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pour l'histoire du temps présent

International Criminal Law, International Security and the Global *Ordre Public*

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In 2009, we find ourselves surrounded by numerous important dates in the area of international criminal law: While last year we celebrated the tenth anniversary of the signing of the Rome Statute of the International Criminal Court, this year marks the fifteenth anniversary of the International Criminal Tribunal for Rwanda. In early 2010, the international community will gather for the second review conference of the Rome Statute in Uganda, a country which until recently has been the theatre of a gruesome civil war. Moreover, this year is the 90th anniversary of the Versailles Treaty, which was the first treaty to introduce the international criminal responsibility of individuals. All this reminds us that international criminal law is an important achievement of the 20th century, and an accomplishment which needs to be developed further in the 21st century. These anniversaries allow us to contemplate the added value, beyond the purely legal, of international criminal justice to modern international governance. In tracing the emergence of this dimension of law throughout the last century, this paper will argue that international criminal law was, from the outset, inextricably linked to issues of international security, and has vastly contributed to extending the traditionally state-centred understanding of security to include individual conduct and to bring forth a global notion of *ordre public*.

International criminal law is a fairly modern phenomenon. The only instance that comes close to an international criminal proceeding prior to the 20th century is the trial of the Burgundian Governor of Breisbach in 1474 for "crimes against the law of God and humanity" by a court composed of judges from various States of the Holy Roman Empire. In the 20th century, the idea of international criminal jurisdiction was first formulated in 1913 by the Investigating Committee for the Balkan Wars. The Committee, which had been established by the Carnegie Endowment for International Peace, had concluded that the people in power in the Balkans were largely responsible for these wars and that many of the atrocities committed in their course could have prevented if they had acted differently, and that therefore, they needed to be brought to justice.

The first international treaty to actually provide for the prosecution of an individual by an international tribunal was the Versailles Treaty of 1919. In Article 227, it stipulated that the German Emperor Wilhelm II was to be held personally responsible "for a supreme offence against international morality and the sanctity of treaties" and that an international tribunal was to be created to prosecute him. However, this trial never took place since the Emperor had fled to the Netherlands, which, having been neutral throughout the First World War, refused to surrender him. Regardless, the Versailles Treaty demonstrated that the First World War was not only understood as a conflict between states, but that leaders now recognized the accountability of certain individuals. At the same time, the Versailles Treaty also conveyed the problem of victor's justice, which risks depriving even an international effort for



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justice of its legitimacy. Indeed, given the fact that Article 296 of the Versailles Treaty already inculpated the German Empire for the war, the outcome of the trial against Wilhelm II appeared largely predetermined.

It would not be before the end of the Second World War, however, that the first two truly international criminal tribunals would be established, one in Nuremberg and its lesser-known counterpart for the Far East in Tokyo. The Charter of the Nuremberg Tribunal (actually the Charter of the International Military Tribunal), adopted on 8 August 1945, was the result of a long-standing debate among the Allies on how to deal with the German military and political leadership once the war was won. Eventually, contrary to initial proposals favouring summary executions, the Allies agreed on the trial of Nazi Germany's leadership for war crimes, crimes against peace, and crimes against humanity. This has also to be seen within the wider context of de-nazification of Germany. Thus, instead of creating "martyrs" for old and new diehard Nazi supporters by simply killing the Nazi protagonists in what might appear like an act of revenge, the trials were to irrefutably prove and publicly expose the atrocities committed, not least to the German population itself.

The Tribunal rendered its judgement on 30 September and 1 October 1946. Arguably its most famous and most telling dictum was that "[c]rimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced." This amounts to nothing less than enshrining in legal terms a paradigm shift in international relations. Whereas under the classic law of nations violations of international law can only be addressed through countermeasures between states, the Nuremberg judgement now also made individuals addressees of obligations under international law. At the same time, this excluded legal persons from the jurisdiction of the Tribunal, despite the fact that a number of corporations had massively contributed to Nazi atrocities, such as I.G. Farben which had provided the poisonous "Zyklon B" pesticide used in the gas chambers of the extermination camps. In procedural terms, the Nuremberg trials also show significant progress. For instance, instead of trying one symbolic figure, 24 political, military and corporate protagonists were prosecuted, some of whom were later acquitted by the Tribunal. Moreover, the Nuremberg Charter also addressed the problem of "superior orders", i.e. the question whether someone can be held responsible if he was just following orders from a superior. The Nuremberg Charter made clear that "[t]he fact that the Defendant acted pursuant to order of his Government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment if the Tribunal determines that justice so requires." The Nuremberg trials, however, have also been subject to the reproach of victor's justice. For instance, the bench only consisted of judges from the four victorious powers, and did not include Germans or even nationals from neutral countries. Furthermore, it has been argued that "crimes against peace" did not form part of international law when they were committed, which would be at odds with the principle of *nulla poena sine lege*. Also, the provisions of the Charter that inculpated individuals for their membership in organizations that had previously been declared criminal by the Tribunal were problematic as they raised the issue of collective punishment. In the end, however, the Tribunal made very scarce use of these provisions.

Likewise, the corresponding tribunal in Tokyo had the aim to try and punish the "major war criminals in the Far East" for an essentially identical list of crimes by a bench of judges from the victorious powers in the Pacific theatre. With the Tokyo trial it now also became clear that international criminal justice did not only take place on the European continent, but on a global level.

In the wake of Nuremberg and Tokyo, and overshadowed by the Cold War, it would take almost fifty years until once again international criminal tribunals would be set up. The post-War tribunals nevertheless influenced a number of important documents adopted in the framework of the United Nations. In 1948, the UN General Assembly adopted the Convention on the Prevention and the Punishment of the Crime of Genocide. According



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to Article 6, persons charged with genocide "shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction." A similar provision can be found in the International Convention on the Suppression and the Punishment of the Crime of Apartheid of 1973. While the crimes enumerated in the Nuremberg and Tokyo Charters referred to crimes committed in connection with an international conflict, genocide and apartheid are crimes that do not require the existence of such a conflict, i.e. they can be committed in an entirely domestic context. This illustrates the increasingly narrow national *domaine réservé*, i.e. the domain of internal affairs with which international law cannot interfere.

Another noteworthy development is the preparation of the "Nuremberg Principles" in 1950 and later the "Draft Code of Crimes against the Peace and Security of Mankind" by the International Law Commission. Also, following the adoption of the Genocide Convention, the UN General Assembly mandated a special Committee on International Criminal Jurisdiction to prepare a Draft Statute for an International Criminal Court half a century before the International Criminal Court would actually come into existence. However, the Committee's mandate was suspended in view of the stalemate in defining the politically sensitive crime of aggression.

After the fall of the Berlin Wall in 1989, the UN General Assembly again directed the International Law Commission to look into ways for establishing of an international criminal court. Following the invasion of Kuwait by Iraq in 1990, the United States and the United Kingdom considered setting up an international tribunal similar to the one at Nuremberg to deal with the regime of Saddam Hussein. While such a tribunal never came about, the issue was on the international agenda again. The event that would ultimately prompt the reappearance of international criminal tribunals was the disintegration of Yugoslavia and the ensuing wars. With nationalist ambitions resurfacing in the post-Cold War environment, various factions tried to establish ethnically homogenous nation-states by force, involving the practice of so-called "ethnic cleansing", which would soon surface in worldwide headlines. Consequently, instead of the permanent court that was in preparation, an *ad hoc* International Criminal Tribunal for the Former Yugoslavia (ICTY) was established in The Hague. This was done directly by the UN Security Council by virtue of Resolution 827 of 25 May 1993. On the one hand, this illustrates that international security and international criminal justice are indeed inextricably linked. This is evident as the UN Security Council used its powers under Chapter VII of the UN Charter to restore international peace and security in order to create an international criminal tribunal. On the other hand, this has been prone to criticism, not only from a legal viewpoint, but also politically. While the international community failed to act more proactively to actually prevent most of the atrocities from occurring, it resorted to an allegedly "inferior" measure to appease public pressure. The ICTY's jurisdiction extends to genocide, grave breaches of the Geneva Conventions, violations of the laws or customs of war, and crimes against humanity committed on the territory of the former Yugoslavia since 1991.

On 2 October 1995, in the case concerning Duško Tadić, the ICTY arguably made its most important ruling. Apart from dismissing claims that it had been illegally constituted, the Tribunal adopted a very progressive stance on international criminal law, stating *inter alia* that war crimes can be committed not only during international armed conflicts but also during civil wars and that crimes against humanity can be committed during peacetime. This relates to the expanding notion of international security as used by the UN Security Council throughout the 1990s, which now also encompasses internal situations as possible threats to the peace. By now, the ICTY has issued 161 indictments and has concluded 86 cases against 120 accused. While one of the most wanted indictees, former chief of staff of the Bosnian Serb Army Ratko Mladić, is still a fugitive, the other three, former Serbian president Slobodan Milošević (who died during the proceedings), former lieutenant general of the Croatian Army Ante Gotovina and Bosnian Serb leader Radovan Karadžić were arrested and brought to The Hague for trial. Planned as a temporary institution from the outset, the ICTY aims at completing its activities by 2012.



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While the ICTY was still being made operational, the civil war in Rwanda in mid-1994, which culminated in the killing of several hundred thousand ethnic Tutsis and moderate Hutus by the majority Hutu faction caught the attention of global media. Once again, the international community had failed to prevent genocide. However, following the precedent of the ICTY, the UN Security Council quickly established through Resolution 955 of 8 November 1994, under Chapter VII of the UN Charter, the International Criminal Tribunal for Rwanda (ICTR), located in Arusha, Tanzania. In contrast to the ICTY, this was a more delicate exercise, since the Rwandan genocide lacked the international dimension of the post-Yugoslavian wars, and met with reservations of China, a veto-wielding permanent member of the Security Council, and Rwanda itself. Still, the ICTR was set up, and given jurisdiction over genocide, crimes against humanity and certain war crimes (i.e. violations of Common Article Three and Additional Protocol II of the Geneva Conventions, which both pertain to war crimes committed during internal conflicts) committed during the year 1994. Its first case, concerning Jean Paul Akayesu, who was found guilty of 9 counts of genocide and crimes against humanity, is notable as it constitutes the first instance in history that the Convention on the Prevention and Punishment of the Crime of Genocide of 1948 was actually enforced. On 2 October 1998, Akayesu was sentenced to life imprisonment. To date, the ICTR has completed 21 trials and convicted 29 accused, while another 11 trials are still in progress. Its completion strategy envisages the conclusion of all proceedings by 2010.

While the *ad hoc* tribunals of The Hague and Arusha had been mandated and staffed by the UN, thus achieving the universal legitimacy that the Nuremberg and Tokyo tribunals were lacking, it was clear from the outset that they were temporary solutions for specific situations. In the meantime, the negotiations on the establishment of a permanent international criminal court had continued, resulting in the diplomatic conference in Rome, where on 17 July 1998 the Statute of the International Criminal Court (ICC) was adopted. The ICC, also located in The Hague, has jurisdiction over the yet to be defined crime of aggression, genocide, crimes against humanity and war crimes committed after the entry into force of the Statute, which was on 1 July 2002. Currently 108 countries are parties to the Statute. A number of important states are, however, not party to the Rome Statute, including three of the five permanent UN Security Council members, China, Russia and the United States. Especially the latter has adopted an increasingly hostile attitude towards the ICC. The main reason for this is the relationship the Court has with the UN Security Council, which significantly differs from the *ad hoc* tribunals of the 1990s. The ICC is an institution independent from the United Nations, and the U.S. under the Bush Jr. administration was concerned that it would encroach upon U.S. sovereignty. Consequently, not only did the U.S. withdraw its signature from the Rome Statute, but it also adopted a number of so-called "Bilateral Immunity Agreements" with other countries to prevent U.S. citizens from being surrendered to the Court. Furthermore, in 2002 the U.S. Congress passed the American Servicemembers' Protection Act, which has become better known as "The Hague Invasion Act" since it provided, among other things, for the U.S. President to authorize military action to retrieve U.S. military personnel held by the Court. This is a remarkable departure from the traditional U.S. position since Nuremberg, which thus far favoured the advancement of international criminal justice. Furthermore, it should be noted that, in contrast to the *ad hoc* tribunals, the ICC has to exercise its mandate in a strictly complementary way. This means that it may not become active as long as states are willing and able to conduct effective proceedings. Also, the Rome Statute grants the Security Council the right to defer certain proceedings for up to one year. However, the U.S. stance is likely to become friendlier toward the ICC under the new Obama administration.

Four situations have so far been referred to the ICC: Uganda, the Democratic Republic of the Congo, the Central African Republic and Darfur, with all proceedings still ongoing. The most remarkable case is that of the incumbent Sudanese President Omar al-Bashir, against whom an arrest warrant was issued on 4 March 2009 on counts of war



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crimes and crimes against humanity (but not on the count of genocide). Al-Bashir is the first head of state in office to be indicted by the ICC.

This brings us to the present time, with the Review Conference of the Rome Statute to be held soon. The goals for the conference are rather modest. It is expected that it will mainly deal with the unfinished business of defining the crime of aggression, while other items on the agenda are likely to be the inclusion in the list of crimes of drug trafficking, the intentional targeting of journalists in war zones and terrorism. Especially with regard to the latter, it is highly unlikely that an agreement on a definition will be reached.

In conclusion, international criminal law has undoubtedly come a long way during the last 100 years. Despite the scepticism, we did see people like Hermann Göring, Slobodan Milošević, Radovan Karadžić, and the major Rwandan génocidaires on trial, having to publicly account for their conduct. These images made it plain to see for everyone that threats to peace and security do not just emanate from states, "abstracts entities", but from people, who now incur a distinct responsibility. While the international human rights regime, another great achievement of the last century, reminded states that they cannot treat people at will, international criminal law now reminds us that it is also individuals that have obligations stemming directly from international law, obligations that cannot be excused by acting on behalf of a country or by following superior orders. These obligations relate to the most basic considerations of humanity, a violation of which not only constitutes a breach of law, but a disturbance of a now global *ordre public*. In the framework of the United Nations and the International Criminal Court, it has finally shed the accusations of victor's justice, and has become an acknowledged tool in 21st century global governance.

However, much remains to be done. For instance, it should be noted that next to international criminal justice proper, a number of different approaches exist, such as hybrid national/international proceedings like the Special Court for Sierra Leone (best known for the trial of former Liberian President Charles Taylor) and the Extraordinary Chambers in the Courts of Cambodia for the prosecution of the Khmer Rouge leaders. Also non-judicial means such as truth and reconciliation commissions have been used to address past atrocities. Prudent international governance will require a selection among these approaches to best fit the specific characteristics of each situation. Finally, even though the nexus between international criminal justice and international security is now well established, it would be a grave fallacy to consider criminal proceedings as a substitute for proactive engagement. Criminal sanctions can only provide prospective prevention by deterring others from committing crimes in the future. This does not absolve the international security architecture, with the UN Security Council at its centre, from intervening when necessary to prevent the worst from happening as long as it is still possible.

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