe the intention to 'cripple in their development, or destroy completely, entire nations', but he concluded that this could not apply to the Jews, who were not a nation, and he omitted anti-semitism in his suggested list of cases in which 'genocide' had occurred. (Sands, 2003:p179) Since both the French and Soviet prosecutors were anxious to include the persecution of their populations in the trial proceedings, a new category of offence, 'crimes against humanity', was agreed. Under the terms of these crimes could be included the deliberate persecution and murder of Jews, gypsies and Poles. The most powerful legal objection was never properly confronted. The crimes of which the defendants stood accused were not regarded as crimes when they were committed, with the exception of war crimes as defined under international agreement. Robert Ley began his rejection of the legal basis of the tribunal by pointing out that the declaration establishing the Tribunal, issued on 8 August 1945, created laws "after all the crimes mentioned in the indictment, which they wish to judge, had been committed' The idea of retrospective justice was foreign to most legal traditions. The idea that the Tribunal would be both legislator and judge, creating crimes in order to punish them, was something that Western legal opinion also found difficult to accept. When the Acting Dean of the Harvard Law School was asked for an opinion on the conspiracy charge, he argued that retrospective justice was alien to the spirit of Anglo-American legal thought', and urged its rejection as 'unwise and unjustifiable'.25 The Professor of International Law at London University, H. A. Smith, writing in December 1945, argued that the Tribunal was to be treated as a 'special case', which self consciously departed from the principle 'that a man must not be punished for an act which did not constitute a crime at the time when it was committed'. Only time would show whether this 'very serious' decision was 'right or wrong'. (Sands, 2003:p178)

Jackson was quite aware of these objections. When he prepared his first report on the plans for a trial for Truman in June 1945, he argued that, even if they were not designated
crimes, the acts committed by the Axis enemy' have been regarded as criminal since the time of Cain'. The argument in favour of retrospective justice rested on the idea that many of the acts covered by the Indictment were in fact known to be criminal at the time they were committed, and would have been subject to criminal proceedings had the law not been perverted by dictatorship. These were flimsy arguments, but the central purpose of the Tribunal was not to conform to existing principles in international law but to establish new rules of international conduct and agreed boundaries in the violation of human rights. The Indictment formally issued on 19 October 1945 consisted of four charges: a common conspiracy to wage aggressive war; crimes against peace; war crimes; and crimes against humanity. At least one of the four prosecuting states, the Soviet Union, was guilty on three of the four counts for acts it had wilfully committed on its own behalf during the previous decade.

The conduct of the trial betrayed the improvised and ambiguous character of its origin. There were practical issues that had not been anticipated. The time taken to translate documents in evidence and other trial material into French and Russian meant that the prosecution teams often lacked the papers they needed, or received them at the last moment. Defence lawyers had particular difficulty in obtaining access to material necessary for the presentation of their defence. All the prosecution teams were short of skilled translators and interpreters, which compounded the problem. The sheer volume of accumulated evidence made it certain that the trial would take considerably longer than had at first been intended. In the summer of 1945, it was hoped that a trial could be started in September and might be over by Christmas. A speedy trial was felt to be desirable to satisfy Allied public opinion that justice was being done as swiftly as judicial process would allow. In reality, the trial lasted for almost a year, and it proved difficult to sustain popular interest in its outcome.

It was also difficult to mask the extent to which the trial was governed by political as much as by legal considerations. The Soviet authorities made no pretence that they considered all the defendants guilty a priori. The trial was regarded as a show-trial, in which Nazi leaders would be exposed to public disapproval before execution. Stalin established a government commission 'on the direction of the Nuremberg trial', which
oversaw efforts to ensure that nothing hostile to Soviet interests would be exposed by the court. In November 1945, the NKVD sent Colonel Likhachev to Nuremberg to win the support of the other three prosecution teams in avoiding awkward questions about Soviet foreign policy. (Sands, 2003:p180) The other powers tolerated the pressure, though in the notorious case of the Katyn massacre of Polish soldiers the British authorities were, rightly, convinced that this had been a Soviet, not a Nazi atrocity. At one point during the trial, the Soviet Procurator-General, Andrei Vyshinsky, guest-of-honour at a dinner for the Tribunal judges, compelled his companions to raise their glasses in a macabre toast to the defendants: 'May their paths lead straight from the courthouse to the grave!'(Sands, 2003:p180) This was a difficult position for American and British judges, who could scarcely endorse the imminent execution of men they were supposed to be treating with judicial impartiality.

Nonetheless, the three Western powers all came to accept the Soviet position that Allied actions which might now be regarded as crimes as a result of the new categories denned by the Tribunal should be excluded from review. Throughout the trial there was only one brief mention of the Soviet-Finnish war, and this was shouted down. Bombing was not included as a war crime, despite the fact that large numbers of innocent civilians were killed on both sides. Even while the horrors of the Nazi camp system were being revealed in court, the Soviet authorities were setting up concentration camps in the Soviet zone of occupation, like the isolation camp at Miilhberg on the Elbe, where, out of 122,000 prisoners who were sent without trial to the camp, over 43,000 were killed or died. (Sands, 2003:p180) This collaboration was sustained in the face of the emerging Cold War for several reasons. It was important for the Western states that the trial did not break down into inter-Allied bickering, and that the Soviet Union was not exposed as an international criminal. The hypocrisy was sustained on grounds of Realpolitik. The whole purpose of the trial, as a statement about international morality and human rights, would have been destroyed, and Nazi crimes viewed with an unwanted moral relativism, if the situation had been otherwise. The political purpose of the trials was also evident in the efforts to use them as part of a more general programme of re-education in Germany, and, by implication, in the rest of Europe. In one of the pre-trial interrogations, the American interrogator, Howard Brundage, explained to his interviewee, the diplomat
Fritz Wiedemann, what he believed the trials represented: *We are trying to get up a record here for the benefit of the children of Germany, so that, when another time comes and a gang like this gets control of the government, they will have something to look back on and be warned in advance ... [T]he United States doesn't expect anything out of this, and we are anxious to make a record here that will be a lesson to the German people.* (Sands, 2003:p180)

The assumption of Western moral superiority implicit in the liberal values expressed in the Indictment was accepted as a necessary underpinning for the construction of a new moral and political order.

There were also legal problems raised by the trial. The provision of evidence was far from ideal. Vital material on the genocide of the Jews only emerged with the capture of the commandant of Auschwitz, Rudolf Hoss, in March 1946, and his testimony arrived too late to be included fully in the trial proceedings. The Soviet Union provided unsworn written depositions about German atrocities in the east, but refused to allow Soviet citizens to be called as witnesses at Nuremberg. In the early summer of 1945, Jackson's team circulated a secret memorandum making it clear that it was inexpedient to wait until all the material for trial had been gathered together, and that the case should rest on 'the best evidence readily available'. The whole idea of conspiracy did prove difficult to demonstrate, and in the end three of the defendants, von Papen, Schacht and Fritzsche, were found not-guilty on all four counts. Subsequent historical research has confirmed that no such thing as a concerted conspiracy existed, though a mass of additional evidence on the atrocities of the regime and the widespread complicity of many officials, judges and soldiers in these crimes has confirmed that, despite all the drawbacks of the trial and of its legal foundation, the conviction that this was a criminal system was in no sense misplaced.

**Conclusion**

The Nuremberg trials produced a large number of judgements, which have greatly contributed to the forming of case law regarding individual criminal responsibility under international law. The jurisdictional experience of Nuremberg and Tokyo marked the start of a gradual process of precise formulation and consolidation of principles and rules during which States and international organizations (namely, the United Nations and the
international Committee of the Red Cross) launched initiatives to bring about codification through the adoption of treaties. As early as 11 December 1946 the UN General Assembly adopted by unanimous vote Resolution 95(I), entitled “Affirmation of the Principles of International Law Recognised by the Charter of the Nuremberg Tribunal”. After “having taken note” of the London Agreement of 8 August 1945 and its annexed Charter (and of the parallel documents relating to the Tokyo Tribunal), the General Assembly took two important steps. The first one was of considerable legal importance: the General Assembly “affirmed” the principles of international law recognized by both the Charter and the Judgement of the Nuremberg Tribunal. This meant that in the General Assembly’s view the Tribunal had taken into account already existing principles of international law, which the court had only to “recognize”. The second was a commitment to have these principles codified by the International Law Commission (ILC), a subsidiary organ of the UN General Assembly. Through this resolution the UN confirmed that there were a number of general principles, belonging to customary law, which the Nuremberg Charter and Judgement had “recognized” and which it appeared important to incorporate into a major instrument of codification (either by way of a “general codification of offences against the peace and security of mankind” or even as an “international criminal code”). By the same token the resolution recognized the customary law nature of the provisions contained in the London Agreement [21]. In 1950, the ILC adopted a report on the “Principles of International Law Recognised in the Charter of the Nuremberg Tribunal and in the Judgement of the Tribunal” [22]. The ILC report does not discuss whether these principles are part of positive international law or not, or to what extent. For the ILC, the General Assembly had already “affirmed” that they belonged to international law. The ILC therefore limited itself to drafting the content of these principles.

Principle I states that “any person who commits an act which constitutes a crime under international law is responsible therefor and liable to punishment”. It constitutes official recognition of the fact that an individual — in the broadest sense (“any person”) — may be held responsible for having committed a crime. And this may be the case even if the act is not considered a crime under domestic law (Principle II). Principles III and IV provide that a person who acts in his capacity as head of State or as a government official
and one who acts on the orders of the government or of a superior are not thereby relieved of responsibility. These two principles affirm what was established in Articles 7 and 8 of the Nuremberg Charter. Article 8, on superior orders, accepted the possibility of mitigation of punishment “if the Tribunal determines that justice so requires”.

Principle IV of the ILC text modifies the approach: the individual is not relieved of responsibility “provided a moral choice was in fact possible to him”. This leaves a great discretionary power to the tribunals that are called upon to decide whether or not the individual did indeed have a “moral choice” to refuse to comply with an order given by a superior.

Principle VI codifies the three categories of crime established by Article 6 of the Nuremberg Charter. What was defined in the London Agreement as “crimes coming within the jurisdiction of the Tribunal” has now been formulated as “crimes under international law”, using the same wording found in Article 6. Principle VI represents the core of a possible international criminal code. The affirmation of the Nuremberg principles by the 1946 General Assembly resolution and their formulation by the International Law Commission were important steps toward the establishment of a code of international crimes entailing individual responsibility. But further progress lay ahead.

Already on 9 December 1948, on the eve of the adoption of the Universal Declaration of Human Rights, an important development of the concept of crimes against humanity led to the adoption (by 56 votes to none) of the Convention on the Prevention and Punishment of the Crime of Genocide. The Convention, which entered into force on 12 January 1951, clearly classifies genocide, whether committed in time of peace or in time of war, as a crime under international law. Article 2 defines genocide as “acts committed with the intent to destroy, in whole or in part, a national, ethnical, racial or religious group”, such as killing members of the group, causing serious bodily or mental harm to them, deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part, imposing measures intended to prevent births within the group, forcibly transferring children of the group to another group. Article 3 of the Convention states that such acts are considered punishable as are various degrees of involvement in them: conspiracy to commit the acts, direct and public incitement, attempts or complicity. But it is Article 4 that establishes the obligation to punish not
only “rulers” or “public officials”, but also “private individuals”. As for Article 6, it places the competence to try offenders in the hands of both domestic and international tribunals.

It follows that this important Convention introduces a new crime under international law, directly linked to the legal category already established by Article 6 of the Nuremberg Charter, that of crimes against humanity. And, again, international treaty law goes far beyond the traditional boundaries of State responsibility, underlining that individuals are “in the front line” with respect to obligations under a particular branch of international law. And, in keeping with the previous documents, the Genocide Convention offers a broad definition of the crime of genocide and of various levels of participation in it (direct acts, conspiracy, incitement, attempts, complicity). The customary nature of the principles which form the basis of the Convention has been recognized by the International Court of Justice.

Shortly afterwards, the four Geneva Conventions of 12 August 1949, drafted on the initiative of the ICRC in the wake of the dramatic experiences of the Second World War, reshaped the entire treaty-based system dealing with the protection of war victims. The parties to these Conventions undertake the basic general obligation “to respect and to ensure respect” for their rules “in all circumstances” (Article 1 common to the four treaties).

An entire chapter of each of the Geneva Conventions deals with acts against protected persons. They are called “grave breaches”— and not war crimes —, but they are undoubtedly crimes under international law. These acts are defined in detail in Article 50 of the First Convention, Article 51 of the Second Convention, Article 130 of the Third Convention and Article 147 of the Fourth Convention, and include crimes such as wilful killing, torture or inhuman treatment (including biological experiments), wilfully causing great suffering or serious injury to body or health, extensive destruction or appropriation of property, compelling a prisoner of war to serve in the forces of a hostile power or wilfully depriving him of the right to a fair and regular trial, unlawful deportation, the transfer or confinement of a protected person, and the taking of hostages “not justified by military necessity and carried out unlawfully and wantonly”. As far as the scope of application ratione personae is concerned, the Conventions establish the responsibility of
the direct authors of those grave breaches and that of their superiors. The scope of the rules is, in fact, very wide since the word “person” comprises both civilians and combatants, whether the latter are members of official or unofficial forces.

The Hague Convention of 14 May 1954 for the Protection of Cultural Property in the Event of Armed Conflict commits the contracting parties to protecting what is called the “cultural heritage of all mankind”. They have “to take, within the framework of their ordinary criminal jurisdiction, all necessary steps to prosecute and impose penal or disciplinary sanctions” upon those persons “who commit or order to be committed a breach” of the Convention.

The two 1977 Protocols additional to the Geneva Conventions of 1949 have added more precise rules to what has become an extensive legal system. In particular, Article 11 strengthens the protection of individuals as far as their physical and mental health and integrity are concerned by stipulating that serious violations constitute a grave breach of international humanitarian law. Moreover, Article 85 adds a great number of violations to the already existing list of grave breaches. Again, with Article 1 of Protocol I, parties undertake “to respect and ensure respect” for the Protocol “in any circumstances”.

The Nuremberg trials were an experiment. There was a clear international consensus among the victor powers that the perpetrators of aggression should this time be treated differently by the international community. To be able to conduct such an experiment it was necessary to have an agreed set of rules of conduct in international affairs and on fundamental issues of human rights. The precise nature of the crimes associated with the war had to be defined and given clear legal status. (Meron, 1998:p75) What is striking about the summer of 1945 is not that the trials were in some sense arbitrary and in defiance of legal convention, but that so much was achieved in the chaos of post-war Europe in building the foundation for contemporary international law on war crimes, and contemporary conventions on human rights. (Meron, 1998:p75) The International Criminal Court established in 2002 is a direct descendant of the Nuremberg Military Tribunal, as were the European Convention on Human Rights signed in 1950 and the genocide convention two years earlier. The trials were without question a political act, agreed at the level of diplomacy, and motivated by political interests. The choice of
defendants and the definition of the charges were arbitrary in the extreme, and rested on
endless wrangles between the prosecution teams and governments of the four Allied
states. Yet the final outcome was less prejudiced and more self-evidently just than these
objections might imply. The trial did not fabricate the reality of the Third Reich and the
death of as many as seven million men, women and children murdered or allowed to die
by the apparatus of state repression, or the deaths of many millions more, Germans
among them, from the waging of continental war. After this grotesque historical
experience, few could doubt, either then or now, that the international community
required new legal instruments to cope with its possible recurrence. The fact that in many
cases since 1945 it has proved impossible to prevent or anticipate further violations is not
a consequence of the failure of the Nuremberg experiment, nor of the legal apparatus that
it spawned. It is a consequence of a persistent reality in which power will always tend to
triumph over justice. (Meron, 1998:p77)
The Nuremberg trials had an almost incalculable effect on normative international law,
and their success went far toward ending the impunity of political and military leaders
around the world. But if one of the goals at Nuremberg was to make the call “never
again” a reality, it did not succeed as much as its proponents might have hoped. The
second half of the twentieth century and, now, the beginning of the twenty-first have been
so marked by atrocities that one commentator has termed the period “the age of
genocide”. (Meron, 1998:p77) From the brutal regime of Pol Pot to Saddam Hussein’s
extermination of ethnic Kurds; from the genocide in Rwanda to the massacres in Darfur;
from the “ethnic cleansing” in Bosnia and the Srebrenica enclave to the attacks on
Kosovo Albanians; and from Sierra Leone to Uganda; the world has continued to witness
malevolent deeds that surpass understanding.

These atrocities recur, not only in spite of the Nuremberg proceedings and
their legacy, but also in spite of the increasing interest in international and mixed criminal
tribunals, and an unprecedented interest in international humanitarian and criminal law.
Thus, one may reasonably ask: since such atrocities still occur, what is the legacy of the
Nuremberg Tribunals and their latter-day heirs? Why can we still call them success? Or
can we?(Meron, 1998:p77)
The mission of the IMT at Nuremberg, in justice Jackson’s worlds, was “to summon such detachment and intellectual integrity” to the task that the trial would “commend itself to posterity as fulfilling humanity’s aspirations the same: to achieve justice through reason rather than force; of uphold the basic principles of human rights and due process; to improve compliance with the law; and to eliminate impunity, not through vengeance, but though the rule of law. (Jackson,1947:p55) Work always remains to be done, but with these noble goals as the lodestar, progress is being made and the expanding universe of international humanitarian law is stronger as a result. (Jackson,1947:p55)

The Nuremberg trial had an apt counterpart in the form of Tokyo Trials, which gave shape to the notion of ‘victor’s justice’, which has been discussed in the next chapter.

REFERENCES


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