

---

## **13. International Criminal Law and Human Rights Protection: From Nuremberg to ICC**

**Ayesha Saiyed**

Law Faculty,  
K. C. Law College, Mumbai.

### **13.1 Introduction:**

Throughout history, the concept of international criminal law has been present and discussed among states and nations. The mission of this organization is to regulate and prevent criminal international violations, with the goal of preserving and upholding international legal order and peace.

Over the course of history, certain actions have been classified as international crimes due to their violation of domestic laws. Malekian's statement suggests that the establishment and implementation of domestic criminal law is fundamental to the formation of international criminal law. In order to effectively enforce domestic criminal laws, a significant number of offenders were extradited. As a result of this collaboration, a significant number of bilateral and multilateral treaties regarding the extradition of criminals were successfully finalized.<sup>1</sup>

The contemporary version of international humanitarian law was developed after World War II with the purpose of preventing the recurrence of the atrocious acts committed in concentration camps and trenches. Several pivotal conventions, such as the Universal Declaration of Human Rights, the European Convention on Human Rights, the Genocide Convention, and the four Geneva Conventions and Additional Protocols (which safeguard civilians and victims of war), were established.<sup>2</sup> These not only laid down strong bases for the development of international criminal law, but they also included criminal regulations and responsibilities for states.

There has been a long-lasting connection between law and warfare since conflicts first arose as collective events. This relationship has remained constant throughout history. Over the course of many centuries, the governance of warfare has developed in parallel with the notion of war. Various factors have influenced the establishment of this regulation, such as custom, tradition, specific codes of behavior, and ultimately the law. The term "Crime of War," also known as a "war crime," is a well-established concept in modern legal terminology. War crimes are defined as unethical military actions that take place during a

---

<sup>1</sup> Andres Clapham in *From Nuremberg to The Hague: The Future of International Criminal Justice*, Philippe Sands, Cambridge University Press, 2003, p. 31

<sup>2</sup> White, Jamison G., *Nowhere to run, nowhere to hide: Augusto Pinochet, Universal Jurisdiction, the ICC, and a Wake-up Call for the Former Heads of State, 1999* and Scharf, Michael P., *Results of the Rome Conference for an International Court, 1998*.

conflict, and they can occur in various conflict scenarios. Nevertheless, it is crucial to acknowledge that prior to the establishment of the United Nations, these war crimes were not subject to punishment in international courts. Instead, they predominantly existed as abstract concepts that hovered over the remains of conflicts. Moreover, their influence did not directly affect individuals; instead, their penalty was based on the concept of state accountability. Crimes Against Humanity have only been recognized as legal offences since the establishment of a human rights doctrine, which is based on well-documented and universally accepted principles.

The term “Crimes Against Humanity” has arisen as a result of recent political, historical, and social events. Due to these advancements, war crimes are now perceived in a significantly altered manner within the realm of international law and have been firmly placed under the jurisdiction of human rights.

These developments have incorporated the characteristics of a codified international phenomenon into the law of war in various ways. It acted as the initial catalyst that led a portion of the global community to adopt a completely different position on specific acts of violence committed against civilians during both times of peace and war. The international community, in theory, made certain practices illegal in the broadest sense possible, thereby criminalizing civilian and military entities, organizations, and individuals. These practices also included the commission of crimes by both individuals and groups. Since the inception of this concept, various international bodies and organizations have implemented numerous conventions, resolutions, and other relevant legislation. The United Nations is the main authority responsible for these actions.

Setting aside political considerations, the primary purpose for creating these provisions has always been to protect the individual human person, regardless of their location, political affiliation, or social situation. As a result, protecting the individual has been recognized as a fundamental “Human Right,” so to speak.<sup>3</sup>

The establishment of the atrocities committed by the Nazis, before and during the war, played a role in the development of the concept of crimes against humanity as a new principle after World War II.

The establishment of the United Nations in 1945 represented the prevailing concern that similar acts of violence and cruelty could occur again. This organization played a crucial role in the development of legal principles related to concepts such as Crimes Against Humanity, which were introduced both legally and conceptually before the Nuremberg Trial in 1945. The United Nations was formed because of the London Agreement of 1945, with its charter providing the basis for its establishment.

### **13.2 The Nuremberg Tribunals:**

---

<sup>3</sup> Malekian, Farhad, *International Criminal Law – The Legal and Critical Analysis of International Crimes*, 1991, p. 1,2, and 9.

- **The International Military Tribunal (IMT):**

The International Military Tribunal (IMT), also referred to as the "Nuremberg Tribunal," was created following the signing of an agreement by the United States of America, Great Britain, the Soviet Union, and France.

The primary aim was to ensure that the principal war criminals of the European Axis were held accountable and received appropriate punishment. This agreement was signed three months after the end of World War II. The penalties for the offences were limited to only four distinct categories:

- Conspiracy (conspiring to engage in the other three counts),
- Crimes Against Peace (planning, preparing and waging aggressive war),
- War Crimes (condemned in Hague Conventions of 1899 and 1907) and
- Crimes Against Humanity (such as genocide), which by their magnitude, shock the conscience of humankind.

The thirty articles were thoroughly scrutinised to ensure a consensus that was equitable and agreeable to the four partners, who represented the United States of America, Great Britain, France, and the Soviet Union.<sup>4</sup> The first International Military Tribunal was assembled on August 8, 1945, following the approval of the Charter that initiated the legal proceedings. This event marked the beginning of the Tribunal's existence.<sup>5</sup>

The Presidential Prosecutors were individually appointed by each of the four triumphant powers to their respective positions. Justice Robert H. Jackson, appointed by President Harry S. Truman, oversaw and organized the trial process as the United States' representative and chief counsel at the International Military Tribunal. In addition, he took on the position of Chief Prosecutor of the United States. He established the objectives and created the atmosphere: "One of the most important acknowledgments that Power has ever made to Reason is that four powerful nations, filled with triumph and motivated by harm, refrained from seeking revenge and willingly subjected their defeated enemies to the authority of the legal system...It is essential to remember that the evidence we use to evaluate these defendants now will also be used to evaluate us in the future by history. If we were to transfer the poisoned chalice to the defendants, it would be equivalent to consuming it ourselves. The present endeavour requires us to demonstrate a level of fairness and intellectual integrity that will guarantee that this trial is seen by future generations as a successful effort to achieve the justice that has always been the aim of humanity.

The entire tribunal convened in Nuremberg from November 20, 1945, to August 31, 1946, under the leadership of Lord Justice Geoffrey Lawrence, who presided over the

---

<sup>4</sup> The four Geneva Conventions of 1949 and Additional Protocol I and II of 1977. The Geneva Convention as drafted in 1949 evolved from 19th century protocols (1864).

<sup>5</sup> White, Jamison G., *Nowhere to run, nowhere to hide: Augusto Pinochet, Universal Jurisdiction, the ICC, and a Wake-up Call for the Former Heads of State*, 1999 and Scharf, Michael P., *Results of the Rome Conference for an International Court*, 1998.

proceedings. The Tribunal conducted a thorough analysis of the development of international criminal law and the growing recognition in treaties, conventions, and declarations that aggressive warfare is a prohibited act, which can result in punishment, including for a head of state.

This recognition was made possible through the implementation of treaties, conventions, and declarations. However, empirical evidence regarding the aforementioned accusation no longer existed. It is implausible that leaders who intentionally attacked neighboring states without justification were unaware of the illegality of their actions; it would be unfair to exempt them from responsibility for such violations solely because no one had been charged with them before. The Tribunal stated that the law is not fixed, but instead, it adjusts to the changing needs of a progressing world through continuous adaptation. The act of engaging in aggressive warfare received widespread condemnation and was commonly referred to as "the foremost transnational violation."<sup>6</sup>

The compelling evidence, primarily consisting of captured German records, clearly showed that extremely brutal and methodical atrocities had been committed in accordance with official policy.

The International Military Tribunal (IMT) dismissed Germany's argument that "total war" was legally justifiable and that the laws of war were no longer relevant. The IMT supported its position by referring to The Hague Conventions and the established practices of civilized nations. The legal system has made progress in the realm of Crimes Against Humanity, which includes the enslavement and extermination of civilian populations based on their political, religious, or racial affiliations. The International Maritime Tribunal (IMT) brought about a significant change in the protection of basic human rights through its decisions and discoveries, leading to a paradigm shift.<sup>7</sup>

Field Marshal Hermann Goering, initially designated for execution by hanging, was sentenced to death in absentia as the primary defendant in the IMT case. The remaining defendants were either executed by hanging or given lengthy prison sentences.

Those individuals who had been found not guilty were subsequently set free. Furthermore, the Charter received endorsement from nineteen more nations, and both the Charter and the Judgement of the International Maritime Tribunal (IMT) were ratified unanimously by the inaugural General Assembly of the United Nations. They have evolved into legally enforceable manifestations of universally recognized international law.<sup>8</sup>

- **Principles of the Nuremberg Tribunal, 1950 NO. 82:**

---

<sup>6</sup> Jackson, Robert H. Statement of Chief Counsel Upon Signing of the Agreement, 19 Temp, I.Q 169 [1945-6]

<sup>7</sup> Andres Clapham in *From Nuremberg to The Hague: The Future of International Criminal Justice*, Philippe Sands, Cambridge University Press, 2003, p. 45

<sup>8</sup> R.H. Jackson, *The Case Against the Nazi War Criminals* (NY, Knopf, 1946, pp 3-7).

The trial's proceedings resulted in the creation of the Nuremberg Principles, a document that sets out the standards for determining a war crime. The Charter and the Judgement of the Nuremberg Tribunal both recognize specific principles of international law. The International Law Commission of the United Nations made the decision to adopt this document in 1950. Resolution 177 (II) paragraph (a) of the General Assembly directed the International Law Commission to “develop the principles of international law acknowledged in the Charter of the Nuremberg Tribunal and in the Tribunal's ruling.” Given the General Assembly's endorsement of the Nuremberg Principles, the Commission's role was not to express admiration for these principles as principles of international law, but rather to establish them. The subsequent textual proposition was sanctioned during the second session of the Commission. The commission's compiled report provides additional details and explanations of the principles.

*Below mentioned are the 5 basic principles established:*

1. Individuals who participate in behavior that breaches international law are held responsible and susceptible to legal repercussions.
2. The lack of a penalty in domestic legislation for an act that is deemed a criminal offence under international law does not exempt the perpetrator from accountability as defined by international law.
3. The appointment of a Head of State or a government official does not exempt them from accountability under international law if they have committed an act that violates international law.
4. An individual's adherence to a directive from their superior or government does not exempt them from accountability under international law, as long as they possessed the capacity to make a moral judgement.
5. According to international law, any person who is accused of a crime has the right to a just trial that is determined by the evidence and the legal principles.

*The crimes hereinafter set out are punishable as crimes under international law:*

1. Crimes Against Peace:
2. War Crimes:
3. Crimes Against Humanity:

### • **Twelve Subsequent Trials at Nuremberg**

Due to the lack of consensus among the four Allies regarding joint subsequent trials, the initial plans to establish an international tribunal for future trials were not carried out. With the aim of reaching a compromise, the quadripartite Control Council responsible for overseeing Germany implemented legislation that authorised each of the four Powers to continue prosecuting in their designated zones of occupation using any methods they deemed appropriate.

The Nuremberg trials, a series of twelve military trials, took place in the United States between 1947 and 1949. These trials involved the participation of politicians, military

personnel, businessmen, industrialists, physicians, solicitors, Foreign Office officials, and other individuals. Comparable trials were carried out during the periods of occupation in France, the United Kingdom, and the Soviet Union.

### **13.3 The Influence of Nuremberg:**

#### **13.3.1 The United Nations:**

International War Crimes Tribunals were not the only impact of the Nuremberg Principles and Crimes Against Humanity. Beyond creating a term for military tribunals and politics, it had other effects. On December 11, 1946, the United Nations Resolution 96 (1) declared genocide a crime under international law, contradicting the UN's goals and condemned by the civilized world. Two years later, the 1948 Convention on the Prevention and Punishment of Genocide embodied this declaration, based on the Nuremberg concept of Crimes Against Humanity and Nazi war crimes.

The Nuremberg principles influenced this convention, which criminalized genocide and related activities abroad. This crime against humanity was extended beyond war and the Second World War.

The Genocide Convention did not advance international human rights, especially Articles V and VI, which require states to criminalize genocide in the domestic sphere and try those found guilty in the country where the acts were committed in the absence of a competent international tribunal with co-operation. Theoretically, the Convention Against Genocide is a sudden and ad hoc development from Nuremberg, especially in codifying Crimes Against Humanity. The Convention distills the main aspect of these crimes into one codified principle. The Nazis' persecution and brutal extermination of certain social, religious, and cultural groups, which the Court called Crimes Against Humanity, is covered by Genocide in Articles II and III.<sup>9</sup>

In 1948, the UN issued the Universal Declaration of Human Rights, the first legal document to recognize such rights as binding and establishing modern Human Rights. Nuremberg and the Tokyo trials shaped such a declaration.

Nuremberg established the first distinction between *jus ad bello*, which focuses solely on warfare, and *jus ad bellum*, which examines the legality of war. Nuremberg created a global concern for war attitudes and the rights of all victims of violence by introducing the new principles of Crimes Against Peace and Crimes Against Humanity. Some academics argue that Nuremberg and the issues raised before, during, and after the Trial almost created the UN Charter, which influenced the Universal Declaration.

#### **13.3.2 War Crimes Trials After Nuremberg:**

---

<sup>9</sup> R.H. Jackson, *The Case Against the Nazi War Criminals* (NY, Knopf, 1946, pp 3-7).

- ***Tokyo:***

The Tokyo Trials, held the same year as Nuremberg, prosecuted several Japanese officials for war crimes and crimes against humanity. Nuremberg and its Crimes Against Humanity definition were frequently mentioned in the Tokyo trials. According to several academics, Article 6 C of the London Agreement Charter was exclusively drafted to prosecute Nazi leaders for atrocities against Jews and other targeted groups inside and outside Germany. The Tokyo trials demonstrated the Nuremberg Principles' flexibility and established tribunals for crimes committed against civilians before or during war, or prosecutions based on political, racial, or religious grounds. Tokyo was the first step from Nuremberg to universalizing Crimes Against Humanity and its derivatives.

- ***Yugoslavia:***

As the Cold War ended in the early 1990s, most former Communist nations began the difficult transition to democracy and capitalism. Ethnic nationalism resurfaced in Eastern Europe after Communist rule ended. Slovenia and Croatia seceded from Yugoslavia in 1991. Large Croatian Serb minorities' resistance to independence sparked ethnic conflict immediately. The Security Council created a Commission of Experts in 1992 to investigate humanitarian law violations in Yugoslavia.

The first international war-crimes court since Nuremberg and Tokyo was established after early Bosnian Civil War atrocities. U.N. Security Council Resolution 827 established the ICTY in May 1993. The new Hague-based court prosecuted Geneva Convention violations like genocide and crimes against humanity. Rape was classified as a crime against humanity by the ICTY for the first time. The first ICTY indictment came in November 1994. As of September 1997, the Court has publicly indicted 78 people. The indicted include 57 Serbs, 18 Croats, and 3 Muslims. The court first sentenced Croat Bosnian Serb Army soldier Drazen Edemovic to ten years in prison for his role in the Srebrenica massacre in November 1996.

- ***Rwanda:***

Rwanda's ethnic tribes fought a brutal civil war in 1994. The Hutu government was reportedly slaughtering half a million Tutsi and their supporters. A small commission sent by the Security Council to investigate (Res. 935, July 1994) found horrendous crimes. To stabilize Rwanda, UN forces were sent there.<sup>10</sup>

During the end of 1994, the International Criminal Tribunal for Rwanda Statute was passed (Res. 955). It followed the ICTFY's general outline but explicitly stated that war crimes would not be tolerated in civil conflicts. Whether the conflict was international or civil, the Court could prosecute genocide, crimes against humanity, and war crimes. The court's jurisdiction over aggression was irrelevant due to the internal conflict. Only crimes

---

<sup>10</sup> Andres Clapham in *From Nuremberg to The Hague: The Future of International Criminal Justice*, Philippe Sands, Cambridge University Press, 2003, p. 47.

committed in the defined area in 1994 could be prosecuted. The Rwanda Court was a special tribunal with limited jurisdiction.

### **13.4 The International Criminal Court (ICC):**

Following extensive efforts and challenges, an International Criminal Court that possesses the authority to address cases of genocide and war crimes has been established. The Court's statute was ratified in Rome in 1998 and became effective on July 1, 2002, following sufficient ratification by countries. The court pledges to eradicate the culture of impunity among human rights violators and establish a world that is characterized by fairness and compassion.

The Nuremberg and Tokyo trials were established with the intention of preventing the recurrence of the atrocities committed during the Second World War. The 1948 U.N. General Assembly resolution declared that as the international community develops, there will be a growing requirement for an international judicial body to prosecute specific crimes under international law. The number 13 is being referred to. In 1937, the League of Nations formulated a convention for the establishment of an international criminal court. However, due to the Cold War, advancements in this area were hindered and the issue was subsequently neglected. It is unfortunate that the cruelty during World War II was pervasive. Countries such as Uganda, Cambodia, Rwanda, Somalia, Bosnia, and others have been subjected to genocide since the Nuremberg trials.<sup>11</sup>

Following the occurrence of ethnic cleansing in Yugoslavia and genocide in Rwanda, the United Nations was able to take action without being hindered by the Cold War's state of inaction. The Security Council, invoking Chapter VII of the UN Charter, created two ad hoc international criminal tribunals—the ICTY for the former Yugoslavia and the ICTR for Rwanda—with the purpose of examining and bringing legal action against violations. Notwithstanding their shortcomings, these courts have made significant progress in the development of international criminal law.

The primary challenge they have faced is the absence of a formal mechanism to apprehend individuals who have been formally charged with criminal offences. Following the conclusion of the Cold War, there was a global desire for the reestablishment of an international criminal court.

The United Nations General Assembly granted the International Law Commission (ILC) the authority to examine the establishment of a permanent International Criminal Court (ICC) on December 4, 1989. After a period of four years, the General Assembly, content with the report provided by the ILC (International Law Commission), requested the Commission to create a formal document outlining the structure and rules of a court. The 1994 legislation was enacted. The next year, a preparatory committee was established to

---

<sup>11</sup> White, Jamison G., *Nowhere to run, nowhere to hide: Augusto Pinochet, Universal Jurisdiction, the ICC, and a Wake-up Call for the Former Heads of State*, 1999 and Scharf, Michael P., *Results of the Rome Conference for an International Court*, 1998.



examine the substantive matters related to the creation of the court, as outlined in the report and statute of the International Law Commission (ILC). The objective was to establish an ICC convention that would be universally recognized and adopted.

The Rome Statute of the International Criminal Court (ICC) was ratified by 120 states during the "United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Court" on July 17, 1998. This is the inaugural, treaty-based global tribunal established to uphold the principles of justice and prosecute the most severe international offences.

The statute delineates the Court's jurisdiction, structure, and functions and becomes operative 60 days after it is ratified or acceded to by 60 states. On 11 April 2002, ten countries submitted their instruments of ratification to the Secretary General, with the 60th country being one of them. The legislation was enacted on July 1, 2002. The Court will pursue legal action against offences that occurred after this specified date.

### **13.5 Conclusion:**

Instances of war crimes and crimes against humanity are regrettably prevalent. Frequent instances entail persistent violence and civil turmoil, yet acts of extreme cruelty are seldom met with retribution.

The September 11th terrorist attacks and the Bali bombings heightened the probability of subsequent terrorist attacks, necessitating immediate legislative and institutional measures to address international crimes.

For more than four decades after the Nuremberg and Tokyo tribunals, the enforcement of international criminal law was the responsibility of individual nations, and the outcomes were extremely distressing. A compelling justification for a robust international criminal law system lies in the inadequacy of domestic courts and legal procedures to effectively address and prevent impunity for heinous crimes.

However, it is important to note that this does not imply that the international community requires a highly efficient global system to supplant national courts and procedures. Instead, it is suggested to establish a multilateral institutional framework that would ensure the accountability of key individuals and expedite the enforcement of international criminal law at the national level.

Nuremberg established a precedent and made a commitment. To avert war, legal precedents were established to prohibit acts of aggression, war crimes, and crimes against humanity. The implicit commitment to the global community was that these offences would be universally condemned and that no individual would be exempt from legal consequences. It seems that the promise may not be kept after a span of 50 years.

The field of international criminal law is undergoing rapid transformation. The Rome Statute of the International Criminal Court (ICC) became operational on July 1, 2002,

signifying a significant achievement in its development. In the new era, international criminals will face consequences for their actions.

The establishment of the new International Criminal Court will incentivize states to prioritize the enforcement of national human rights laws. Several states have enacted comprehensive criminal legislation to encompass all crimes under the Rome Statute, particularly in light of the principle of complementarity of the International Criminal Court. This groundbreaking criminal law reform is motivated by the aim to optimize the advantages of complementarity for accusations against individuals who are citizens of a particular country.

The Rome Statute has a significant impact on the field of international criminal law. The Statute was founded upon principles of international humanitarian law, specifically drawing from the Geneva Conventions and their protocols, as well as the established standards for "war crimes," "Crimes Against Humanity," and "aggression" set by the Nuremberg and Tokyo War Tribunals. The experience gained from the ad hoc tribunals of the UN Security Council for the former Yugoslavia and Rwanda is also highly valuable.