PART I

PRECEDENTS OF INTERNATIONAL TRIALS

The idea to establish an international criminal court to try individuals for the commission of international crimes was first put forward at the 1899 Hague Conference and was again considered after World War I, but never before did the need to bring perpetrators of major crimes to justice emerge as clearly as after World War II. The disclosure of the horrors which had occurred during the war and the defeat of the Axis Powers led to the trials of major war criminals before the International Military Tribunal at Nuremberg (hereinafter the “Nuremberg Tribunal”), and before the

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11 Over the centuries and until 1945, ‘war crime’ trials were a very rare event. The Breisach trial is sometimes referred to as “the first international war crimes trial”. In 1474 at Breisach, Austria, an ad hoc Tribunal made up of twenty-eight judges from states members of the Holy Empire tried the Burgundian governor Peter von Hagenbach for murder, perjury, rape and other offences including orders to kill. See Georg Schwarzenberger, 2 INTERNATIONAL LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS, Vol. II, THE LAW OF ARMED CONFLICT, Stevens & Sons, London (1968), at 465 (hereinafter “INTERNATIONAL LAW AS APPLIED”). See also Yves Beigbeder, JUDGING WAR CRIMINALS, THE POLITICS OF INTERNATIONAL JUSTICE, New York: St. Martin’s (1999), at 5. Hagenbach’s counsel pleaded that the accused had been following orders from his superior Duke Charles of Burgundy (Charles the Terrible). The defence of superior orders was rejected, Hagenbach was found guilty and sentenced to death. The significance of this trial is that over five centuries ago such acts were identified as criminal, that the accused was brought to justice, and most significantly that superior orders did not relieve the defendant of criminal responsibility. However, it is questionable whether this case can be seen as an “international war crime trial” precedent for two reasons: 1. As the Swiss-Burgundian war did not start till 1476, the horrors committed by Hagenbach, despite their gravity, did not constitute a war crime since they were not committed in the context of a war; 2. The Tribunal was composed of judges from states that were members of the Holy Empire, the latter and not the former was, de jure, the subject of international law. Consequently the Tribunal can be characterized as an intrastate rather than as an international Tribunal. See Timothy. L.H. McCormack, From Sun Tzu to the Sixth Committee: The Evolution of an International Criminal Law Regime, in THE LAW OF WAR CRIMES: NATIONAL AND INTERNATIONAL APPROACHES, Timothy L.H. McCormack and Gerry J. Simpson (eds.), Kluwer Law International (1997), at 31–63 (hereinafter “THE LAW OF WAR CRIMES”). After World War I, the 1919 Versailles Treaty provided for the establishment of an international tribunal to try Kaiser Wilhelm II. Article 227 of the Treaty of Versailles established a “special tribunal” for the trial of Wilhelm II. However the German Kaiser took refuge in the Netherlands which refused to surrender him to the Allied Powers and therefore the tribunal never came into being; see M. Cherif Bassiouni, An Appraisal of the Growth and Developing Trends of International Criminal Law, in INTERNATIONAL CRIMINAL LAW AND PROCEDURE, John E.D. Dugard and Christine Van den Wyngaert (eds.), Aldershot: Brookfield, VT (1996), at 79 and 95.

12 The Nuremberg Tribunal was established by the allied Governments of France, the United Kingdom, the United States and the Soviet Union pursuant to Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis (London Agreement): 82 U.N.T.S. 279, entered into force 8 August 1945. See also 1 Nuremberg Trial Proceedings, Charter of the International Military Tribunal at the Yale Website
International Military Tribunal for the Far East in Tokyo (hereinafter the “Tokyo Tribunal”).

The United Nations has considered the establishment of an international criminal jurisdiction as of 1948. At the beginning of the 1950’s, draft statutes were developed but the onset of the Cold War prevented these endeavours to materialise. Efforts within the United Nations on this subject were interrupted in 1956 due to the lack of agreement on the definition of aggression. Endeavours within the United Nations continued in closely related fields such as the preparation by the International Law Commission (ILC) of the Draft Code of Crimes against Peace and Security of Mankind, however the catalyst for the prompt establishment of an international criminal court was sadly provided by the atrocities committed in the former Yugoslavia and in Rwanda.

Although the Nuremberg Charter was later adhered to by a further nineteen states, only the four original members appointed Judges and Prosecutors.

The Charter of the Tribunal (hereinafter the “Tokyo Charter”) was not based on a treaty but on a proclamation issued on 19 January 1946 by the Supreme Commander of the Allied Powers, General Douglas MacArthur; International Military Tribunal for the Far East, Established at Tokyo, 19 Jan. 1946, U.S. Dep’t of State Pub. No. 2675, T.I.A.S. No. 1589. The Tribunal was created by the Tokyo Charter. See also Charter of the Military Tribunal for the Far East <http://yale.edu/lawweb/ayalon/imtfech.htm>.

At the request of the General Assembly, the International Law Commission studied the feasibility of establishing an international criminal court to try people found guilty of genocide. This was carried out in the wake of the enactment of the Convention on the Prevention and Punishment of the Crime of Genocide.

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In 1993, the Security Council established the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia (hereinafter the “ICTY” or the “Tribunal for the former Yugoslavia”); S.C. Res. 827, 25 May 1993. In 1994, the Security Council established the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda (hereinafter the “ICTR” or the “Tribunal for Rwanda”); S.C. Res. 955, 8 Nov. 1994.