War Crimes in International Law

- Doctoral Thesis -

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Abstract

The present research intends to examine the historical evolution of the concept of war crime and of creating mechanisms that would ensure (at least, accomplish as widely as possible) the punishment of individuals whose actions can be qualified as such. While, starting with the end of the Second World War, the United Nations has assumed the role of searching and implementing a manner as appropriate as possible of bringing war criminals to justice, establishing through Resolutions international tribunals such as the ones in Nuremberg, Tokyo, Former Yugoslavia or Rwanda, the first trials and convictions of war criminals determined by the consensus of states manifested through a multilateral international treaty haven't been the ones in the United Nations system, but took place at the end of the First World War, and represented one of the consequences of the Peace Treaty of Versailles.

Hence, the paper aims at analyzing the emergence of the idea of war crime and its crystallization until the end of the First World War, namely until the first express mention in an international multilateral treaty of the need for effectively punishing war criminals that also led to bringing these criminals to justice.

The paper intends to demonstrate, firstly, that the beginnings of punishing war criminals in an international framework are to be found, in fact, at the end of World War I, in the *Report of the Commission on Responsibility*, in the provisions of the *Treaty of Versailles* and in the conceiving and conduct of the *Leipzig Trials*, that introduced the idea of international responsibility of individuals for committing war crimes (giving rise to the concept of war crimes proper) and represented the source of inspiration for the international tribunals established starting with 1945 and for the current international system of punishing those who commit such acts.

Secondly, the research intends to show that certain difficulties encountered at the end of World War I in finding a manner of effectively ensuring the punishment of war criminals subsist even nowadays, in spite of the extensive international regulations in the field of war crimes.

If different societies have come to regard certain behaviours as *morally wrong*, in time, with the support of a general practice, these behaviours have also become *legally prohibited*. The entire effort of codifying the rules of behaviour during war represented a collective reaction, product of Western thought and with universalist intentions even 'fulfilled', to the destructive means and methods of warfare emerged with the technologization and industrialization of war in a modern sense, and is subsumed to some *humanitarian* intentions.

These rules of behaviour on the battlefield represented (and still represent) the expression of the practice of participants in armed conflicts, or of their intentions, motivated, in time, by different reasons, different 'morals', endorsed by all the recognized states in the world, if not for purely humanistic reasons, at least considering a sense of reciprocity - the universal ratification of the 1949 Geneva Conventions stands as proof. In what concerns, however, ensuring some forms of international criminal justice for war crimes and other serious crimes, such as the crime of genocide, crimes against humanity or the crime of aggression, these fully depend on the express agreement of the states, through their participation in the specialized international mechanisms.

As a matter of fact, states are, anyhow, decision makers in all these matters: they 'establish' international customs, conclude treaties in the areas of interest and subject themselves, by their own will, to the agreed provisions, apply or don't apply those rules. If states are creators of international law, either of treaties, or of customs, they also determine the limits of their application, and assume obligations mainly to the extent that seems convenient, manifesting an obvious reluctance to apply the most severe norms, such as the ones regarding the aggravated responsibility of states or subjecting individuals to the International Criminal Court. Hence, both states and individuals can be held responsible within international mechanisms for committing war crimes. For liability to be drawn, there must be legal obligations in force at the time of committing those actions, obligations established either by treaties, or by customs, or by other sources of law.

International law has always known certain 'instructions' regarding the manner in which war had to be conducted, and these rules of behaviour on the battlefield started to be widely

codified since the second half of the nineteenth century, through the adoption of numerous conventions regarding, ultimately, forms of protection of individuals, whether it was about certain categories with special status (medical and religious personnel, for instance), or about categories that were vulnerable on the battlefield (sick, wounded, shipwrecked), or simply due to the fact that technological developments came with more and more destructive weapons, which had the potential of causing unnecessary suffering.

The legal force of these documents is questionable; in principle, given the fact that sanctions and specific modalities of ensuring compliance were missing from the texts of the conventions, they can be judged as 'inefficient'; that fact that they did not refer in any way to the responsibility of the individuals that commit breaches of the rules in discussion or the fact that they only had the force of law between the contracting parties are arguments in the same respect. However, the interested states would have easily found manners of penalizing the contrary behaviours of other states, even in the classical mechanisms of responsibility; what the Geneva and Hague Conventions managed was to gradually raise the matter of some forms of ethical behaviour on the battlefield to the degree of legal requirement, transforming, in the same time, the 'private' relations between countries in an international legal system.

Forms of liability, however, seemed to be more and more necessary, despite the reluctance of states to waive essential attributes of sovereignty, and it is no wonder that the First World War had to be carried before the matter of responsibility was raised on the international level. Thus, only at the end of WWI took place the first major efforts regarding the punishment of individuals (not only states) whose actions were contrary to the laws and customs of war, and this, through an international criminal trial; the concept of 'international crimes' started, therefore, to be shaped. In this respect, the Report presented by the *Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties*, within the Paris Peace Conference, came with a number of innovative proposals, particularly regarding the matter of the breaches of the laws and customs of war and of the laws of humanity, altogether considered to be 'war crimes'. The Commission submitted a list of international crimes proper, of 'war crimes', it introduced the idea of criminal responsibility of individuals according to international law (regardless of the rank or position occupied by an individual in the state mechanism, hence including the responsibility of Heads of State, inviolable until then), as well as the idea of an

international court that functions for the purpose of judging and punishing individuals that breached international law.

Therefore, an international tribunal was to be set up in order to conduct the trials of those accused of breaches of the laws and customs of war and of the laws of humanity, which represents the first 'official' proposal of establishing such a court, given that, while the legal and philosophical doctrine, as well as practitioners from the field of international law, had previously advanced such proposals, the states did not manifest a real interest in implementing these ideas until the end of the First World War and the drafting of the Commission's Report.

In the negotiations carried out at the end of the war for the purpose of establishing the conditions of the peace, all these proposals of the Commission were adopted in a truncated manner, or completely ignored, as was the matter of the breaches of the laws of humanity, which, in the Treaty of Versailles, did not appear at all. Neither was accomplished the establishment of the tribunal desired by the Commission. However, it was neither absolutely ignored - the Treaty of Versailles provided, though, that, if an individual committed breaches of the laws and customs of war against individuals from more than one state belonging to the winning side, he could be brought in front of a mixed international tribunal, with judges from each of the states concerned. There remained, thus, a form of international tribunal, and the model of the mixed tribunals for Former Yugoslavia and Rwanda, from after 1990, was highly influenced by this model provided in the Treaty of Versailles.

Ultimately, important political and legal issues intervened in the effective implementation of the Commission's proposals and the provisions of the treaty, whether we are talking about the existing conceptual difficulties (the lack of clarity, the ambiguity of the new concepts used by the Commission, the lack of an agreement among jurists regarding the form chosen for judging and punishing individuals), the issue of legality (the lack of some previous tools with penal character that would allow the prosecution and punishment at the international level, the lack of state practice in the field of international criminal sanctions), or political issues (the dissensions between the winning states both at the drafting of the Report, and at the peace negotiations regarding the establishment of an international tribunal and the international prosecution and punishment of the accused, the different perspectives that the winners had regarding the administration of justice after the war, the issue of state sovereignty, the precarious political and

economic situation of the defeated states, the general feeling within them that a 'law of the winner' was imposed, instead of some just measures).

In this context, an accurate assessment of the ultimately implemented manner of calling to account the war criminals is necessary. Initially, it seemed that Germany is assuming the role of prosecuting its war criminals in a serious manner, and many indications of this were highlighted even by participants in the trials: Germany had made efforts to adapt its legislation in order to allow the prosecution for crimes such as the ones provided in the Commission's Report, it sought and requested evidence from the states that brought prosecution proposals, the trials that took place in Leipzig seemed fair, in the sense that they allowed each party to be represented, the German Imperial Court of Justice (which conducted the trials) even extended at its own initiative its jurisdiction over individuals whose prosecution had not been requested, and invited from the beginning the delegations of the states who had proposed cases to take part in the trials as co-accusers. By the end, however, it seemed rather that Germany was simply attempting to demonstrate that it executes an assumed obligation that would avoid the return to the system of mixed international tribunals provided in the *Treaty of Versailles*, without being particularly interested in a fair assessment of the cases, as, for instance, the decision in the trial of Dithmar and Boldt demonstrates. The very small number of cases in which penalties have been imposed, the very low punishments that have been applied, even in these few cases, the very small duration of each trial (2 to 3 days) demonstrate that these trials took place rather as a formality than due to the interest of the administration of justice - it's impossible to know how these trials would have been carried out had there not been in the courtroom a delegation of senior officials from the winning states.

While the Germans, resentful towards the Allied and the concluded treaty, were regarding these trials as an imposition and a form of national humiliation, the states that had brought cases in front of the Court regarded them, ultimately, as a failure. When it came to finding a more efficient manner of sanctioning war criminals, in the years of the Second World War, the interested states showed that they learned "the lesson of Leipzig" and returned to the proposals of the Commission on Responsibilities from the end of the Great War, establishing international tribunals according to the model it had proposed.

The International Military Tribunals of Nuremberg and Tokyo were constituted particularly for the aims pursued by the Commission and the winning European participants 25

years before: the prosecution and trial of the individuals accused of crimes against peace (reminding of the 'supreme offence against international morality and the sanctity of the treaties' that Wilhelm II was charged with), war crimes (similar to those in the Commission's Report) and crimes against humanity (acts to which the Commission had referred to as breaches of the laws of humanity). The two international tribunals were also constituted in a similar manner to the model proposed by the Commission in what regards their composition or functioning.

Many of the issues that occurred at the end of the First World War served as a 'lesson' for those attempting to accomplish peace at the end of the Second. For instance, when the question of international tribunals was raised, the matter of legality was taken into consideration in advance and its anticipation was attempted with documents that established obligations. Which doesn't mean that other stringent issues, such as partiality and politicization, didn't maintain in the same terms, with the winning states imposing their version of biased international justice - neither at the end of World War I, nor at the end of World War II was the punishment of the alleged war criminals belonging to the winning states taken into consideration.

It is more accurate, therefore, to identify the origins of the international punishment of individuals for breaches of international law at the end of the First World War, and not with Nuremberg. Even though the trials conducted at the end of World War I were not, strictly speaking, international, they had as basis and catalyst the *Report of the Commission on Responsibility*, but, especially, the *Treaty of Versailles*, a multilateral treaty that, although did not provide them, *determined* them.