

6. The individual in the International Criminal Tribunals.

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1. Background to international criminal tribunals

Proposal to establish an international judicial instance for countries to apply the rules of international humanitarian law, such as the Geneva Convention of 22 August 1864, contained no provision for prevention or repression in case of violation of its provisions.

1.1. Moynier's 1872 project

Although unsuccessful, Moynier's project is considered to have initiated the debate on repression through international bodies and led to the emergence of the obligation of states to criminalise and repress violations of humanitarian law that were left to the sanction of domestic courts and went unpunished.

1.2. The Hague Peace Conferences: Permanent Court of Arbitration

In 1899 and 1907 these conferences resulted in several conventions, including the 1899 Convention on **the Pacific Settlement of International Disputes**, which created a Permanent Court of Arbitration.

It was not a permanent adjudicatory body, but it is a step towards the creation of tribunals for the settlement of international disputes.

1.2. The Hague Peace Conferences: Permanent Court of Arbitration

These conferences did not create a criminal court as such, but in some of their points, references to international criminal responsibility are outlined.

See Santiago Urios Moliner *"Antecedentes Históricos de la Corte Penal Internacional"*, La Corte Penal Internacional: un estudio interdisciplinar. Tirant Lo Blanch. 2003. p. 26

1.2. The Hague Peace Conferences: Commission on the Responsibility of War Perpetrators

After the end of the First World War, the Peace Conference was held at Versailles, at which a **Commission on the Responsibility of War Criminals and the Enforcement of Penalties** was set up, under which it was planned to create an international tribunal to prosecute enemies found guilty of breaching the laws and customs of war.

Countries agreed on a series of measures that do not work in practice but are nevertheless considered a precedent.

1.3. The League of Nations: the Permanent Court of Justice

The **League of Nations** had on several occasions put forward proposals for the creation of **an International Court of Justice to deal with crimes**, but these failed for various reasons:

- considered too advanced for their time as states did not recognise international criminal law;
- Question of sovereignty, i.e. states were opposed to their nationals being judged by a foreigner and according to international rather than domestic law.

1.3. The League of Nations: the Permanent Court of Justice

- Because of the absence of positive law, there were no specific rules on international criminal law, a court could not act without violating the principle of *nullum crimen sine lege*.

2. The 1945 Nuremberg and 1946 Tokyo Tribunals

After the Second World War, the international community put forward proposals for the establishment of an international criminal court, proposals which became a reality with the creation of the Nuremberg tribunal in 1945 and the Tokyo tribunal in 1946, in response to Nazi genocide, Japanese occupation of Asia, and massive human rights abuses.

2. The 1945 Nuremberg and 1946 Tokyo Tribunals

- The Nuremberg Tribunal of 1945

The Allies were able to agree (Treaty of London) and the International Military Tribunal (based in Nuremberg) was set up to try the major Nazi criminals, and lower tribunals in other areas to try lower ranking Nazis.

The Statute, or Charter of the International Military Tribunal, defines the fundamental and procedural rules that the tribunal would apply.

2. The 1945 Nuremberg and 1946 Tokyo tribunals

The jurisdiction of the International Military Tribunal included war crimes and crimes against humanity, as well as crimes against peace.

The decisions of this tribunal, despite the criticisms (victors judge the vanquished, nullum crimen sine lege, lack of precedent), made it clear that international law takes precedence over national law; that there is the possibility of direct responsibility of an individual, setting aside the idea of collective guilt.

2. The Nuremberg Tribunal in 1945 and the Tokyo Tribunal in 1946

- The Tokyo Tribunal of 1946

The Nuremberg International Military Tribunal served as a model for the Tokyo Tribunal, set up with the intention of prosecuting senior Japanese officers for the same crimes as the Nazis, and was officially called the International Military Tribunal for the Far East.

Differences from Nuremberg:

- It was created by an executive order of the Supreme Leader of the Pacific Alliance (General MacArthur) and not by an international treaty.

2. The 1945 Nuremberg and 1946 Tokyo tribunals

- Broader composition (judges from the states concerned, an American prosecutor, and several associate prosecutors);
- The Tokyo tribunal mainly prosecuted those responsible for **crimes against peace** (it was concluded that there had been a conspiracy to wage wars of aggression against various countries).

2. The 1945 Nuremberg and 1946 Tokyo tribunals

According to Yáñez-Barnuevo, the work of these tribunals demonstrated that **international criminal justice** was feasible, **that responsibility can be focused on the leaders and the main executors**, and because guidelines were established according to which the behaviour of political leaders or military authorities of any country would be judged in the future.

YÁÑEZ-BARNUEVO, Juan Antonio, 'la Conferencia de Roma y el Estatuto de la Corte Penal Internacional: balance y perspectivas' in *Creación de una jurisdicción penal internacional*, Colección Escuela Diplomática nº4, Madrid, 2000.

3. The Ad Hoc Criminal Tribunals for the Former Yugoslavia of 1993 and Rwanda of 1994

- The International Criminal Tribunal for the former Yugoslavia

Tribunal established in 1993 by Resolution 808 of 19 February 1993 by the United Nations (UN) Security Council for the prosecution of those allegedly responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia.

It was established as an (unprecedented) measure for the maintenance of peace and security under Chapter VII of the UN Charter.

3. The Ad Hoc Criminal Tribunals for the Former Yugoslavia in 1993 and Rwanda in 1994

They provides a model that can be used on other occasions and competences include:

- Grave breaches of the 1949 Geneva Convention, violations of the laws or customs of war, genocide, and crimes against humanity.
- Violations committed on the territory of the former Yugoslavia (includes land area, its airspace, and territorial waters).
- Established the primacy of the Court over national jurisdictions, albeit on a concurrent basis.

3. The Ad Hoc Criminal Tribunals for the former Yugoslavia in 1993 and Rwanda in 1994

- Individuals who have planned, instigated, or ordered the commission of any of the crimes listed, or have committed them, or have helped in any way to plan, prepare, or execute them, may be tried, including the responsibility of the superior, and neither the official position of the accused nor the allegation of due obedience may be exonerating circumstances for individual criminal responsibility, although in this case it may be grounds for a reduction of the sentence.

3. The Ad Hoc Criminal Tribunals for the former Yugoslavia in 1993 and Rwanda in 1994.

- International Criminal Tribunal for Rwanda 1994

Established by Resolution 955 of 1994, it was named the International Tribunal for the Prosecution of International Crimes Perpetrated in Rwanda (ICTR).

The Rwandan government requested the Security Council to establish the tribunal. Its statute is based on that of the ICTY with some differences, for example:

3. The 1994 Ad Hoc Criminal Tribunal for Rwanda

- The court only judges events that occurred between 1 January and 31 December 1994;
- In relation to crimes against humanity, it is specified that these are committed on a national, ethnic, racial, or religious basis and there need not be a nexus to an armed conflict.
- It has jurisdiction to prosecute persons responsible for serious violations of international humanitarian law committed on the territory of Rwanda and Rwandan nationals responsible for such violations committed on the territory of neighbouring states.

3. The Ad hoc Criminal Tribunals for the former Yugoslavia in 1993 and Rwanda in 1994

- Both tribunals have provided important jurisprudence that influenced the negotiations for the drafting of the Rome Statute of the International Criminal Court.
- They can only impose custodial sentences (up to life imprisonment).

3. The Ad Hoc Criminal Tribunals for the former Yugoslavia in 1993 and Rwanda in 1994

- Its judges are not nationals of victorious powers, they are prestigious jurists of various nationalities (Justice of the International Community through the UN).
- They may order the return to the rightful owners of property and income acquired by criminal means, including coercion.
- They are not military tribunals.

3. The Ad Hoc Criminal Tribunals for the former Yugoslavia in 1993 and Rwanda in 1994

- The Security Council, in its Resolution 1503 (2003), adopts the 'completion strategy' in which the TIPY tribunals are urged to take steps to conclude investigations.
- Resolution 2256 of 22 December 2015 has determined that the judicial work of the International Criminal Tribunal for Rwanda has been completed and the Tribunal is ordered to close on 31 December 2015. The same resolution extends the term of office of judges and prosecutor of the ICTY until 31 December 2014 and urges the Tribunal to complete its work.

4. INTERNATIONALISED COURTS

In the interim period of the adoption of the Rome Statute of the International Criminal Court (ICC) and its entry into operation, international criminal tribunals were established, which have been referred to as 'mixed', 'hybrid' or 'internationalised'.

4. INTERNATIONALISED COURTS

These tribunals must be placed in the context where national structures do not permit or governments are unwilling to initiate credible judicial proceedings and the question arises as to the subsidiary responsibility of the international community. (Bou Franch, V and Castillo Daudi, M. "International Human Rights Law and International Humanitarian Law, pp 400).

4. INTERNATIONALISED COURTS

Some characteristics of internationalised courts:

- Mixed composition of its judicial and prosecutorial chambers (international and national judges and prosecutors);
- Mixed substantive jurisdiction to deal with international crimes and ordinary crimes;
- Funding through international assistance.

4. INTERNATIONALISED COURTS

Examples:

- The Kosovo Courts (2000).
- Special Court for Sierra Leone (2002).
- Extraordinary Chambers for the Prosecution under Cambodian Law of Crimes Committed during the Period of Democratic Kampuchea (2003).