CHAPTER 2

Historical Evolution of International Criminal Law

ICL has not had a constant development and application over time. On the contrary, ICL has been developed and applied in very specific historical moments, particularly in the five years that followed World War II (1945–1950), in the “golden decade” of international criminal justice at end of the Cold War (1993–2002) and in the subsequent decade (2002–2011) in which the fruits of the golden decade were collected.

Prior to World War II, it is only possible to find some distant ICL precedents, which could not be enforced (e.g. articles 227 to 230 of the 1919 Treaty of Versailles1, which provided for the establishment of an ad hoc international

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1 In 1915, the governments of France, the United Kingdom and Russia made a joint declaration stating that the Ottoman Empire, an ally of the German and the Austro-Hungarian Empires during World War I, had committed crimes that affected the “conscience of humanity” against about 800,000 Armenians who lived in its territory. This statement is included in the Armenian memorandum, submitted on 14 March 1919 by the Greek delegation to the Commission on the Responsibility of the Authors of War and on the Enforcement of Penalties, established by the Allied States at the end of the World War I. Its text can be found in Schwelb (1949: 178–181). After World War I, the Treaty of Sevres provided for the right of the Allied Powers to prosecute those responsible for the above-mentioned crimes, and the obligation of the Ottoman Empire to surrender the members of the Ottoman government and armed forces who had incited them (Matas: 1989). The United States and Japan opposed this provision because in their view the category of crimes against the conscience of humanity had not been internationally defined prior to the violence exerted against the Armenians living in Turkey (Bassiouni, 2011: 88–89). Despite having been signed by the United Kingdom, France, Italy and Turkey, the Treaty of Sevres never came into force. The absence of any international investigation into those responsible for the Armenian genocide (1925–1933) gives support to those who claim that the price that the Turkish government had to pay to obtain impunity was the abandonment of the German side to become an ally of the Allied Powers. According to this view, after the 1917 Bolshevik Revolution, the United States and the European Allied Powers decided that Turkey could collaborate as an ally of the West to prevent Communist Russia from gaining access to the Mediterranean Sea. This would explain the absence of international criminal proceedings for the Armenian genocide at the end of World War I (Bassiouni, 2016: 368). At the national level, and due to British pressure, Turkish courts convicted for homicide (a crime that existed under the Penal Code of the Ottoman Empire) some members of the Turkish armed forces (Cassese, 2011: 134). Subsequently, there is only one case in Argentina in which Turkey is declared responsible for the Armenian genocide. See:
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tribunal to try German Kaiser Wilhelm II for crimes against international morality and the sanctity of the treaties)\(^2\) or were nothing short of a farce (e.g. the war crimes trials carried out in the 1920s by the German Supreme Court in Leipzig) (Mullins, 1921: 98–112, Becker, 1996).\(^3\)

These first ICL precedents constitute a first attempt to change a long-lasting tradition that considered unnecessary to prosecute and punish those responsible for atrocity crimes in light of the need to find negotiated resolutions of armed conflicts\(^4\). This usually led to forgetfulness and lack of punishment for the atrocities committed during the hostilities.

\(^2\) In particular, article 227 of the Treaty of Versailles provided for the establishment of an ad hoc international criminal tribunal, composed of five judges appointed respectively by France, Italy, Japan, the United Kingdom and the United States, with jurisdiction over the crimes against international morality and the sanctity of the treaties committed by Kaiser Wilhelm II of Hohenzollern. Nevertheless, the international tribunal could not finally be established because Kaiser Wilhelm II, after his abdication in the autumn of 1918, took refuge in the Netherlands, which had declared neutrality during World War I and where his aunt Queen Wilhelmina reigned. After granting him asylum, the Dutch government refused to hand him over to the Allied Powers that were seeking to prosecute him, claiming that the charges he was accused of did not exist under Dutch law. The conflict for the establishment of an international criminal tribunal was closed in 1920 when Belgium, France and the United Kingdom (the United States had already left beforehand because the crimes charged had not been internationally defined prior to their commission) accepted the German proposal to prosecute in its Supreme Court, located in Leipzig, 45 cases that had been selected by those states, under the supervision of an Allied Powers mission of observers (Mullins, 1921: 98–112).

\(^3\) Between 1921 and 1929 the Penal Chamber of the German Supreme Court prosecuted low-level and mid-level members of the German army who had allegedly engaged in war crimes during World War I. 13 convictions were entered in a total of 861 trials. None of the alleged most responsible persons, including General Ludendorff, General Hinderbug, Admiral von Tirpitz or Foreign Minister Bethmann-Hollweg, were charged (Becker, 1996).

\(^4\) In international armed conflicts, state responsibility for humanitarian disasters resulting from aggressive or unjust wars was assessed in economic terms in favour of the victors. Article 231 of the Treaty of Versailles dealt with the issue of guilt under the section on “reparations,” which shows that economic responsibility for war crimes was more important than criminal liability at that time (Schmitt 1994: 24 et seq.). In non-international armed conflicts, the notion of “political crimes” committed by the “opposing parties” was frequently used. Since the main goal was to recover the rule of law and political stability, amnesty
It was the horror of World War II, together with the fact that it directly affected the social, political and economic elites of the states that had dominated the international society since the 18th century, which brought about a minimum consensus on the political opportunity and moral need to prosecute and punish those leaders of the defeated side who were responsible for aggressive wars and atrocity crimes against combatants and non-combatants (Vormbaum, 2009).\textsuperscript{5} In this way, the notion of international individual criminal responsibility was born.

During the years that followed World War II (1945–1950), the foundations of what we know today as ICL were laid down (Bassiouni, 2011: 718 et seq.). Genocide (1948) and war crimes – understood as grave breaches of the 1949 Geneva Conventions – were regulated by treaty law. The ILC elaborated the so-called Nuremberg principles (1947 & 1950) and prepared a Draft Code of Crimes against the Peace and Security of Mankind (1951, 1954) and a Draft Statute for an International Criminal Court (1951 & 1953). All of this took place against the backdrop of IHL development and the establishment of IHRL foundations (Cançado Trindade, 2010: 275–276; Del Arenal, 2002: 32; Marchett Gauche, 2002: 485).

Simultaneously, the IMT and the IMTFE (both established at the request of the United States, whose position with respect to the establishment of international criminal tribunals had completely changed from the opposition it had shown twenty-five years before at the end of World War I), as well as the military commissions of the four Allied Powers that occupied Germany since 1945 (the United States, the United Kingdom, the Soviet Union and France), sent the following message: those who in leadership positions resort to aggressive wars against third states and use armed force against their own population: (i) lack moral legitimacy to continue leading their respective

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\textsuperscript{5} As Werle (2009: 84) underscores, when the change of political system is the result of a complete military defeat of the previous regime or a revolution, there is no reason to enter into any agreement with the previous order. As a consequence, there is no obstacle to undertake criminal proceedings for atrocity crimes.
national societies; and (ii) incur in individual criminal liability *vis-à-vis* the international society as a whole, due to the harm that they have caused to it (Olásolo, 2017a: 101).6

6 The principles contained in the 8 August 1945 London Charter of the International Military Tribunal (known as the ‘The Nuremberg Tribunal’) were approved by the UNGA in its Resolution 95 (I) of 11 December 1945 on the Affirmation of the Principles of International Law Recognized by the Charter of the Nuremberg Tribunal. Two years afterwards, once the Nuremberg Tribunal handed down its judgment (known as the ‘Nuremberg Judgment’), the United Nations General Assembly in its Resolution 177 (II) of 21 November 1947 on the Formulation of the Principles Recognized in the Chapter of the Nuremberg Tribunal and in the Judgment of the Tribunal, directed the ILC to “(a) formulate the principles of international law recognized in the Charter of the Nuremberg Tribunal and in the judgement of the Tribunal; and (b) prepare a draft code of offences against the peace and security of mankind, indicating clearly the place to be accorded to the principles mentioned in subparagraph (a) above.” The ILC adopted its final formulation of the Nuremberg Principles at its second meeting held between 5 June and 29 July 1950, and submitted them to the UNGA. The Nuremberg Principles are reproduced in full in the Yearbook of the International Law Commission, 1950, vol. II. According to the 1950 ILC Report, the following seven principles had been identified by the Commission: Principle I: “Any person who commits an act which constitutes a crime under international law is responsible therefor and liable to punishment.” Principle II: “The fact that internal law does not impose a penalty for an act which constitutes a crime under international law does not relieve the person who committed the act from responsibility under international law.” Principle III: “The fact that a person who committed an act which constitutes a crime under international law acted as Head of State or responsible government official does not relieve him from responsibility under international law.” Principle IV: “The fact that a person acted pursuant to order of his Government or of a superior does not relieve him from responsibility under international law, provided a moral choice was in fact possible to him.” Principle V: “Any person charged with a crime under international law has the right to a fair trial on the facts and law.” Principle VI: “The crimes hereinafter set out are punishable as crimes under international law: (a) Crimes against peace: (i) Planning, preparation, initiation or waging of a war of aggression or a war in violation of international treaties, agreements or assurances; (ii) Participation in a common plan or conspiracy for the accomplishment of any of the acts mentioned under (i). (b) War crimes: Violations of the laws or customs of war which include, but are not limited to, murder, ill-treatment or deportation to slave labour or for any other purpose of civilian population of or in occupied territory; murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns, or villages, or devastation not justified by military necessity. (c) Crimes against humanity: Murder, extermination, enslavement, deportation and other inhuman acts done against any civilian population, or persecutions on political, racial, or religious grounds, when such acts are done or such persecutions are carried on in execution of or in connection with any crime against peace or any war crime.” Principle VII: “Complicity in the commission of a crime against peace, a war crime, or a crime against humanity as set forth in Principle...
Nevertheless, the cases that the IMT, the IMTFE and the military commissions acting under Allied Control Council Law No. 10 selected also hinted that those leaders who engage in international crimes would only be prosecuted and punished if they acted on behalf of the defeated side (Jescheck, 1952; Norrie, 2009: 187–231; Christie, 2004; Zolo, 2007). The enforcement of ICL by national jurisdictions during the Cold War (1950–1989) reinforced this message because only those who had acted on behalf of the Axis Powers were prosecuted – the 1984–1985 trial of the members of the Argentinean Military Junta and the 1970–1974 proceedings for the crimes committed by US forces during the My Lai massacre in Vietnam were unusual exceptions to this forty-years long practice (Nino, 1991: 2619–2640; Neier, 1998; Douglas, 1999).

The limited enforcement of ICL during the Cold War coexisted with the use of traditional conflict resolution techniques in numerous situations. As a result, conflicts were ended through agreements between adverse parties that, at best, undertook the commitment to offer public apologies to victims. This led to forgetfulness and avoided prosecution and punishment for large-scale atrocities. The Indian-Pakistani conflict in the early 1970s is a paradigmatic example of public apologies without ulterior legal consequences (Murshid, 1997: 1–34).

All this happened despite 18 million deaths, hundreds of thousands of executions and innumerable victims of torture caused by the Cold War as a result of: (i) the desperate attempts of the European colonial powers to avoid, by all possible means, the process of decolonization; and (ii) the dispute between the two new super-powers (the United States and the Soviet Union) for areas of influence and access to natural resources in very favourable conditions (Bassiouni, 2011: 120–121).

It was in this context that a new form of “modern” warfare, which was designed to confront a “subversive” enemy by widespread and systematic torture, extrajudicial killings and enforced disappearances, was put in place by

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7 Werle (2009: 84). For Schmitt (1994: 238, 244), in the Nuremberg and Tokyo trials, together with the expiation of individual guilt, the goal of judicially declaring that Germany and Japan were solely responsible for the war was also pursued.

8 At first, India tried to prosecute for war crimes around 200 Pakistani prisoners. Nevertheless, the Indian government finally agreed to release them as a sign of reconciliation. India also gave back to Pakistan more than 15,000 km² in the Treaty of Simla with a view to fostering a long-lasting peace between the two nations (Murshid, 1997: 1–34).
the dictatorships of South America (Osiel, 2004: 129–141). To this end, military and police forces were instructed by members of the French military who had fought in Algeria (Robin, 2005) and by members of the CIA, which established military and police bases in the region and counterinsurgency schools in Panama and the United States (Galain Palermo, 2016: 27; Weschler, 1990).9 While the dictatorships in Brazil (1964–1984), Paraguay (1954–1989) and Uruguay (1973–1985) used torture in a wide-spread and systematic manner, the dictatorships in Argentina (1976–1983) and Chile (1973–1990) committed thousands of enforced disappearances as a state terror mechanism (Cardoso, 2017).10

Notwithstanding the foregoing, important legislative developments in IHRL (including the 1966 International Covenants on Civil and Political rights and Economic, Social and Cultural Rights) and IHRL (two additional protocols to the Geneva Conventions) were adopted in this period. Furthermore, some ICL developments took also place, including the adoption of the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity (1968), the inclusion of provisions on an International Criminal Court in the Convention on the Suppression and Punishment of the Crime of Apartheid (1973), the definition of the acts of aggression (1974), the extension of the material scope of application of the principle of universal jurisdiction to grave breaches of the Additional Protocol I to the Geneva Conventions (1977) and the adoption of the Convention against Torture and Other Cruel, Inhuman and Degrading Treatment and Punishment (1984). For the most part, these ICL developments took place between 1961 and 1979, when the Movement of Non-Aligned Countries and the G-77 had greater influence in the international society.

9 Gill (2005: 153); Cockroft (2001). In his book on torture, Di Cesare (2016: 166 et seq.) explains the modalities of CIA assistance to the dictatorships in South America. Subsequently, the CIA has continued providing the same forms of assistance in other conflicts related to the war against terrorism. With respect to the French case, see: http://www.telam.com.ar/notas/201312/43491-murio-el-jefe-de-espionaje-frances-que-reivindico-las-torturas-cometidas-por-su-ejercito-en-argelia.php [last visited: 30 December 2017].

10 According to the so-called “Terror Archives,” the Condor Plan caused in South America 50,000 deaths, 50,000 enforced disappearances and 400,000 unlawful imprisonments. See: http://www.papelesdesociedad.info/IMG/pdf/informes_secretos-stroessner.pdf [last visited: 30 December 2017]. On the Condor Plan, see Eichner (2009). According to Straßner (2007: 34 et seq.), the high number of international crimes are a sufficient reason to refer or even abolish the institutions responsible for the implementation of the Condor Plan. The same view is held by Peluso Neder (2017) and Arnold et al. (2006).
The sweeping collapse of the Soviet Union at the end of the Cold War, coupled with the gradual weakening that the Non-Aligned Movement and the G-77 had experienced since the early 1980s, gave way to a decade of global dominance of the only superpower that survived the Cold War (the United States) and its NATO allies – the globalization of the economy since the 1970s and the gradual loss of power of the nation-state imposed nevertheless some limitations on the global dominance by the US-led coalition (Howsbaum, 1992: 568).

The political and economic weakness of Russia (successor of the Soviet Union in the UNSC) and the Chinese traditional policy of restraint in the use of its veto power, allowed the United States, the United Kingdom and France to push forward a broad teleological interpretation of the UNSC functions under article 24(1) and (2) of the UN Charter. According to this interpretation, the UNSC can assume any function that aims at maintaining international peace and security and respects the Purposes and Principles of the UN Charter, even if the UNSC is not explicitly entrusted with it by the UN Charter (Ortega Carcelén, 1995: 132–136; Scheffer, 1991: 101–110).

In this context, the 1990s witnessed successive international conferences on different IHRL aspects (Salvioli, 2000: 3). Furthermore, in 1991 the ILC

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11 269 vetoes were presented since the establishment of the UNSC in 1945 until 2012. In this period China used its veto power 9 times, France 18, the United Kingdom 32, the United States 89 and Russia/Soviet Union 128. Approximately two thirds of the Russian/Soviet vetoes were taken between 1945 and 1955. See Global Policy Forum. (2013). Changing Patterns in the Use of the Veto in the Security Council. Available at: https://www.globalpolicy.org/images/pdfs/Changing_Patterns_in_the_Use_of_the_Veto_as_of_August_2012.pdf [last visited: 30 December 2017].


13 Among them are: (i) the UN World Summit for Children (New York 1990); (ii) the UN Conference on Environment and Development (Rio de Janeiro 1992); (iii) the World Conference on Human Rights (Vienna 1993); (iv) the International Conference on Population and Development (Cairo 1994); (v) the World Summit for Social Development (Copenhagen 1995); (vi) the Fourth World Conference on Women (Beijing 1995); (vii) the Second United Nations Conference on Human Settlements (Istanbul 1996); and (viii) the World Food Summit (Rome 1996). Furthermore, other meetings sponsored by the United Nations were held with a more limited participation of states and/or NGO s, including: (ix) the Global Conference on the Sustainable Development of Small Island Developing States (Bridgetown 1994); (x) the World Conference on Natural Disaster Reduction (Yokohama 1994); and (xi) the Ninth UN Congress on the Prevention of Crime and the Treatment of Offenders (Cairo 1995).
sent to the UNGA its first Draft Code of Crimes against the Peace and Security of Mankind since the one prepared in 1954. Strong criticism of the new text made the ICL conduct a five years review during which the first international criminal tribunals since the end of World War II were established in 1993 (the ICTY) and 1994 (the ICTR). By the time the ILC presented a new draft code in 1996, the UNGA attention was already in the ICC Statute negotiation process\textsuperscript{14} that led to its approval in the Conference of Plenipotentiaries on the Establishment of an International Criminal Court (Rome 1998). In the following years, several hybrid criminal tribunals were also established: the Special Panels for Serious Crimes in East Timor (2000), the Regulation 64 Chambers in Kosovo (2000), the SCSL (2002), the ECCC (2004) and the STL (2007).

In the two decades following the end of the Cold War, national jurisdictions of territorial states have also investigated and prosecuted thousands of international crimes cases, as shown by the proceedings carried out in Bosnia and Herzegovina (The Court of Bosnia and Herzegovina, 2017), Rwanda (Tirrell, 2014: 143) and several Latin-American countries (Sancinetti & Ferrante, 1999) (Galain Palermo, 2014b: 123–124). This has prompted the United Nations to establish specialized investigative bodies, such as the International Commission against Impunity in Guatemala (2007), to increase the capacity of national prosecution offices.\textsuperscript{15} Criminal proceedings for international crimes have also been undertaken by foreign national tribunals acting under the principle of universal jurisdiction, particularly in the period 1998–2010 (Carnero Rojo, 2015: 41–54; Ollé Sesé, 2016; Panakova, 2011: 49 et seq.; Pérez Cepeda, 2015: 10 et seq.; Roth Arriaza, 2005).

As a result, in the two decades after the end of the Cold War current ICL has been, to a large extent, built by restating and developing its pre-existing legal regime and by strengthening national, international and hybrid ICL enforcement mechanisms. Nevertheless, the second decade of the twentieth century has witnessed the shutting down of the ICTR (2015)\textsuperscript{16} and the ICTY (2017)\textsuperscript{17} after the completion of their work – their few remaining functions have been

\textsuperscript{14} As a result, the examination of the new draft code was not a priority for the UNGA. Twenty years after its presentation, the UNGA examination of the 1996 ILC Draft Code of Crimes against the Peace and Security of Mankind is still pending.

\textsuperscript{15} The International Commission against Impunity in Guatemala was created by an agreement signed by the UNSG and the Government of Guatemala on 12 December 2006. The agreement was ratified by the Guatemalan Congress on 1 August 2007 and entered into force on 4 October 2007.

\textsuperscript{16} ICTR (17/11/2015).

\textsuperscript{17} ICTY (17/05/2017).
entrusted with the MICT established by UNSC resolution 1966 (2010). Moreover, no other international criminal tribunal and only two new hybrid tribunals (the EACS (2012) and the KSCS (2016)) have been established. Furthermore, as discussed in chapter 4, despite the approval of the definition of the crime of aggression in the 2010 Kampala Review Conference and the agreement reached in December 2017 to activate the ICC jurisdiction over this crime on 17 July 2018, the difficult circumstances that surrounded the ICC between 2002 and 2011 have increased in the period 2012–2017.

As a result, as we have gone into the second decade of the twentieth century, the number of cases handled by international and hybrid criminal tribunals has declined significantly. A trend that, as discussed in chapter 4 in further detail, it is not likely to change any time soon despite the recent establishment of the EACS and the KSCS and the adoption by the African Union of the Malabo Protocol (2014), which aims at extending the jurisdiction of the African Court of Justice and Human Rights to include the investigation and prosecution of international and transnational crimes (Werle & Vormbarum, 2016; Ventura & Bleecker, 2016: 441–460).

Furthermore, although the national jurisdictions of some territorial states, such as Argentina (Parenti & Pellegrini, 2009; Eser & Arnold, 2012), Bosnia and Herzegovina (The Court of Bosnia and Herzegovina, 2017), Colombia (Olásolo & Ramírez, 2017) and Uruguay (Galain Palermo, 2014: 123–124; Fornasari, 2016: 199) continue carrying out criminal proceedings for international crimes in a systematic manner, investigations and prosecutions by foreign national tribunals under the principle of universal jurisdiction have decreased significantly (Carnero Rojo, 2015: 41–54; Panakova, 2011: 49 et seq.).

18 UNSC. (2010). Resolution 1966. The MICT has one branch in Arusha (Tanzania) that carries out the ICTR remaining functions since 1 July 2012, and a second branch in The Hague (The Netherlands) that carries out the ICTY remaining functions since 1 July 2013.
19 See supra chapter 1, fn. 2.
20 African Union (2014). According to the Malabo Protocol, the African Court of Justice and Human Rights will have jurisdiction to investigate and prosecute the following crimes: genocide, crimes against humanity, war crimes, unconstitutional change of government, piracy, terrorism, mercenarism, corruption, money laundering, human trafficking, drug trafficking, trafficking of dangerous substances, illegal exploitation of natural resources and aggression.