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Introduction

Three decades ago, international criminal law might charitably have been referred to as a niche interest area within the discipline of public international law. There were no academic journals dedicated to the subject. Only a handful of monographs and doctoral theses addressed issues of relevance. The subject matter did not normally figure on university curricula. If a course in the field were offered, it would have been viewed as the idiosyncrasy of a lecturer, an offering to satisfy some private obsession rather than a genuine demand from students. The situation has been completely transformed. Today, several academic journals focus almost exclusively on the subject, and books are released at a prodigious rate. Special post-graduate degrees are offered in the field and hundreds of doctoral students, in universities around the world, toil in research libraries and archives. Moreover, newspapers and television feature stories related to international criminal justice activities almost daily. Few areas in international law, or for that matter in law in general, have ever developed at such a pace.

The birthdate of this exciting project might be fixed in December 1981, when the United Nations General Assembly invited the International Law Commission to resume work on the Code of Crimes Against the Peace and Security of Mankind, a matter that had been virtually moribund since 1954. The Commission produced its initial report in 1983 and then subsequently delivered annual reports, politely appealing to the General Assembly to complete its vision by contemplating the establishment of an International Criminal Court. In the early 1980s, nobody could have imagined that within a decade there would be two *ad hoc* international criminal tribunals and that within two decades a permanent International Criminal Court would be fully operational.

Actually, the history really begins seventy years earlier with the declaration by the British, French and Russian governments of their intent to prosecute those responsible for 'these new crimes of Turkey against

humanity and civilisation', the atrocities that today we call the genocide of the Armenians. The Treaty of Sèvres of July 1920 authorised prosecutions and reserved the right for these to take place before an international court '[i]n the event of the League of Nations having created in sufficient time a tribunal competent to deal with the said massacres'. Although the proposed trials did not take place, it was clear that important changes in international law were afoot. But this project was not yet ripe. The first effective efforts at international criminal justice had to wait for the Second World War.

Several of the chapters in this book consider the post–Second World War prosecutions. Despite their flaws, more a question of pangs of birth than genuine shortcomings, they not only delivered justice, they provoked a brief yet intense period of law-making. One of the participants in those activities, Benjamin Ferencz, who was prosecutor in the 1947 trial of SS officers at Nuremberg, is a contributor to this book. The crimes in the Rome Statute that comprise the subject matter jurisdiction of the International Criminal Court trace their ancestry to this time. In a more general sense, international law had begun a historic turn, leaving behind its traditional indifference to issues governing the treatment of the individual by his or her own State. The relationship between international human rights law and international criminal law can be traced to this point in time.

One of the classic criticisms of the post–Second World War prosecutions involves the retroactive application of criminal justice. Rather than rigid and mechanistic application of the maxim *nullum crimen sine lege*, judges at Nuremberg held that 'the accused knew or should have known that in matters of international concern he was guilty of participation in a nationally organised system of injustice and persecution shocking to the moral sense of mankind, and that he knew or should have known that he would be subject to punishment if caught'.[1] This issue arises less frequently in modern times, in large part because the International Criminal Court is unable to deal with acts that occurred before the entry into force of the Rome Statute in 2002. But the retroactivity argument is also less potent today because of the profound development of international human rights law.

1 *United States* v. *Alstötter* et al., 'The Justice Case', (1951) 3 TWC 954, at pp. 977–8.

The issue of retroactive criminality recurs throughout the chapters in this book. Although not directly connected, a second issue, that of 'victors' justice', features in most discussions of Nuremberg and the other early trials. There is no doubt that the efforts of the 1940s only addressed atrocities committed by one side in the conflict. Even today, it appears to be asking a lot of a State to undertake prosecution of its own leaders for international crimes committed in pursuit of governmental policy. One of the most steadfast advocates of international justice, the United States of America, has shown itself incapable of applying the provisions of the Convention for the Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment when its own leaders are concerned. It seems that it can acknowledge the commission of the crime to be an ugly, regrettable feature of its military adventures in the Middle East and Asia, yet sheepishly decline to prosecute those suspected of responsibility, adopting what amounts to a *de facto* amnesty.

Double standards

When the United States defies its obligations under the Torture Convention while continuing to hector other countries, in Africa, Asia and South America, about their obligations to bring perpetrators of international crimes to justice, this is not so much 'victors' justice' as a problem of double standards. It may be unfair to highlight this huge shortcoming of international justice given that double standards also afflict the enforcement of human rights principles and, more generally, international law as a whole. At the apex of the international law pyramid stands the International Court of Justice. Yet its jurisdiction is only mandatory for about one-third of the world's countries, those that have made declarations of acceptance. Some justice! It is probably better to see things as some unfinished jigsaw puzzle. It is no longer a jumble of single pieces, but only an incomplete picture has emerged. We know where the missing elements are to be found. Slowly, the gaps are being filled.

The first experiments with international justice manifested such double standards because they only really operated where a consensus of the most powerful could be found. The post–Second World War tribunals were established by mighty military powers whereas the more recent United Nations *ad hoc* institutions owe their creation to the Security Council. This is a distinction without necessarily much of a difference. Of

course, there may be nothing necessarily perverse about addressing Nazi atrocities while giving a get out of jail free card to the victorious allies. The crimes of the former manifestly outweighed those of the latter, and by several orders of magnitude. Nor are we shocked by the initial choices of the United Nations Security Council in the early 1990s, given the horrors of the conflicts in the former Yugoslavia and, even more so, Rwanda. But why devote massive international efforts to the killings and other crimes attributed to the Khmer Rouge in Cambodia during the 1970s, with their bizarre attempt at social revolution, yet pass in silence on the extermination of hundreds of thousands of communist sympathisers in Indonesia only a few years earlier? Why establish a deluxe international court to deal with a single assassination in Lebanon in 2005 while studiously ignoring other atrocities in that country and neighbouring territories during the same period?

The International Criminal Court promises something better, a universal regime applicable to all. Yet its jurisdiction is mainly dependent upon acceptance by each individual State. The largest and most powerful, as well as some of the most brutal, have yet to join. Indeed, this jigsaw puzzle of jurisdiction looks woefully incomplete, especially in the face of appalling internal conflicts such as those in Sri Lanka and Syria. Nevertheless, the pieces are slowly finding their place. The coverage, though still very partial, is increasingly complete. In contrast with the International Court of Justice, which is a much older institution, the International Criminal Court seems already to be a phenomenal success. About twice as many States have recognised the jurisdiction of the International Criminal Court as have accepted the jurisdiction of the International Court of Justice.

This book appears at a time when international criminal law is passing through a phase of uncertainty about its future. The dynamic presence of temporary or *ad hoc* tribunals that has characterised the past two decades seems to be drawing to a conclusion. These institutions had always been viewed as a temporary substitute for the permanent institution, the International Criminal Court. However, the Court's first years of activity have been marred by frustrating delays, procedural missteps and an extraordinarily deceptive level of productivity. It might be simplistic to measure the health of international justice by the number of ongoing trials. But to the extent this gives even an imperfect insight into the vitality of

the system, it is disappointing to observe that the level of activity in 2015 is significantly lower than it was in 2005. To some, this recalls a wave that is cresting or that has already crested.

In the early 1920s, no reasonable observer could have anticipated that the modest efforts at international justice associated with the First World War were actually the start of something great. The same is true for the post–Second World War years. After the International Law Commission halted its initial work on the creation of a permanent criminal court, in the early 1950s, there was nothing to suggest that the project was merely in hibernation and not frozen to death. The contrast with today is very stark. International criminal justice is firmly implanted within the international order. It is an expectation of the public conscience. It is considered one of the essential tools to deal with conflicts and transitions. Its implementation is demanded by international human rights institutions. Nothing resembling such consensus has ever existed in the past. Thus, although like everything else its growth may not be entirely linear, and it will encounter periods of difficulty as well as those of exceptional vitality, international criminal justice is here to stay.

International criminal justice is a matter not only for international criminal tribunals but also for the domestic system. The international courts have invariably been justified as a replacement for the failure of the relevant national mechanisms to do the job expected of them as institutions dedicated to the rule of law. Occasionally, domestic courts operate as surrogate international bodies when they act under the principle of universal jurisdiction, as in the legendary *Eichmann* trial. Even when national courts are willing and able to prosecute the most heinous crimes, they may be stymied because they require international co-operation in the form of extradition and evidence gathering. The first international criminal law treaty of general application, the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, addressed such issues. Enlarging the regime of international co-operation has also proven to be a great challenge. Only now is the International Law Commission studying a proposed treaty aimed at extending the obligations of the Genocide Convention to the broader concept of crimes against humanity. This results from an initiative led by one of the contributors to this book, Professor Leila Sadat.

Peace, justice and the crime of aggression

Another persistent theme in this book is what might be called the 'peace v. justice' debate. International justice is often associated with transitional justice, a concept that underscores the utilitarian function. Accountability and prosecutions are said to make an important contribution when nasty regimes are replaced or when protracted conflict with an ethnic dimension is being calmed. There are even claims that without justice, peace cannot succeed in the long term, although this is a dubious assertion. In fact, some societies do manage a lasting peace in the absence of accountability; others return to conflict, but the reasons for this are usually more complex than a simplistic assertion that justice was not done. Regardless of whether justice actually assists in post-conflict reconciliation, there is also a strong case that it is an entitlement of victims. This proposition finds support in human rights law where a right to justice and to truth is deemed a corollary of the right to life and to protection against inhuman treatment.

The centrepiece of the Nuremberg prosecutions was the 'crime against peace'. Aggressive war was the evil lying at the core of the atrocities perpetrated by the Nazis and their allies, according to the International Military Tribunal. But when the immediate post-conflict period gave way to the early skirmishes in the Cold War, international law began to have more difficulty with the offence that was being rebranded as the 'crime of aggression'. Debate about its definition ultimately halted all further progress in international criminal law. Work did not resume until the early 1980s. By then, the waging of illegal war seemed to have migrated to the periphery of international criminal law. When the International Criminal Tribunal for the former Yugoslavia was established, in 1993, aggression was not even listed in the Statute.

There was no consensus at the Rome Conference on the importance of including the crime of aggression within the jurisdiction of the International Criminal Court. After protracted negotiations, a package was finally adopted in 2010 at the Kampala Review Conference. The amendments require a somewhat complicated process of ratification that should come to a successful conclusion in 2017. The United States arrived at Kampala after having boycotted the process of crafting the amendments for several years. It tried without real success to adjust a

definition upon which consensus had already been reached. The intent was to carve out an exception so as to ensure that the use of force labelled as 'humanitarian intervention' would not fall within the ambit of the crime of aggression. Of course, this is entirely unnecessary as long as any use of force is authorised pursuant to the Charter of the United Nations.

At Rome, representatives of the permanent members of the United Nations Security Council argued that aggression could not be treated like the other crimes within the Court's jurisdiction. In particular, they contended that an independent prosecutor should not have the authority to initiate charges of aggression in the absence of a blessing from the Security Council. Their claims relied upon a particular interpretation of the Charter of the United Nations. Yet in Kampala, after again insisting that giving such power to the Prosecutor of the Court amounted to indirectly modifying the Charter, the United Kingdom and France sat on their hands and joined a consensus that allowed the unthinkable. Henceforth, unable to ensure impunity for themselves or their proxies by use of the veto, even they may find themselves called to account by the International Criminal Court for the unlawful use of force.

The amendments adopted at Kampala adjust the prerogatives of the permanent members of the Security Council. They continue a process that began in the 1990s as the Rome Statute was being drafted and that is reflected in some of its provisions. The Rome Statute, and the Kampala amendments, trim the authority of the Council, and thereby the extraordinary powers of its permanent members. This accomplishes indirectly what it seems it is impossible to do directly, namely, to amend the Charter. Small and middle powers have used the opportunities involved in the establishment of the International Criminal Court to reduce, ever so slightly, the powers of the five permanent members. These may only amount to small cracks in the system of the Charter. But they are signs of development, manifesting a tendency towards a more democratic and egalitarian world order, one in which double standards are reduced if not entirely eliminated. As Leonard Cohen wrote, '[t]here is a *crack*, a crack in everything. That's how *the light gets in*'.

Part I Purposes and principles