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## War Crimes

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The term *war crimes* may strike some as redundant and others as oxymoronic: redundant because war itself is criminal; oxymoronic because war submits to no law. Neither position is serious. The idea that morals, if not laws, control the waging of war dates back thousands of years. Following the Greek tradition, Roman law established prohibitions on the conduct of warfare. One finds similar norms expressed in the Hindu code of Manu: “let him not strike with weapons... barbed, poisoned, or the points of which are blazing with fire” (chap. 7, § 90).

There are other important antecedents to the articulation of a coherent notion of war crimes in international law. These include the trial and execution of Peter von Hagenbach in Austria in 1474 for wartime atrocities committed during the siege of Breisach. Francis Lieber (1798–1872) prepared what scholars later called the Lieber Code, a manual enumerating serious breaches of the law of war that was distributed to field commanders of the Union army during the American Civil War. These examples support the view that prohibitions against war crimes had long assumed the status of law in the customs of nations.

## The Nuremberg Charter

Such customary law found codification in the Hague conventions of 1899 and 1907, which established the “general rules of conduct for belligerents in their relations with each other and with populations.” The Hague conventions, in turn, supplied the template for the definition of war crimes used by the International Military Tribunal (IMT) in the trial of the major Nazi functionaries in Nuremberg in 1945 and 1946. These “violations of the laws or customs of war” were understood to include, “murder, ill-treatment or deportation to slave labor or for any other purpose of civilian population of or in occupied territory, murder or illtreatment 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” (Charter of the International Military Tribunal 1947: 11).

Although the IMT's definition of war crimes tracked Hague language, Nuremberg nevertheless represented a radical innovation in the law's response to crimes of

war. The trial marked the first time that jurists formally recognized that waging a war of aggression and committing crimes against humanity—the other two substantive crimes named in the [p. 1570 ↓ ] charter—were incriminating in international law. Of equal significance, Nuremberg revolutionized the international community's treatment of the question of responsibility. Despite its somber adumbration of offenses, the Hague convention remained silent on the matter of sanctions. Nuremberg, by contrast, assigned “individual responsibility” for the violations of international law under its purview.

Two key provisions of the IMT's charter implemented the principle of individual responsibility. Article 7 held that “the official position of defendants... shall not be considered as freeing them from responsibility,” thus puncturing the immunity that previously had shielded heads of state and ministers from answering for their conduct in foreign or international courts. Article 8, in turn, held that “the fact that the defendant acted pursuant to [an] order of... a superior shall not free him from responsibility.” Together, these two provisions transformed war crimes jurisprudence into a potentially potent tool for imposing penal sanctions on individuals found guilty of violating international law.

## The Post–War World War II Framework

In the decades since Nuremberg, the jurisprudence of war crimes has undergone definitional, conceptual, and institutional changes. For war crimes to be justiciable, the alleged offenses must bear a nexus to the waging of war. Horrific acts of mass killing, such as the purges carried out by the Soviet Union under Joseph Stalin (ruled 1929–1953), arguably do not constitute war crimes. Here it is instructive to compare the definition of war crimes with the definition of other grave international offenses, such as crimes against humanity or genocide. When first recognized at Nuremberg, jurists treated crimes against humanity as an accessory offense to war crimes and, like war crimes, had to bear a connection with the waging of war to fall under the jurisdiction of the IMT.

In the years since Nuremberg, international law has freed crimes against humanity from this tether to armed hostilities. Likewise, genocide, mentioned in the Nuremberg

indictment as a war crime, and first recognized as a discrete and independent violation of international law in the Genocide Convention of 1948, need not bear any connection to actual warfare.

In requiring a nexus to armed hostilities, war crimes would appear, then, to apply more restrictively than crimes against humanity and genocide. This impression, however, may be misleading. Although crimes against humanity reach only widespread or systematic attacks on a civilian population, and genocide touches only those acts that intend to destroy a “national, ethnical, racial or religious group, as such” (art. 2), war crimes embrace a broad array of transgressions—large and small—perpetrated in course of armed hostilities.

If jurists have at times struggled to define with precision what constitutes these crimes, so too have they struggled over the definition of *war*. The Geneva Conventions of 1949 and 1977, which extended the reach of war crimes to include such grave breaches of its provisions as, for example, “willfully depriving a prisoner of war or other protected person of the rights of fair and regular trial” (1949: art. 130), conceptualized *war* as paradigmatically an international conflict. More recently, however, decisions by the International Criminal Tribunal Yugoslavia (ICTY), along with provisions of the fledgling International Criminal Court (ICC), have served importantly to close the gap between how jurists treat war crimes in the context of internal, as opposed to international, armed conflicts.

The decades since Nuremberg have also witnessed important extensions to the spatiotemporal reach of the law of war crimes. In 1968, the Convention on the Non-applicability of Statutory Limitations to War Crimes and Crimes against Humanity declared such offenses imprescriptable—that is, not governed by any statute of limitations. The trial of Adolf Eichmann in Jerusalem in 1961, along with the passage of war crimes statutes in many national legislatures (such as the United Kingdom's War Crimes Act of 1991 and Belgium's “Loi relative à la repression des violations graves du droit international humanitaire” of 1993) have established that war crimes can be tried under principles of universal jurisdiction. Under this concept, a state may seek to prosecute and punish conduct “irrespective of the place where it occurs, the nationality of [p. 1571 ↓ ] the perpetrator, and the nationality of the victim” (Reydam's 2003: 5). By treating war crimes as offenses that can be tried anywhere and at anytime, the

international community has recognized these offenses as deserving to be treated, along with crimes against humanity, as the gravest breaches of international law.

The institutional enforcement of war crimes, however, has not always kept pace with its definitional and conceptual changes. Both the IMT and the tribunal established in Tokyo that handled Axis crimes in the Pacific theater (International Military Tribunal—Far East, IMTFE), were ad hoc courts, mandated to disband after they rendered judgments and imposed sentences. Efforts to establish a permanent international criminal court foundered amid Cold War tensions; the Charter of the United Nations authorized the Security Council to create future international tribunals exclusively on an ad hoc basis. Even then, fractious Cold War politics frustrated the efforts to bring egregious human rights violators, such as the Khmer Rouge leader Pol Pot (ruled 1975–1979), to international justice. (Whether Pol Pot's genocidal practices were sufficiently connected to international combat for jurists to treat them as war crimes is an open question; certainly, they could have tried him for crimes against humanity.) During the decades of the Cold War, then, war crimes trials became the charge of domestic national, rather than international, courts.

## Recent International Tribunals

The end of the Cold War gave fresh impetus to those dedicated to bringing war criminals before international tribunals. Two of the greatest humanitarian crises in recent decades—the ethnic cleansing practiced by nationalist groups in the Balkans, and the mass killings perpetrated by Hutus against the minority Tutsi population in Rwanda—led to the establishment of the ICTY in The Hague, in 1993, and the International Criminal Tribunal Rwanda (ICTR) in Arusha, Tanzania, in 1994. Although plagued by vexing delays and cost overruns, one should credit the ICTY with establishing important precedents. These include the ruling in the Dusko Tadic case (1995–2000), which held that one could consider offenses committed in internal armed conflicts (as distinguished from international armed conflicts) war crimes in international law. In addition, the prosecution of Slobodan Milošević (1941–2006), which marked the first time that a former head of state had ever stood trial before an international court.

More recently, the creation of the ICC, a permanent institution with jurisdiction over war crimes, crimes against humanity, and genocide, may spell the end of the need for ad hoc tribunals such as the ICTY and the ICTR. Formally established by the passage of its enabling statute in Rome in 1998, the ICC entered into force in 2002 after the ratification of its statute by the sixtieth state party. By 2006, ninety-four states have ratified the Rome statute; notably absent from this list are China, Russia, India, Pakistan, and the United States. Human rights activists have praised the Rome statute for its detailed and broad definition of war crimes, incorporating, as it does, the ruling in the Tadic case. Whether the advent of the court will lead to a more vigorous prosecution of war crimes and to a more humane application of force in the battlefield remains for the twenty-first century.

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*See also*

- [Arms Control](#)
- [Customary Legal Norms, International](#)
- [Genocide](#)
- [Human Rights, International](#)
- [International Criminal Tribunals](#)
- [Mass Murder](#)
- [Military Justice](#)
- [Morality and Law](#)
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