



Evolution of the Idea of a Permanent International Criminal Court Prior to World War I

Cenap ÇAKMAK

Abstract

The article reviews the evolution of the idea to create a permanent international criminal court to deal with the worst crimes since early times through the breakout of the World War II. The historical survey in this article demonstrates that despite attempts to establish such an institution, the idea did not come to life due to concerns over national sovereignty. The study of the history of international criminal law clearly demonstrates that the international community has always shown interest towards establishing strong institutions and mechanisms to achieve global justice. On the other hand, states have shown that they were interested in the prosecution and punishment of those individuals responsible for the commission of international crimes only to the extent that the engagement would not negatively affect their prerogatives as a sovereign unit.

Keywords: *international criminal law, international criminal court, World War I, international humanitarian law*

INTRODUCTION

For practical reasons it is possible to divide the history of international criminal law into three parts. Although there may be some serious overlaps between the periods, such a division seems to be helpful in understanding the development and evolution of individual criminal responsibility in a more precise and clearer fashion. Given that the state-centric world system has been dominant over the course of nineteenth and twentieth centuries, and that the evolution of international criminal law is closely related to this system, it would be wise to choose important historical turning points in order to explain the evolution concerned. Undoubtedly these historical points are the two world wars, which, as one may easily expect, brought the idea that those responsible for the deaths in large scales should be tried and convicted to the fore. Therefore, in general terms the evolution of international criminal law is examined in four phases: pre-World War I, inter-war period, that is to say, the period between the World War I and the World War II, the period between the end of World War II

and the collapse of the Soviet Union, and lastly the period that covers the developments since the end of cold war.

INITIAL ATTEMPTS

Over the past 500 years the global community has sought numerous ways to address the most serious crimes that concerned and equally horrified the whole world.¹ Bassiouni even argues that there is evidence of a tribunal holding the individuals responsible for war crimes in Greece in 405 BC.² Schabas joins this view saying, "war criminals have been prosecuted at least since the time of the ancient Greece, and probably well before that."³ Some others also refer to similar examples from ancient China, India and Japan.⁴ Therefore, it could be argued presumably that the world has always shown an interest and desire toward a superior judicial body having the power to deal with the most heinous crimes, given that those crimes have always been committed. However, both historians and international lawyers often agree that such a body has not come into the existence until the end of the fifteenth century. Although it is asserted that "the concept of a permanent ICC has intrigued the international community since the thirteenth century,"⁵ in fact "the concept of an international tribunal with its own super-national criminal justice power" could be traced to the 15th century.⁶ In this vein, it is generally accepted that the first known international criminal trial was conducted in 1474. It is contended that international criminal rules were first enforced and invoked when an ad hoc tribunal was established to try Peter von Hagenbach who was accused of and then convicted for committing such crimes as "murder, rape, perjury, and other crimes in violation of 'the laws of God and man.'"⁷ It is essential to point out that those crimes were committed against a civilian community during his military occupation of Austria.⁸ Given that the referred crimes were war crimes, and that von

¹ Sandra L. Jamison, 'A Permanent International Criminal Court: A Proposal that Overcomes Past Objections,' *Denver Journal of International Law & Policy*, Vol. 23, Issue 2, 1995, p. 419.

² M. Cherif Bassiouni, *Crimes Against Humanity in International Criminal Law*, 2nd rev. ed. (Cambridge, MA: Kluwer Law International, 1999), p. 517.

³ William A. Schabas, *An Introduction to the International Criminal Court* (Cambridge, UK and New York, NY: Cambridge University Press, 2001), p. 1.

⁴ Adriaan Bos, 'The International Criminal Court: A Perspective,' in Roy S. Lee (ed.), *The International Criminal Court: The Making of the Rome Statute: Issues, Negotiations, Results* (The Hague: Kluwer Law International, 1999), p. 465 and Yves Beigbeder, *Judging War Criminals: The Politics of International Justice* (New York: St. Martin's, 1999), pp. 4-5, cited in Paul Bowers, *The International Criminal Court Bill (HL), Bill 70 of 2000-2001*, Research Paper 01/39, 28 March 2000, through House of Commons Library, United Kingdom, accessed via: <http://www.parliament.uk/commons/lib/research/rp2001/rp01-039.pdf>, p. 13, footnote 8.

⁵ Brook Sari Moshan, 'Women, War, and Words: The Gender Component in The Permanent International Criminal Court's Definition of Crimes Against Humanity,' *Fordham International Law Journal*, Vol. 22, Issue 1, 1998, p. 165.

⁶ Scott W. Andreasen, 'The International Criminal Court: Does the Constitution Preclude Its Ratification by the United States?' *Iowa Law Review*, Vol. 85, Issue 2, 2000, p. 703.

⁷ Damir Arnaut, 'When in Rome? The International Criminal Court and Avenues for U.S. Participation,' *Virginia Journal of International Law*, Vol. 43, Issue 2, 2003, p. 532.

⁸ Roseann M. Latore, 'Escape Out the Back Door or Charge in the Front Door: U.S. Reactions to the International Criminal Court,' *Boston College International & Comparative Law Review*, Vol. 25, Issue

Hagenbach was tried by a criminal tribunal of 28 judges from different locations and political entities, including Alsace, Rhineland, Switzerland and Austria,⁹ it is understandable that many has referred to this famous occasion as the first attempt to hold a foreign individual responsible for perpetrating crimes that are today believed to fall into the definition of international crimes.

However, it should be noted that the view that the Peter von Hagenbach case could be seen as the earliest precedent for the individual criminal responsibility at the international level is challenged and questioned, since it is not obvious that whether the law applied and even the tribunal itself were truly international and whether the crimes committed during the invasion were in fact war crimes.¹⁰ This view is also objectionable in that it does not seem possible to talk about an international order based on the interactions between nations. It is also interesting to note that no other 'international' criminal court trying the individuals responsible for international crimes is cited for the period that covers the developments before the world war, a fact that raises doubts about the credibility of the view concerning the first international criminal trial stated above. Although there have been attempts to deal with serious international, particularly war crimes, they were not of international character, and have not foreseen the establishment of an international criminal court. Among these attempts probably the most notable one is the so-called Lieber Code,¹¹ a set of rules regulating the conduct of war. Drafted by Francis Lieber from Columbia University and applied by Abraham Lincoln during the American Civil War, those rules could be cited as the earliest modern codification of the laws of war.¹² They were of significance, as they explicitly proscribed inhumane conduct of war, and maintained notable punish-

1, 2002, p. 162. It should be noted that the trial of Peter von Hagenbach is often cited by many others as the first international criminal proceeding. For instance, see, among others, Jamison, 'A Permanent International Criminal Court: A Proposal that Overcomes Past Objections,' p. 421; M. Cherif Bassiouni, 'From Versailles to Rwanda in Seventy-Five Years: The Need to Establish a Permanent International Criminal Court,' *Harvard Human Rights Journal*, Vol. 10, Issue 10, 1997, p. 11; Jules Deschênes, 'Toward International Criminal Justice,' in Roger S. Clark and Madeleine Sann, (eds.) *The Prosecution of International Crimes* (New Brunswick, NJ: Transaction Publishers, 1996), pp. 30-32; James D. Meernik and Kimi L. King, 'The Effectiveness of International Law and the ICTY – Preliminary Results of an Empirical Study,' *International Criminal Law Review*, Vol. 1, Issue 3-4, 2001, p. 344; Aryeh Neier, *War Crimes: Brutality, Genocide, Terror, and the Struggle for Justice* (New York: Times Books, 1998) and Walter Gary Sharp, Sr., 'International Obligations to Search for and Arrest War Criminals: Government Failure in the Former Yugoslavia,' *Duke Journal of Comparative & International Law*, Vol. 7, Issue 2, 1997, p. 417.

⁹ Marlies Glasius, 'Expertise in the Cause of Justice: Global Civil Society Influence on the Statute for an International Court,' in Marlies Glasius, Mary Kaldor ve Helmut Anheier (eds.), *Global Civil Society 2002* (Oxford: Oxford University Press, 2002), p. 138.

¹⁰ See, for instance, Timothy L. H. McCormack, 'Selective Reaction to Atrocity: War Crimes and the Development of International Criminal Law,' *Albany Law Review*, Vol. 60, Issue 1, 1997, pp. 690-92.

¹¹ For a brief narration of the process through which the Lieber Code has been prepared as well as some biographical snapshots of the Code's author, Dr. Lieber, see, George B. Davis, 'Doctor Francis Lieber's Instructions for the Government Armies in the Field,' *American Journal of International Law*, Vol. 1, Issue 1, 1907, pp. 13-25.

¹² Schabas, *An Introduction to the International Criminal Court*, p. 1.

ments should the inhumane acts take place during the war, including death penalty.¹³ The importance of these rules notwithstanding, they were national regulations, applying to the US nationals only. Similar endeavors in other parts of the world were no different. Therefore, prosecution for war crimes "was only effected by national courts, and these were and remain ineffective when those responsible for the crimes are still in power and their victims remain subjugated."¹⁴

Nevertheless, it would not be fair to say that the above rules have entirely remained as national regulations. Although those rules have not been incorporated in any international text regulating the conduct of war, they have had a great deal of impact on the works relevant to the codification of legal rules on war crimes and similar atrocities. Professor Bluntschli, who was charged with "the preparation of a draft of the proposed compilation of the recognized rules and usages of war" for the international meeting held in Brussels in 1874, heavily relied on the instructions prepared by Dr. Lieber. The impact of the instructions on the works of Bluntschli was so significant that the outcome of the Brussels meeting "bears in every article a distinct impression of the Instruc-

¹³ Instructions for the Government of Armies of the United States in the Field, prepared by Francis Lieber, LL.D., Originally Issued as General Orders No. 100, Adjutant General's Office, April 24, 1863, Washington 1898: Government Printing Office. Those could be reached at <http://www.yale.edu/lawweb/avalon/lieber.htm>. Some important provisions from the Orders are as follows:

Art. 33.

It is no longer considered lawful - on the contrary, it is held to be a serious breach of the law of war - to force the subjects of the enemy into the service of the victorious government, except the latter should proclaim, after a fair and complete conquest of the hostile country or district, that it is resolved to keep the country, district, or place permanently as its own and make it a portion of its own country.

Art. 37.

The United States acknowledge and protect, in hostile countries occupied by them, religion and morality; strictly private property; the persons of the inhabitants, especially those of women: and the sacredness of domestic relations. Offenses to the contrary shall be rigorously punished.

Art. 67.

The law of nations allows every sovereign government to make war upon another sovereign state, and, therefore, admits of no rules or laws different from those of regular warfare, regarding the treatment of prisoners of war, although they may belong to the army of a government which the captor may consider as a wanton and unjust assailant.

Art. 70.

The use of poison in any manner, be it to poison wells, or food, or arms, is wholly excluded from modern warfare. He that uses it puts himself out of the pale of the law and usages of war.

Art. 76.

Prisoners of war shall be fed upon plain and wholesome food, whenever practicable, and treated with humanity.

They may be required to work for the benefit of the captor's government, according to their rank and condition.

Art. 80.

Honorable men, when captured, will abstain from giving to the enemy information concerning their own army, and the modern law of war permits no longer the use of any violence against prisoners in order to extort the desired information or to punish them for having given false information.

¹⁴ Schabas, *An Introduction to the International Criminal Court*, p. 1.

tions.”¹⁵ Considering the heavy influence and practical usage of the Brussels Code,¹⁶ which was prepared with the chief reliance on Lieber’s Code, during the proceedings of The 1899 Hague Conference,¹⁷ it could be said that the Lieber Instructions in fact became –although indirectly- internationally recognized rules. Despite the fact that those rules were promulgated during an internal war, they did not lose eminence with the time and continued partially impacting on the international codifications on the Code’s subject matter.

FIRST PROPOSAL FOR A PERMANENT INTERNATIONAL COURT

However, no matter whether the above case constitutes a precedent for the international criminal proceedings, it is obvious that it did not significantly affect and contribute to the inquiry for international criminal justice, as the first proposal for creation a permanent international court was first made in 1872, when Gustave Moynier of Switzerland, one of the founders of the International Committee of the Red Cross, suggested the creation of an international criminal court to address violations of the 1864 Geneva Convention¹⁸ in the Franco-Prussian War of 1870-71,¹⁹ far later than the supposedly first international criminal tribunal was established in 1474.

¹⁵ Davis, ‘Doctor Francis Lieber’s Instructions for the Government Armies in the Field,’ p. 22.

¹⁶ The text of the outcome of the Brussels Conference could be found at: Project of an International Declaration Concerning the Laws and Customs of War, Adopted by the Conference of Brussels, August 27, 1874, reprinted in *The American Journal of International Law*, Vol. 1, Issue 2, Supplement: Official Documents, 1907, pp. 96-103.

¹⁷ *Ibid.*, p. 23.

¹⁸ *Laws of War: the Geneva Convention for Amelioration of the Condition of the Wounded on the Field of Battle* (also known as the Red Cross Convention); adopted at Geneva, August 22, 1864, entered into force June 22, 1865. The text of the Convention can be reached through the website of *the Avalon Project of Yale University* at: <http://www.yale.edu/lawweb/avalon/lawofwar/geneva04.htm>.

¹⁹ Arnaut, ‘When in Rome? The International Criminal Court and Avenues for U.S. Participation,’ p. 532. Unlike the von Hagenbach case, there is an agreement and thus certainty that the proposal for the establishment of a permanent international criminal court was first made Gustave Moynier in 1872. See, for example, Christopher Keith Hall, ‘The First Proposal for A Permanent International Criminal Court,’ *International Review of the Red Cross*, Issue 322, 1998, p. 57-74; Christopher W. Mullins, David Kauzlarich and Dawn Rothe, ‘The International Criminal Court and the Control of State Crime: Prospects and Problems,’ *Critical Criminology*, Vol. 12, Issue 3, 2004, p. 289; Marie Törnquist-Chesnier, ‘NGOs and International Law,’ *Journal of Human Rights*, Vol. 3, Issue 2, 2004, p. 256; Christopher K. Hall, ‘La Primera Propuesta de Creacion de un Tribunal Penal Permanente,’ 145 *Revista Internacional de la Cruz Roja* 63-82 (1998), as cited in Héctor Olásolo, ‘The Prosecutor of the ICC Before the Initiation of Investigations: A Quasi-judicial or a Political Body?’ *International Criminal Law Review*, Vol. 3, Issue 2, 2003, p. 87. On January 3rd 1872, Moynier presented his draft for the establishment of a permanent international criminal court at a meeting in the International Committee for the Relief of the Wounded (later to become the Red Cross), which was set up under *the Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field*, 1864. This proposal was published in the *Bulletin International des Sociétés de secours aux militaires blessés* on January 28th, 1872. See, Morten Bergsmo, ‘Folkerettslig belysning av ‘etisk rensing’ i det tidligere Jugoslavia,’ pp. 75-133 in Bård-Anders Andreassen and Elin Skaar (eds.), *Forsoning eller rettferdighet? Om beskyttelse av menneskerethighetene gjennom sannhetskommisjoner og rettstribunaler* (Oslo: Cappelen Akademisk Forlag, 1998), p. 98, cited in Tom Syring, ‘Good Governance and the ICC: Strengthening Besieged Democratic Regimes by International Means, The Logic of Institutional Empowerment,’ Paper presented at Arbeidsgruppe Internasjonal Politikk (Working Group on International Politics), Oslo, December 19th, 2002, p. 7, footnote 3.

The main reason and impetus behind this proposal was the reluctance of states to comply with the provisions of the Geneva Convention cited above. While that Convention was signed by a large number of states at the time, atrocities in large scale were committed in the Franco-Prussian War.²⁰ During the discussions after that war while many referring to the uselessness of the aforesaid Convention and other related arrangements were in favor of abolishing the rules of war, given that those rule were not observed at the times of wars, Moynier took the opposite position and argued that those rules should be backed by an international criminal court so that the Convention would have a deterring effect on the warring parties.²¹ However, his proposal was met with skepticism and eventually was largely ignored.²² It should be noted that the proposal was too extreme and radical,²³ given the political circumstances of the time and the dominance of power politics.

The proposal drafted by Moynier was very brief with ten articles only, and modest in terms of scope and reference to an international body that was to have the authority to prosecute war crimes. Article 1 of the draft provided that "in order to ensure the implementation of the Geneva Convention of 22 August 1864, and of its additional articles, there will be established, in the event of a war between two or more Contracting Powers, a tribunal to which may be addressed complaints concerning breaches of the aforementioned Convention."²⁴ Therefore, the draft did not refer to a separate statute governing the proposed court, but suggested that the 1864 Geneva Convention be observed. The Court Moynier proposed lacked of a permanent panel of judges. Article 2 stated that the adjudicators would be nominated by three Powers to be chosen by the President of Swiss Confederation, as soon as war has been declared.²⁵ Furthermore, the draft did not determine the venue where the judges would sit, once they have been appointed. This choice was left to the judges.²⁶ The proposed tribunal was not to be authorized to act on its own, but it was recognized the power to deal with the complaints addressed to it by the interested governments.²⁷ The tribunal was to determine whether the accused was guilty or not. If the guilt were to be established, then the tribunal would also have the authority

²⁰ It is interesting to note that Moynier, the owner of the first proposal for creating a permanent criminal court, was not originally in favor of such an institution. However, the atrocities committed in the Franco-Prussian War seemed to radically change his mind. See, Hall, 'The First Proposal for A Permanent International Criminal Court,' p. 57

²¹ For a detailed examination of Moynier's proposal, see, Hall, 'The First Proposal for A Permanent International Criminal Court,' pp. 57-74. This article also includes the text of Moynier's proposal, 'Draft Convention for the Establishment of an International Judicial Body Suitable for the Prevention and Punishment of Violations of the Geneva Convention.'

²² Marlies Glasius, 'How Activists Shaped the Court,' Crimes of War Project, The International Criminal Court: An End to Impunity? *The Magazine* Section, December 2003, accessed via: <http://www.crimesofwar.org/print/icc/icc-glasius-print.html>.

²³ Hall, 'The First Proposal for A Permanent International Criminal Court,' pp. 57-74.

²⁴ Article 1 of Draft Convention for the Establishment of an International Judicial Body Suitable for the Prevention and Punishment of Violations of the Geneva Convention, reprinted in *ibid.*

²⁵ *Ibid.*, Article 2.

²⁶ *Ibid.*, Article 3.

²⁷ *Ibid.*, Article 4.

to impose the penalty in accordance with the existing rules of international law.²⁸ However, the tribunal would not be able to implement the decisions it made. Instead, the draft provided that "the tribunal will notify its judgments to interested governments. The latter shall impose on those found guilty the penalties which have been pronounced against them."²⁹

The brief review of the draft above suggests that Moynier's proposal was in effect very modest by contemporary standards. No argument that it was daring and striking at that time, yet it should have been acceptable to the States, given its modesty and non-interference with national sovereignty. Despite this fact, States did not show interest towards the proposal, a fact proving the dominance of power politics and observation of national sovereignty and national interests. According to Hall, the lack of support and interest by the international law experts of the time towards Moynier's proposal was one of most important reasons for the failure of its enactment.³⁰ In other words, should the draft was supported by non-state figures; there could have been at least a little prospect for the creation of the institution provided in it.

HAGUE CONVENTIONS AND THE IDEA OF A PERMANENT INTERNATIONAL CRIMINAL COURT

However, as the arms technology was increasingly being enhanced and thus the wars were becoming more deadly, the people became more concerned about the implications of war. This necessitated the adoption of certain rules on the conduct of war. As a consequence, the attempts to develop a law of war that would be helpful to minimize the negative effects of warfare accelerated the codification of international legal arrangements on the conduct of war in particular starting from the end of nineteenth century.³¹ Two developments are worth mentioning in this regard: The Hague Conventions of 1899 and 1907, where the first attempts to create an international penal code were made. The initial proposal for the Conference held in 1899 was made by Czar Nicholas II of the Russian Empire on August 24, 1898.³² The proposal was accepted by

²⁸ *Ibid.*, Article 5.

²⁹ *Ibid.*, Article 6.

³⁰ Hall comments on this matter as follows: 'A century and a quarter after Gustave Moynier's daring proposal, the prospects are increasingly bright that the international community will adopt a treaty establishing a permanent international criminal court. In dramatic contrast to the response of leading international law experts in 1872, more than three hundred non-governmental organizations throughout the world have joined forces in an NGO Coalition for an International Criminal Court to mobilize public support for the prompt establishment of an effective court.' Hall, 'The First Proposal for A Permanent International Criminal Court,' pp. 57-74.

³¹ Seha L. Meray, *Devletler Hukukuna Giriş*, revised 3rd ed., 2nd vol. (Ankara: Ankara University Press, 1965), p. 428.

³² It is interesting to witness that the proposal for a conference that could have limited the state sovereignty was made by a head of state, who should normally be eager to preserve the sovereignty of the state he represents. However, considering that the Czar made the proposal to 'diminish the burden of taxation for military and naval expenditures which presses down with enormously increasing weight upon the shoulders of the people,' it could be concluded that his sincerity for demanding world peace is questionable. William I. Hull, *The Two Hague Conferences*

twenty-six countries and eventually the Peace Conference was held in The Hague. The Czar once again assumed role in the second Hague Conference held in 1907 by issuing the formal invitation. However, this time the proposal for the Conference came from the United States. Forty-four countries participated in the Conference.³³

Those conventions were "the first significant codification of the laws of war in an international treaty."³⁴ The Convention of 1899 created the Convention for the Pacific Settlement of Disputes and a Court of Arbitral Justice.³⁵ Also known as Permanent Court of Arbitration (PCA),³⁶ this Court is especially significant, as it is seen by some scholars as one of the earliest predecessors of the permanent International Criminal Court. Two reasons are referred to for this assertion. First, it is commented that the establishment of the PCA foresaw that inter-State disputes could be sometimes resolved through legal endeavors, and would not necessarily be matters of political rivalries. Second, its establishment triggered a general tendency toward international adjudication.³⁷

and their Contributions to International Law 3 (1908), cited in Leila Nadya Sadat, 'The Establishment of the International Criminal Court: From The Hague to Rome and Back Again,' *Michigan State University-DCL Journal of International Law*, Vol. 8, Issue 1, 1999, p. 97, at note 1. In fact, it was not a concern for Russia only. The following quotation eloquently explains one of the most outstanding motives behind the States' willingness to hold a multilateral conference in which discussions and deliberations on reducing armaments took place: "It was a world with an Arms Race going on, and with military-industrial complexes to feed it. The costs were enormous, and came not just from the numbers of men involved. These were years when...there was much application of scientific invention to military purposes. New weapons and new means of delivering them were being developed every year. As soon as one military establishment had acquired a new military marvel, every state with which it might come into conflict felt the lack of an equivalent. It was repeatedly claimed, and not by socialists and liberals alone, that the costs were becoming too heavy to bear." Geoffrey Best, 'Peace Conferences and the Century of Total War: The 1899 Hague Conference and What Came After,' *International Affairs*, Vol. 75, Issue 3, 1999, pp. 619-20.

³³ Sadat, 'The Establishment of the International Criminal Court: From The Hague to Rome and Back Again,' pp. 97-98.

³⁴ Schabas, *An Introduction to the International Criminal Court*, p. 2. "They include an important series of provisions dealing with the protection of civilian populations...Other provisions of the Regulations protect cultural objects and private property of civilians." *Ibid*.

³⁵ Jamison, 'A Permanent International Criminal Court: A Proposal that Overcomes Past Objections,' p. 421. There are four Hague Conventions adopted at the Hague Convention of 1899. These are: CONVENTION (I) FOR THE PACIFIC SETTLEMENT OF INTERNATIONAL DISPUTES (HAGUE I) (29 July 1899), entered into force 4 September 1900, access via: <http://www.yale.edu/lawweb/avalon/lawofwar/hague01.htm>, CONVENTION WITH RESPECT TO THE LAWS AND CUSTOMS OF WAR ON LAND (HAGUE, II) (29 July 1899), entered into force 4 September 1900, access via: <http://www.yale.edu/lawweb/avalon/lawofwar/hague02.htm>, CONVENTION FOR THE ADAPTATION TO MARITIME WARFARE OF THE PRINCIPLES OF THE GENEVA CONVENTION OF AUGUST 22, 1864, adopted July 29, 1899, entered into force, September 4, 1900, access via: <http://www.yale.edu/lawweb/avalon/lawofwar/hague993.htm> and Declaration on Prohibiting Launching of Projectiles and Explosives from Balloons (Hague, IV); July 29, 1899, entered into force, September 4, 1900.

³⁶ For brief information on the attempts made before The Hague Conference of 1899 with regard to international arbitration, see, William L. Penfield, 'International Arbitration,' *American journal of International Law*, Vol. 1, Issue 2, 1907, pp. 330-341.

³⁷ Sadat, 'The Establishment of the International Criminal Court: From The Hague to Rome and Back Again,' p. 98, at note 2.

However, it is worth noting that the Court whose creation was proposed at the 1899 Hague Conference had important defects. The most important one is that

The Hague Tribunal is not in the true sense a permanent court, it is permanent only in name. Its membership of judges is not confined to a few selected men who sit as a permanent court ready at all times to do its business and receiving a fixed salary during an appointment for life.³⁸

Instead of a permanent court, what was proposed at The Hague was "a list of referees" from whom judges might be selected as "occasion offers. A clerk's office and a council to run it is all that is permanent or continuous in the organization." The judges were to be selected from a pool of 104. They were basically to be called from their vocations for a few months "to decide a certain dispute in their capacities as judges and then lapse back again into the private life and environment from which they came."³⁹

The Hague Convention of 1907 is of significance in that while during the former Convention it was decided that submission to the court would be optional, at the Convention of 1907 attempts were made in order to make the court's jurisdiction obligatory. However, although the preconditions for the court's entering into force were set at the Convention, because these conditions would not be met later, the court never went into effect.⁴⁰ The Convention also witnessed the first comprehensive codification of laws of war.⁴¹ Thirteen conventions on various aspects of warfare were adopted at the conference in 1907, although one is never ratified, thus did not enter into force.⁴² Overall, the primary objective of these conventions was to create rules and procedures that would eliminate unnecessary suffering by the warring persons and ensure that noncombatants would not be targeted in the wars.⁴³

³⁸ R. Floyd Clark, 'A Permanent Tribunal of International Arbitration: Its Necessity and Value,' *American Journal of International Law*, Vol. 1, Issue 2, 1907, p. 343.

³⁹ *Ibid.*, p. 344.

⁴⁰ Sadat, 'The Establishment of the International Criminal Court: From The Hague to Rome and Back Again,' p. 422.

⁴¹ Gerard E. O'Connor, 'The Pursuit of Justice and Accountability: Why The United States Should Support the Establishment of an International Criminal Court,' *Hofstra Law Review*, Vol. 27, Issue 4, 1999, p. 935.

⁴² These are: Convention for The Pacific Settlement of International Disputes (1907), Convention Respecting The Limitation of The Employment of Force For The Recovery of Contract Debts (1907), Convention Relative to The Opening Of Hostilities (1907), Convention Respecting The Laws and Customs of War on Land (1907), Convention Respecting The Rights And Duties of Neutral Powers and Persons In Case of War on Land (1907), Convention Relating to The Status of Enemy Merchant Ships At The Outbreak Of Hostilities (1907), Convention Relating to The Conversion of Merchant Ships Into War-Ships (1907), Convention Relative to The Laying of Automatic Submarine Contact Mines (1907), Convention Concerning Bombardment by Naval Forces In Time of War (1907), Convention for The Adaptation to Maritime War of The Principles of The Geneva Convention (1907), Convention Relative to Certain Restrictions With Regard to The Exercise of The Right of Capture In Naval War (1907), Convention Relative to The Creation of An International Prize Court (Never Ratified) and Convention Concerning The Rights And Duties of Neutral Powers In Naval War (1907). All are accessible at: <http://www.lib.byu.edu/~rdh/wwi/hague.html>.

⁴³ O'Connor, 'The Pursuit of Justice and Accountability: Why The United States Should Support the Establishment of an International Criminal Court,' p. 935.

However, despite the novel arrangements made, The Hague Conventions fell short in many respects.⁴⁴ First of all, although the Hague Convention of 1907 managed to codify the laws of war, only states and not individuals were made obligated to comply with the rules adopted at the conference. In other words, the Conventions "were meant to impose obligations and duties upon States, and were not intended to create criminal liability for individuals."⁴⁵ Furthermore, the enforcement of the laws was "primarily through reparations imposed upon a defeated state, or through reprisal or retaliation, which tended to escalate the spiral of savagery."⁴⁶

More importantly, most conventions adopted at the Hague Conventions in order to maintain rules of laws of war lost the significant portion of their power, due to the reservations they contain. Like the Conventions of 1864 and of 1906, the Hague Conventions of 1907 state that any State Party to those conventions is obligated to abide by the rules contained in the conventions as long as the other States Parties comply with those rules. This was called 'clause of solidarity' (Clause de solidarité). According to this clause, if any State Party violates the Convention concerned, or a non-party joins the war, there would be a great possibility that other States Parties do not regard themselves as obligatory to comply with the provisions of that convention.⁴⁷

There is one simple and equally solid explanation for the weak provisions of the Conventions discussed above: states were concerned with preserving their sovereign rights. There was an obvious link between the attempts aiming at regulating warfare that were adopted at the two Hague Conferences and the notion of sovereignty that has been prevalent in world politics at the time. It was generally assumed that the head of a state has the authority over the authority of the state he rules, and that a state could not be subjected to any law other than its domestic legal rules, should that state does not explicitly express its consent to get bound by that law.⁴⁸

However, it should be noted that notwithstanding the shortcomings of The Hague Conventions of 1899 and 1907 stated above, there has been at least one attempt to invoke their provisions within a few years after their codification. The Carnegie Endowment for International Peace, a non-governmental organization, established a commission of inquiry to investigate atrocities committed especially against civilians and prisoners of war during two Balkan Wars of 1912 and 1913.⁴⁹ In its report, the commission referred to the Hague Conventions as a

⁴⁴ In fact, it is indicated in the preamble to the Conventions that they are incomplete. Schabas, *An Introduction to the International Criminal Court*, p. 2.

⁴⁵ *Ibid.*

⁴⁶ Bryan F. MacPherson, 'Building an International Criminal Court for the 21st Century,' *Connecticut Journal of International Law*, Vol. 13, Issue 1, 1998, pp. 4-5.

⁴⁷ Meray, *Devletler Hukukuna Giriş*, p. 434.

⁴⁸ Sadat, 'The Establishment of the International Criminal Court: From The Hague to Rome and Back Again,' p. 102.

⁴⁹ M. Cherif Bassiouni, 'Establishing an International Criminal Court: Historical Survey,' *Military Law Review*, Issue 149, 1995, p. 53.

basis for its description of war crimes.⁵⁰ But it is worth remembering that the attempt was not led by states. Therefore, the initiative of the Carnegie Endowment could only be cited as a reference to the Hague Conventions.

Another reference to the Hague Conventions was made far later. Statute of the International Criminal Tribunal for the Former Yugoslavia of 1993⁵¹ heavily relies on the Conventions as the main basis for the codification of the customs and laws of war. Indeed, the Rome Statute of the International Criminal Court also borrows from those Conventions in its Article 8(2)(b), (e) and (f).⁵² This is a clear recognition of those long ignored international legal arrangements on the laws of war as an authoritative base with respect to their coverage. Moreover, it is argued that the current permanent international criminal court is "the culmination of a process that goes back to the Red Cross and Hague Conventions on the conduct of warfare in the nineteenth and twentieth centuries,"⁵³ which is in effect a statement that gives full credit to the Hague Conventions and acknowledges their prominence in international criminal law.

There is in fact one more point, an important one given the subject matter of this study, that needs to be emphasized. While the above-mentioned two multilateral conferences are in general seen as the attempts of States Parties that participated in the conference, the input and encouragement of civil elements throughout the process cannot be overlooked. Although it may not be possible to refer to an organized civil society of that time, the 'non-state' elements' contributions to both the inauguration of the conference and the principles and rules adopted there suggest that the achievement made by those conferences at least partially belongs to the civil society.

Especially the 1899 Hague Conference witnessed the visible contribution of different elements of civil society. The peace societies of the time were interested in the Conference. In particular, the Inter-Parliamentary Union's participation is worth noting, as this organization has been involved in international peace congresses since 1880s. A further point worth mentioning is that women actively joined and assumed effective roles in those organizations. Aside from peace movements and early human rights organizations, the professional groups, especially those formed by the international lawyers made contributions

⁵⁰ *Report of the International Commission to Inquire into the Causes and Conduct of the Balkan Wars* (Washington, DC: Carnegie Endowment for International Peace, 1914), reprinted as George F. Kennan and Thomas M. Franck, *The Other Balkan Wars: A 1913 Carnegie Endowment Inquiry in Retrospect* (Washington, DC: Carnegie Endowment for International Peace, 1993).

⁵¹ Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, U.N. Doc. S/25704 at 36, annex (1993) and S/25704/Add.1 (1993), adopted by Security Council on 25 May 1993, U.N. Doc. S/RES/827 (1993). The Statute's text can be reached at: <http://www.un.org/icty/legal/doc-e/index.htm>.

⁵² Schabas, *An Introduction to the International Criminal Court*, p. 3.

⁵³ Giulio M. Gallarotti and Arik Y. Preis, 'Toward Universal Human Rights and the Rule of Law: The Permanent International Criminal Court,' *Australian Journal of International Affairs*, Vol. 53, Issue 1, 1999, p. 95.

during the Conference. There were also some gatherings of masses before the Conference, even though they are not comparable to the contemporary ones.⁵⁴

Of course, the magnitude of their presence in the Conference and the scope of their contributions to the deliberations and influence on the decisions to be made by States Parties' delegates were limited and modest and are by no means comparable to the works of today's global civil society. However, even considering alone the fact that the Conference was "the first ever occasion on which an intergovernmental...conference was accompanied by a great show of organized public opinion in its support"⁵⁵ reveals how important and crucial the participation of the 'organized public' was. Although they were aware of their limits, the organizations formed by 'peoples' wanted to be taken by the delegations seriously during the Conference. Otherwise, they might have formed an alternative conference other than the official one. They also tried to influence the outcome by lobbying and informal meetings. However, as already noted, their contribution was modest largely due to their limited influence and resources. Best refers to another reason for this limited influence: that not from all participant States were civil elements present at the Conference.⁵⁶ In any case, the important point is the success of the Conference, if any, cannot be attributed to the States Parties alone, but to the civil elements that participated in the Conference as well.

CONCLUSION

The study of the history of international criminal law clearly demonstrates that the international community has always shown interest towards establishing strong institutions and mechanisms to ensure prosecution and punishment of the criminals responsible for the commission of international crimes in general, and particularly creating a permanent international penal tribunal with universal jurisdiction to address the question of preventing the commission of the crimes, and in cases of their commission, of punishing the perpetrators.

Moreover, this interest is not peculiar to the twentieth century only, where the commission of such international crimes as genocide, crimes against humanity and war crimes has been widespread and more influential and damaging than ever. In fact, it is almost as old as the human being itself, though the evidence available at hand permits us to trace this interest back to only several centuries ago.

Yet despite the inherent constraints, the data available are indicative enough of the fact that the idea, and even desire, to maintain an international order where justice is achieved through holding the individuals committing the worst crimes responsible for their acts, and bringing them before an impartial international penal body has always been existent.

⁵⁴ Best, 'Peace Conferences and the Century of Total War: The 1899 Hague Conference and What Came After,' pp. 620-621.

⁵⁵ *Ibid.*, p. 623.

⁵⁶ *Ibid.*, p. 624.

However, it is also true that the most substantial and concrete attempts towards the transformation of the interest into solid measures have been made after serious global events that affected the international community as a whole. Needless to say, the world wars are exemplary in this regard.

Although there are a lot of examples that could be cited as proofs for the above argument, several ones are noteworthy. The Hagenbach case, referred to by some as the first international trial, is surely the first one. The commission of atrocities that deeply wounded the conscience of the international society led to outcry even as early as fifteenth century, when wars and associated with those wars were seen inevitable.

The second one is the first proposal for a permanent international criminal court by Gustave Moynier. Even though previously he was not in favor of such an institution, the horrifying outcome of the Franco-Prussian War changed his mind. Although it is not possible to speculate that he would not have advanced this proposal in the absence of such a concrete reason, it is very likely that he was affected by it.

The end of WWI saw growing interest towards the creation of an international penal institution for the purpose of prosecuting the persons responsible for the commission of crimes during the war. The absence of such an institution was strongly felt, and a promising enthusiasm emerged soon after the end of the war.

However, the revival of the interest by the international community towards the establishment of an international criminal tribunal following the global wars has never been sufficient to achieve satisfactory results. Despite the enthusiasms and numerous attempts made in this context, once the horrifying impact of the war lost its strength, those attempts and enthusiasm were immediately replaced with reluctance and ignorance.

Moynier's proposal was never seriously taken into consideration and it has over the time become a courageous and yet unfruitful attempt that is today referred to by the students of international criminal law with respect and admiration. As a consequence, it took its place in the history only as the first proposal for an international criminal court.

The attempts to prosecute, try and probably punish the perpetrators of the international crimes committed during WWI have also failed in that the prosecutions had never taken place. Even though the establishment of an international tribunal was envisaged even during the war, those individuals responsible for such crimes have for the most part gone unpunished. The excitement and determination prevalent during the war to achieve justice has lost its impact, and soon after the healing of the wounds caused by the war was left to the slow passage of time.

Upon the examination of evolution of international criminal law and individual criminal responsibility, the question of why there has always been reluctance to address the commission of large scale atrocities, even in the presence of a

strong desire and interest towards the creation of an international mechanism for this purpose, becomes relevant and even necessary. Even though that might seem to be a contradiction, in fact there is a simple and clear explanation for that. States have always been more concerned about the preservation of their sovereign positions in world politics than the engagement in such international problems as commissions of genocides and war crimes.

As the above survey demonstrates, in countless occasions States have shown that they were interested in the prosecution and punishment of those individuals responsible for the commission of international crimes only to the extent that the engagement would not negatively affect their prerogatives as a sovereign unit.

It is obvious that States have regarded an institution vested with the authority to prosecute and punish the individuals regardless of their nationality or the territory they are apprehended in as a threat and intrusion to the international order based on the mutual recognition of territorial sovereignty. They have been especially keen in the particular case of individual criminal responsibility, as it was seen as the States' domain. In other words, while States have tended to act flexibly in some other matters, they wanted the question of prosecuting the criminals to remain at their sole discretion.

However, it should also be noted that despite the resistance of the states to the establishment of an effective system of international criminal jurisdiction on the grounds that such an attempt would substantially damage the nation-state's dominant position in world politics, numerous successes have been achieved. In other words, although states could have managed to retain their sovereign positions, at least to some extent, they had to make concessions in response to the demands voiced by the large masses of international community.

Therefore, the progress that has been made over centuries cannot be overlooked for that the permanent international criminal court is for some part the culmination of that progress. The attempts made in late nineteenth century served as a basis for the later ones. The accrued experience during this time must have contributed to the idea of creating an international penal tribunal raised in the immediate aftermath of WWI for the purpose of addressing the massacres directed against the civilians during the war. It could be argued that in the absence of previously codified legal documents and adopted principles, such an idea could not even have been voiced.

However, given that nation-states have consistently demonstrated strong attachment to the notion of national sovereignty and principle of non-intervention to internal matters of other sovereign states in the venues where the question of a universal criminal jurisdiction has been deliberated, it is not possible to attribute the above incremental development and partial achievement to sovereignty-based international order. Rather, the insistence and patience of civil society actors is a better explanation for the gains of international society with regard to the evolution of international criminal law and individual criminal accountability.

The involvement of private actors, ranging from outstanding individuals with no organizational attachments to internationally recognized non-governmental organizations, in the processes where the instruments of international criminal law have been codified is indicative of the influence of civil society sector on the development of a more individual-oriented order. The contributions and inputs made by various civil society organizations to every stage of treaty-making relevant to international criminal law, including preparation, drafting, revision and codification, are therefore what we should regard the determinative if not the sole factors in the creation of what could be called a partially successful system of international criminal jurisdiction.