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Genocide and controlling the crimes of the powerful

Augustine Brannigan

Introduction: the idea of cosmopolitan justice

Consensus over the definition and measurement of elite crime has arrived slowly in criminology compared to the prolific theoretical and methodological literature on street crime. The associated correctional and criminal justice literature on garden-variety offenses has pointed the way to avenues of crime reduction. By contrast, the *suppression* of elite crime has proven extremely difficult not only for national justice but also for international justice. There has been *some* progress in the articulation of an effective rule of law in such areas as war crimes, crimes against humanity and genocide. More specifically, there has been a growing confidence about how to define such crimes according to sound standards of jurisprudence in the ad hoc International Tribunals for the Former Yugoslavia (1993) and Rwanda (1994), and the subsequent International Criminal Court (2002). In this chapter, we analyze how successive generations of jurists have pursued Immanuel Kant's 1795 vision of a "cosmopolitan justice." This was conceived of as a system of law that would transcend national justice aimed at ordinary offenders, and alternatively would hold political and military elites personally accountable for criminal acts committed by states against their neighbors and by political elites against their own citizens (Höffe 2006).

In what follows, I will describe the leading twentieth-century efforts to hold warmongers accountable for their crimes. This requires an examination of the legal outcomes of the First and Second World Wars. Initially, these were concerned with crimes *within* war, but were subsequently extended to other forms of atrocity, including genocide, and the crime of *starting* war. Second, we evaluate the effectiveness of the legal regimes created after the Second World War, and their performance during the Cold War. Finally we access the current state of the contemporary legal remedies designed to control crimes of the powerful, and the extent to which the international order has achieved cosmopolitan justice. Our story starts with the Great War (1914–1918) and outlines the halting shift from a regime of international relations characterized by sovereign immunity to a situation in which sovereigns became increasingly accountable for criminal misconduct.

From sovereign immunity to criminal accountability

The year 2014 is the centenary of the start of the Great War in Europe, one of the most brutal, pointless and ill-conceived military confrontations in modern times. Unlike the American Civil War (1861–1865) which was fought over the abolition of slavery, the Great War originated over a complicated diplomacy of face-saving, competing national aspirations for geo-political dominance in Europe and military brinksmanship. War was triggered by the assassination of Austria-Hungary's Archduke Ferdinand and his wife Sophia by Serbian militants in Sarajevo on June 28, 1914. The political ultimatum demanded by Austria-Hungary raised international tensions because it was simply impossible for Serbia to meet its terms. The Austro-Hungarians assumed that the leaders of Serbia were behind the assassination, and that Serbia was capable of apprehending and prosecuting the assassins without delay. Germany guaranteed the security of allies in Austria-Hungary in prosecuting their case against the Serbs. Germany gambled that the Russian assistance to *its* allies in Serbia could not be mobilized before the end of what was expected to be a brief military encounter. Arguing that its diplomatic demands had not been satisfied, Austria-Hungary declared war on Serbia on July 28. On August 1, Germany declared war on Russia, and on August 3 on Russia's ally France. Why France? France had been anxious to recover territory in Alsace and Lorraine lost to the newly united German state following military defeat in 1871. Renewed conflict could reclaim the lost provinces. When Germany invaded a neutral Belgium to occupy France on August 4, this triggered a British declaration of war against Germany. On August 17, Russia invaded East Prussia, and Austria-Hungary struck back at Galicia (Russian Poland) on August 23. In October, Turkey joined the Germany and Austria-Hungary alliance. This was one of the most phenomenal failures of diplomacy in modern European history.

The focus of the war shifted to the Western front by early autumn when the Russians proved no match for the Axis powers in the East. A gridlock of endless miles of trenches appeared, swept with ongoing machine-gun and sniper fire. The largest howitzers and field artillery ever manufactured stripped every sign of agriculture and forest from the open landscape and turned medieval towns and villages into piles of rubble. The battlefields at Ypres, Vimy Ridge and Passchendaele were strewn with decaying and half-buried corpses. The countryside was turned into fields of shell craters filled with mud and human remains. Rats frequently overran trenches. In addition to murderous pounding by artillery shells and bullets, the troops faced poisonous gas attacks. As the stalemate mounted, nations poured increasingly more young men into the conflict. Eventually, the Allies began to prevail. On November 3, 1918, the German navy mutinied at Kiel and seized the city. The Kaiser abdicated his rule on November 9, and Germany became a republic overnight. An armistice was negotiated to end hostilities on November 11.

What was the toll of the fighting and what was actually achieved? By the end of the war, the Allies had mobilized over 42 million personnel, and suffered over 52 percent casualties. These included over 5 million killed, nearly 13 million wounded and 4 million missing or taken prisoner. The Axis powers mobilized 22.85 million, and suffered casualties of 67 percent, including 3.4 million killed, 8.4 million wounded, and 3.6 million missing or taken prisoner (PBS 2014; Trueman 2014). Losses in specific nations were incomprehensible. The Russian army (12 million men) suffered 76 percent casualties, France (8.4 million men) 73 percent casualties, Austria (7.8 million) 90 percent, and Germany (11 million) 67 percent. What was achieved? The battles were fought mostly in France and Belgium, not in Germany. Germany was not occupied. It was not defeated as such. It signed an armistice to end hostilities (as did Austria and Turkey). Germany's Weimar government was subsequently forced into a humiliating peace treaty at Versailles (1919) that set the stage for the mobilization of the subsequent Nazi dictatorship in Germany, and the renewal of hostilities in 1939. The peace arrangements in 1919 portended the first day of the Second World War.

Allied authorities had planned during the war to indict the German Kaiser for his role in plunging the world into such a bloody and pointless catastrophe, and to charge German generals with war crimes. The day before the armistice, the Kaiser fled Germany for sanctuary in the Netherlands. Attempts to extract him to face criminal prosecution in an Allied country were rejected by the Netherlands on the basis of the age-old principle of *sovereign immunity*. What was that? When a previous generation of European warlords concluded the Thirty Year War in the Peace of Westphalia in 1648 they did so on the premise that the parties to the conflict were to be regarded as nations with distinct geographic boundaries, and were governed as autonomous states whose sovereigns were immune from international accountability for behavior within their own boundaries. Sovereigns could be tried by their own subjects in national courts, and could be summarily executed by a conquering sovereign. But the idea that a legitimate sovereign could be criminally indicted before the community of nations for making war against his or her neighbors, or for murdering his or her own subjects was not established in international law until the Nuremberg trials after the Second World War. And even that process was controversial. In the end, the Kaiser had to answer to no one for his role in initiating the First World War and the millions of lives that it had destroyed and injured.

The rule of law at Nuremberg

The Nuremberg trials spanned the period from 1945 to 1949. The main trial, the International Military Tribunal, focused on the prosecution of senior German military leaders, senior ministers in the Nazi government and party leaders for, among other things, orchestrating the Second World War through the subjugation of Poland (1939) and most of Western Europe except England (1940). Six million European Jews were murdered during this period. In total there were over 25 million civilian casualties in Allied countries. Hitler, Himmler and Goebbels – leading Nazis – committed suicide before they could be apprehended. There were 11 further trials which dealt with a range of horrific misconduct under Nazi rule: forced medical experiments on and torture of concentration camp inmates, the recruitment of slave labor into munitions industries, trial of the officers of the mobile killing units, the *einsatzgruppen*, who conducted mass shootings of civilian Jews, Poles and POWs in Poland, Russia, the Baltic states and Ukraine under the cover of war, and the prosecution of senior industrialists and government officials who promoted aggressive war, orchestrated the theft of Jewish wealth, and the forced resettlement of the regime's enemies. What may be surprising to many students of the war was that the charge of genocide was not available at Nuremberg, although the courts heard a great deal of evidence of the mass atrocities against European Jews. *Genocide* combines the Greek 'geno' (group or people) with the Latin 'cide' (murder), and was coined in 1943 by Polish lawyer, Raphael Lemkin, to express the extraordinarily evil of murder perpetuated against an entire human group. It appeared first in print in *Axis Rule in Occupied Europe* (1944). The legal instrument that defined the crime by international convention was negotiated after the war at the UN in 1948. Consequently, the Holocaust as such was not a focus of indictments for the Nuremberg prosecution in 1945. Even when endorsed by the UN, recognition of genocide was subject to adoption by member states at their discretion. For example, the US did not certify the convention until President Reagan signed the Proxmire Act in 1988. This delay was explained in part by the fact that the American Civil Rights Congress had petitioned the UN to have the lynching and murder of, and the segregation laws against US blacks, as well as cases of wrongful conviction, examined by the world body in a document entitled *We Charge Genocide* (1951). It remains a compelling read up until this day.

The second important point in this context was the use of indictments for two *new* crimes. The Nuremberg court was the first to recognize the crime of "aggressive war" or "crimes against

peace." These were hostilities distinguished from war originating in self-defense that had always been deemed lawful. The second new crime was the commission of "crimes against humanity." We shall deal with this below. The immediate problem of indicting sovereigns or persons acting under their delegated authority with a charge of planning and undertaking an aggressive war was that these activities had not been the basis of any prior, sound, international convention. Despite the principle of sovereign immunity, sovereigns *can* willingly surrender some of their autonomy to others for a mutual benefit through international agreement. Had they done so? The Nuremberg prosecution invoked Germany's obligations under a treaty called the Pact of Paris or the Kellogg–Briand Pact. Under the pact, nations had agreed to denounce war as an instrument of national policy (Article 1). Where nations had controversies, disputes or conflicts with one another, they committed themselves to resolving them through diplomacy, and by avoiding hostilities (Article II). The pact was initiated jointly by France and the US in Paris, and was signed by 15 leading nations in 1928. Other nations were invited subsequently to sign the treaty (Article III), and 48 did so. On its face the agreement was symbolic. Any signatory who did resort to war "should be denied the benefits furnished by this Treaty," which suggested that while abrogation of the treaty would not be appropriate, it was not necessarily criminal. The pact did not identify specific penalties for breaches of the agreement (such as capital punishment and life imprisonment *for individuals* as imposed at Nuremberg); nor did it identify a court competent to mediate such breaches (criminal, civil, national or otherwise). In addition, the adoption of the pact did not obligate any signatory to take steps to rectify non-compliance. The three core articles in the English version totaled a scant 270 words (Yale: Avalon Project 1928). When Japan invaded Manchuria in 1931, no penalty resulted – likewise, when Italy attacked Ethiopia in 1935. The pact never achieved traction due both to its vagueness and to an absence of international commitment to it. Moghalu (2008: 34) argues persuasively that its use in 1945 was *ex post facto law*, in effect, holding people responsible for conduct that was not illegal at the time of its occurrence. While this may have been true in retrospect, the judiciary at Nuremberg, composed of judges from the winning countries, accepted it as positive law, suggesting a degree of "victor's justice" in their outlook.

The charges of "crimes against humanity" arose from even more vague circumstances. The preamble to the 1907 Hague Convention on the rules of war referred to how the principles adopted by civilized nations during war were constrained by "the laws of humanity" – without specifying what these were. At the Treaty of Versailles in 1919 the British and French described the wholesale murder of Armenians by Turkish officials in 1915 during the Great War in language reflecting the Hague Convention as "crimes against the laws of humanity." Many states, including the US, objected, suggesting that these were moral outrages but did not constitute positive law. Nonetheless, Britain attempted in the years after the war to prosecute Turkish soldiers and officials for their role in the massacres of Armenians and mistreatment of British POWs, and confined the suspects to jails in Malta in 1920. The trials ended when Turkish forces seized members of the British occupying army in Turkey, and negotiated a "prisoner exchange" for the suspected war criminals (Power 2002: 14–16). In 1945 the Nuremberg Charter defined "crimes against humanity" to include murder, extermination, enslavement, deportation and other inhumane acts directed against civilians before or during war. *Afterwards*, the UN endorsed the Nuremberg Charter (Bassiouni 2011). Crimes against humanity were formally incorporated into the later ad hoc tribunals in 1992 and 1994 and the International Criminal Court in 2002. But initially the basis for indictments for such vague crimes was more philosophical than legal.

In summary, over a period of a century a significant incursion was made into the principle of sovereign immunity, by asserting the responsibility of sovereigns for offenses that had traditionally been beyond the reach of the law. Taking vague concepts, such as the laws of humanity on the one hand, and symbolic treaties, such as the Pact of Paris on the other, and incorporating them into

post-war legal proceedings in 1919 and 1945, accomplished this. In both cases, the laws acquired traction since the courts created to prosecute them dealt from a position of military superiority. This changed the landscape of international accountability for atrocities. The Kaiser's successors could no longer plead sovereign immunity or *nullem crimen sine lege*. But the methods used to achieve this would become something of an Achilles' heel, as later developments would reveal. In the aftermath of the Second World War, and in the optimistic atmosphere associated with the creation of the United Nations, the world was in a receptive mood to consider the general crime at the heart of the Holocaust for which Lemkin had invented the term "genocide."

The Genocide Convention of 1948: its contents and discontents

As a young man, Raphael Lemkin was perplexed by the ability of the Turkish government in 1915 to strip the minority, native Armenians of all their civil rights, their property and, ultimately, of their lives, without penalty or accountability. In his 1933 Madrid paper he described the atrocities in terms of acts of barbarity (violence) and acts of vandalism (destruction of the cultural heritage). He advocated the creation of a multilateral convention that would prevent extermination of human groups as an international crime, and also provide a way of making the perpetrators accountable. He watched in horror as the Nazis unleashed a similar tragedy throughout Europe, directed primarily against the Jews. When the United Nations was created in 1945, he worked tirelessly to promote the adoption of a convention that would recognize, punish and prevent genocide. In 1946 the General Assembly of the United Nations adopted Resolution 96 (1) that recognized the crime of genocide, which it asserted had always existed and was already criminal. It identified in particular the need to punish "the denial of the right to exist of entire human groups . . . whether the crime is committed on religious, racial, political or any other groups." Diplomats subsequently negotiated an international agreement that was adopted in 1948, *The Convention on the Prevention and Punishment of the Crime of Genocide.*

In Article 1 the convention confirmed that genocide was a crime under international law, and that it could occur in peacetime as well as in war. In addition, parties to the convention agreed not only to punish it, but also to prevent it. The *actus reus* of genocide specified the ways in which genocidal conduct could occur (Article 2).

In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

(a) Killing members of the group;
(b) Causing serious bodily or mental harm to members of the group;
(c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
(d) Imposing measures intended to prevent births within the group;
(e) Forcibly transferring children of the group to another group.

The convention also specified that, in addition to genocide, four other crimes could be punished: conspiracy to commit genocide, direct and public incitement to commit genocide, attempted genocide and complicity in genocide (Article 3). In Article 4, the convention identified who was accountable, and named "constitutionally responsible rulers, public officials or private individuals." If war crimes, the conduct of aggressive war and crimes against humanity had become international criminal law after Nuremberg, finally the crime of genocide rounded out the last important step in moving beyond sovereign immunity to criminal accountability through the convention.

Two of the peculiar elements of the convention merit comment. First, the convention protects four specific categories of humanity: those who belong to "a national, ethnical, racial or religious group." The 1946 UN resolution had referred to "religious, racial, political or any other group," The 1948 convention did not mention "political or any other group." As a consequence, persons could be exterminated because of class, gender, political orientation, ideology, age, etc. For example, the Holodomor (extermination by hunger) or "man-made famine" in Ukraine that Stalin undertook to annihilate the political opposition of Kulak peasants who opposed collectivization of agriculture in 1932/1933 would be beyond the scope of the convention because the Kulaks were a prosperous, agricultural class, not a nation. It may be argued with merit that such cases could be prosecuted as crimes against humanity. A major difference is that there is no legal duty to *prevent* crimes against humanity as there is for genocide, and no defined court with jurisdiction.

The second peculiarity concerns the *mens rea* or guilty mind requirement. The convention requires that genocide be committed "with intent to destroy . . . as such" one of the four identified groups – in whole or in part. This is described as the *dolus specialis*. It means that a perpetrator consciously targets one of the protected groups, but that he or she is selecting them specifically because they are members of that group. If group A tried to eliminate group B because of its political beliefs, or because of armed competition for the same resources, and not because of "ethnicality," this would not be covered by genocide. Again, it might amount to a crime against humanity, but the legal framework is significantly different. In addition, this peculiarity of the convention, the *dolus specialis*, increases the burden of proof on the prosecutor, and actually narrows the scope of the law.

The suppression of genocide after 1948 in Frankfurt and Jerusalem

Raul Hilberg (2007), one of the Holocaust's most important historians, suggests that concentration camp survivors wrote the cry of "never again" on signs after the camp was liberated in the spring of 1945. It conveys a commitment to prevent the repetition of the unspeakable mistreatment of Jews by the Nazis. "Never again!" has been repeated by a number of US presidents, although, as pointed out by Power (2002: xxi), none of them ever lifted a finger to suppress genocidal activities anywhere. The fact is that the slogan was about all the attention genocide received in the decades after the UN convention was established – 1948 – and when the first tribunal was created – 1992, which was 44 years later.

At the end of the Second World War, numerous former Nazis were extradited to Eastern Europe to face trials for wartime atrocities. For example, Rudolf Hoess was extradited to Poland where he was tried and executed for his role as commandant of the Auschwitz camp from 1940 to 1943. However, there were charges throughout the 1950s that many former camp guards remained free in West Germany, and that they had escaped accountability for their role in mass murder in Poland. The Auschwitz trial was the most dramatic and high-profile Nazi trial to be convened in the Federal Republic of Germany after Nuremberg. Where Nuremberg was created, prosecuted and adjudicated by the victors, this trial was convened under German law, and prosecuted and judged by Germans. In Frankfurt, 22 persons were indicted under domestic criminal law with the crimes that occurred in Nazi-occupied Poland. They represented a cross-section of the camp's administrative units and ranged in rank from major to private, and included a single kapo (inmate guard). The case was brought to the attention of the Hessian Attorney General, Fritz Bauer. He secured the jurisdiction of the Frankfurt court, and indicted the suspects with murder. The crimes consisted of selecting persons on the railway ramp at Auschwitz for immediate death by gassing, or for forced labor designed to bring about death through exhaustion and starvation. Other crimes

dealt with the murder of hospital inmates by lethal injections of phenol into the heart. There were also periodic purges of units of workers within the camps and individual executions for attempting to escape and for disobedience, and killings arising from "intensive interrogation."

For Fritz Bauer, the purpose of the trial was pedagogical: to educate Germans about their own history (Pendas 2006: 52). It would expose the deep reach of Nazism into German society, and would contribute to the discrediting of Nazi ideology in that society. Bauer attempted to put the entire genocidal complex at Auschwitz on trial, and to demonstrate how the Holocaust was the outcome of widespread complicity of people from all walks of German life. Because the international convention against genocide was *ex post facto* law, the defendants were tried under the 1871 German homicide law that applied in Poland after the German conquest. That law limited liability for first-degree murder ("mord") to those who were *primary* perpetrators and who acted with base motives in taking the lives of others. Accomplices, while guilty, were considered to have significantly lower levels of culpability, particularly in terms of penalty. As a result, the routine activities of forcibly deporting millions of people from their homelands, classifying them on the railway sidings for work or immediate death, and the subsequent act of gassing millions of them, were viewed as regrettable but minor crimes ("totschlag") akin to manslaughter. The real crimes of Auschwitz were equated with individually culpable acts of subjective barbarity, overshadowing state-initiated acts of mass murder. The extermination system was, in the words of Rebecca Wittmann, "beyond justice" and escaped what Devon Pendas described as "the limits of law." Six accused were convicted of first-degree murder ("mord"), but the majority was convicted of being an accessory to "mord" and received an average penalty of 6.3 years. Ironically, the "totschlag" convictions were implicated in the extermination of millions, while the "mord" convictions were based on a handful of cases. Throughout the trials, the defendants acknowledged that crimes had occurred at Auschwitz, but denied their own guilt since they had played a secondary role. The defendants exhibited no sense of remorse, and displayed a sullen indifference to their culpability.

If Bauer had expected the trials to produce a moral epiphany in West German society, nothing could have been more counter-productive. According to Wittmann (2005: 271),

> the public gained a skewed understanding of Auschwitz. The sentences meted out to the defendants distorted the realities of the program of extermination [and] shifted the focus in the courtroom away from Nazi genocide towards individual acts of cruelty, suggesting that . . . the Nazi orders had been acceptable.

The trial failed to register the historical enormity of the events that transpired in Auschwitz. The only deplorable thing that occurred was that some bad apples descended into depravity by resorting to cruelty and torture. Aside from that, murder "by the book" was not noteworthy.

That was not the sentiment conveyed in Jerusalem by the Eichmann trial. Eichmann had been smuggled out of Germany to Argentina with the assistance of church organizations, and lived there under a pseudonym. He was apprehended in 1960 by Israeli agents in Buenos Aires and secretly transported to Israel, where he was tried in 1961 on 16 counts under Israeli law and executed in 1962. The legal situation for Israel was awkward, since the events of interest pre-dated the creation of the State of Israel, and the crimes did not occur in the territory occupied by Israel. However, Israel had an unassailable interest in asserting jurisdiction in the case, since its citizens represented the majority of the survivors of the European death camps, and Eichmann represented a prime subject of interest in injuring them. There was enormous international interest in the trial, since Eichmann had been so intimately associated with the development of "the Final Solution." Eichmann's office had organized the transportation of European Jews to factories in Poland created to erase their physical presence in Europe.

Gideon Hausner, the Israeli Attorney General, initially planned to indict Eichmann for actions with which he was directly associated. He was subsequently persuaded to employ the trial as a vehicle to describe the whole story of the Nazi crimes against the European Jews. The trial became famous following Hannah Arendt's news reports in *The New Yorker*. She described "the man behind the glass" as more of a buffoon than a monster, and coined the term "banality of evil" to suggest that the perpetrators of the Holocaust were not people of deep conviction or commitment, but "desk murderers" who were "thoughtless" drones who acted without reflection in accordance with bureaucratic rules and regulations. This view has been challenged by more recent research. Lipstadt (2011) notes that Eichmann personally negotiated the deportation of 440,000 Hungarian Jews in Budapest in the summer of 1944 to Auschwitz, even after being advised by Himmler to postpone further deportations in order to negotiate favorable conditions with the Allies. Cesarani (2006: 15) argues that Arendt's notion of the banality of evil "strait-jacketed research into Nazi Germany" for two decades by obfuscating the zeal with which Nazis like Eichmann pursued genocide. The execution of Eichmann was a milestone in the halting shift from impunity to accountability in elite crimes, and like Frankfurt's Auschwitz trial, occurred without assistance from the UN genocide convention. History shows that no UN genocide trials occurred between 1948 and 1992, but does that mean that there were no further genocides?

The forgotten genocides

Chalk and Jonassohn (1990) review a number of cases of atrocities that ought to have attracted the attention of the UN member states as potential cases of genocide during the period we are examining. We review five cases. The first case involved the retaliation of the Indonesian army against members of the Indonesian Communist Party (PKI) following a failed coup in 1965. The army initiated the killings against unarmed PKI cadres and party members, and subsequently recruited civilian groups to follow suit. It is estimated that the numbers killed throughout the archipelago totaled a staggering 500,000 and another 500,000 arrested within a six-month period. There was no US or UN intervention. The killings were portrayed in a recent documentary, *The Act of Killing*, in which members of one of the ad hoc murder squads re-enacted how they kidnaped, tortured and murdered suspects – without any sense of remorse, guilt or misgivings.

In Burundi, in 1972, the Tutsi army exterminated an estimated 200,000 Hutus, claiming that it was responding to a coup designed to overthrow the Tutsi-led government. The army targeted well-educated Hutus, persons of some wealth, and those employed in the civil service, wiping out fully half of the Hutu teachers, and other professionals in a period of months. "The U.S. government never publicly rebuked the Burundi government" (Chalk and Jonassohn 1990: 391). Only Belgian Premier, Gaston Eyskens, condemned the massacres as "veritable genocide." However, no one was ever called to account, and the UN failed to act (Lemarchand 1994).

The third case was the massacre of citizens in Bangladesh in 1971. "Between one million and three million were killed" by the Pakistani army before the latter were defeated by the Indian Army (Chalk and Jonassohn 1990: 396). Two million people were made homeless, and 10 million became refugees. This case was described recently in Bass's book, *The Blood Telegram: Nixon, Kissinger and a Forgotten Genocide* (2013). Arthur Blood was head of the US diplomatic mission in Dacca when the Bengalis elected their first representative government in what was then East Pakistan. Fears that they might secede brought out West Pakistani military reprisals in force. Arthur Blood brought the unprovoked violence to the attention of then US President Nixon and Secretary of State Kissinger, imploring for US intervention. Since West Pakistan was strategic in opening diplomatic ties to the PRC, Nixon refused to speak out. The entire diplomatic mission in Dacca committed career suicide by condemning its own government for failing to acknowledge the genocide.

Chalk and Jonassohn's fourth case was the Cambodian genocide of 1975 to 1979 in which 1.7 million people were murdered by the Khmer Rouge after Pol Pot's occupation of Phnom Penh. Most of the targets of the massacres were Cambodian nationals. A hybrid national–UN tribunal was created at the Extraordinary Chambers for the Courts of Cambodia 30 years after the defeat of the Khmer Rouge.

The last case was the invasion of East Timor in 1975 by Indonesia. The Indonesians supported a small pro-Indonesian political party that opposed the main parties seeking political independence from Portugal. The Indonesians conducted a campaign of murder and terror against the indigenous people, including massacres of citizens and carpet-bombing of villages and towns to exterminate the armed opposition to the invasion. There was a policy of starvation pursued to neutralize opposition to the forced annexation of the country. Kierman (2007: 578) estimates that these policies were responsible for the death of over one-fifth of the population. In addition, the Indonesians sponsored a transmigration program to replace the indigenous people with immigrants from Java and Bali. In 1999 the rebels declared independence, and the nation's autonomy was recognized in 2002. The UN repeatedly passed motions to criticize the illegal Indonesian occupation of the country, but these actions were always blunted by Indonesia's ally in the Security Council, the US.

What all these cases have in common is the wholesale massacres of civilians by national or colonial armies and militias. None of these cases attracted a speedy judicial remedy as provided for in the UN Convention. The Cambodia case was pursued after a delay of three decades (and not always for genocide). Unlike the Frankfurt and Jerusalem trials which dealt with events that pre-dated the convention, these cases occurred post-1948. They also occurred during the Cold War, a fact that led the US to shelter allies in Indonesia and Pakistan, and ignore events elsewhere of no geo-political significance (Burundi, Cambodia). This is the Achilles' Heel alluded to earlier – geo-political considerations may have expedited justice at Nuremberg, but in the longer run, genocide courts required more autonomy.

The ad hoc tribunals for the former Yugoslavia and Rwanda

The first tribunals to apply the 1948 convention were created to deal with the genocides in the former Yugoslavia and Rwanda. The tribunals were an attempt to repair the damage to the UN's credibility, and the political failure of the major Western players – the US, France, Britain and Belgium – to honor their obligations under the convention. According to Carla Del Ponte, "it was a diplomatic *mea culpa*, an act of contrition by the world's major powers to amend for their gross failure to prevent or halt the massacres" (2008: 69; see also Cruvellier 2010). In the 45 years following its adoption, the convention was never invoked. In some cases the victims were not within the protected categories, but in other cases they were. There may be another problem suggested in the controversy over Darfur. In *Darfur: The Ambiguous Genocide*, Prunier (2005) labels the conflict as the "first genocide of the twenty-first century," a view shared with Totten and Markusen (2006), and Hagan and Rymond-Richmond (2009). For Mamdani (2007, 2009), and de Waal (2004), the labeling of genocide is inappropriate because the events developed in the context of political insurrection that witnessed atrocities on all sides. Nonetheless, the UN did take action in 1992 and 1994 in creating the first ad hoc tribunals for the former Yugoslavia (in The Hague) and Rwanda (in Arusha, Tanzania).

Have the new ad hoc tribunals succeeded where the Auschwitz trials failed? After all, the new courts have had the advantage of legal doctrines that explicitly recognized liability which the 1881 German homicide law lacked. They also enjoyed the moral and financial support of the Security Council of the UN. In 2004, the UN Assistant Secretary-General for Legal Affairs

shocked his colleagues when he publicly expressed doubts about the ICTR and ICTY; Ralph Zacklin (2004: 545), who helped create the tribunals, wrote in the most disparaging terms about them: "the ad hoc tribunals have been too costly, too inefficient and too ineffective. As mechanisms for dealing with justice in post-conflict societies, they exemplify an approach that is no longer politically or financially viable." Wittmann and Pendas said the fault lay with the law. By contrast, Zacklin claimed it was the institutional success of the tribunals that had appropriated a world to them disconnected from the realities of finance, and distantly removed from the victims in whose name the proceedings were convened. The accomplishments, in terms of convictions, were modest, their progress was glacial, and their contribution to the restoration of social peace was largely non-existent. What has changed since 2004? Adam Smith (2009) presents a sobering report of the tribunals that reinforces Zacklin's misgivings. We deal first with finances.

> The courts have been monumentally expensive. The yearly ICTY budget from 1993 to 2007 expanded a thousand-fold, from $276,000 to $276 million . . . from 1993 to 2007 the ICTY cost $1.2 billion, and is on pace to cost as much as $2 billion by the time it completes its mandate in 2010. Judicial productivity, however, has seemingly not matched the expense. The average cost per conviction at the tribunal has been estimated at nearly $30 million, more than fourteen times the average cost per capital conviction in the United States. . . .The Rwandan tribunal is somewhat less costly, though it is projected to also have spent more than $1.4 billion by the time it finishes operations in 2010.

The tribunals made up about 15 percent of the entire UN budget (Smith 2009: 182–183).

At the ICTY there were 190 judgments completed as of early 2014, including 20 acquittals. The ICTR reported 59 cases completed, including 12 acquittals. There were 16 cases under appeal at the ICTR and five cases at the ICTY representing 18 individuals. Despite procedures to wind down the tribunals in 2012, neither has been able to clear its caseload completely. The enormous cost overruns at the ad hoc tribunals motivated the UN to pursue "hybrid" jurisdiction in subsequent cases of genocide. The hybrid courts in Sierra Leone, Cambodia, East Timor and Lebanon were created in part as a result of cost escalation at the ad hoc courts. How have they faired in comparison? In the case of the Special Court for Sierra Leone, Smith (2009: 183) reports that "the original budget was very ambitious and called for only $54 million over 3 years; since the special court's opening in 2002, that amount has more than tripled," and the three-year mandate has morphed into eight. That was for ten cases, but the most important case – Charles Taylor – was moved for security reasons to The Hague, duplicating much of what was already invested in Freetown. The costs for the Khmer Rouge genocide trials at the Extraordinary Chambers in the Courts of Cambodia were reported by Rebecca Gidley (2010: 14): "in terms of its finances, the budget for the court from 2005 to 2010 is US $142.6 million." Gidley comments that this is a lot less than either the ICTR or the ICTY, but she fails to mention that there were only six accused in the docket. In addition, the International Justice Tribune (RNW 2010) points out that "for 2011, the total budget of $46.8 million is unfunded" – which suggests that the projected costs are nearly US$189,000,000 if one includes 2011– or about US$38,000,000 per case. The hybrid courts do not appear to be less costly than the ad hoc courts on a per accused basis.

In Arusha, prior to the ICTR, it would be difficult to find a store that sold computer supplies, let alone facilities to hold witnesses under protective custody. The entire substructure of the actual physical plant, and the superstructure of judges' chambers, offices for prosecutors and defense counsel and their investigators, translators, courtrooms, visitors' galleries, law libraries, security offices, lunch rooms, archival and computer resources – not to mention plumbers and electricians – all had to be created where nothing had existed beforehand. No one entirely

foresaw this cost. The disconnects between the proceedings in Arusha and the audience in Kigali, or between the proceedings in The Hague and the audiences in Sarajevo and Belgrade, were not anticipated by anyone. And no one anticipated the cronyism, corruption and incompetence of the persons appointed by the UN to run these organizations, particularly in Arusha and Kigali. Nonetheless, the courts were created, and made some progress towards the Kantian ideal of cosmopolitan justice. The ICTY apprehended Milošević, Karadžić and Mladić, leaders of the forces that led to genocide and war crimes in Bosnia. The ICTR apprehended Jean Kambanda, the Prime Minister of the genocidal Rwandan government, and Théoneste Bagosora, the chief of staff who oversaw the start of the Rwandan genocide. And the joint appeal tribunals laid down a body of jurisprudence that has helped clarify the law of genocide, crimes against humanity and war crimes. In this respect, the international world order is a far more accountable environment compared to the situation in 1918 when the Kaiser could hide behind sovereign immunity. However, these courts were ad hoc enterprises with limited jurisdiction. They have been superseded by a permanent criminal court, the International Criminal Court. This is the most recent chapter in the legal attempt to hold sovereigns responsible for international humanitarian crimes. We turn now to that institution to assess its effectiveness.

Conclusion: the International Criminal Court

The Rome Statute created the ICC that was supported by120 nations at a UN diplomatic conference in 1998. Seven states opposed the Rome Statute, and 21 abstained. It came into being in 2002, by which time over 60 countries had ratified the treaty. The new court is situated in The Hague. As of 2014, there were 21 cases in various stages of progress, derived from eight "situations," all from Africa (Uganda, Darfur, Central African Republic, Democratic Republic of the Congo, Kenya, Côte d'Ivoire, Mali and Libya). The cost of the court is managed by the Assembly of States Parties (ASP) and, like the ad hoc courts, has been steep – about half a billion euros from 2002 to 2009, or about €100,000,000 annually in recent years (Mettraux 2009) (about US$160,000,000). The ASP consists of states which are party to the treaty, and who support the court financially. As of early 2014, the court had convicted two individuals in the DRC situation (Thomas Lubanga Dylio for conscripting child soldiers; Germain Katanga as an accessory to crimes against humanity and war crimes), and acquitted a third (Mathieu Chui for crimes against humanity and war crimes).

The court faces several key stumbling-blocks. The primary one is that none of the superpowers has joined the convention, including the US, the Russian Federation, India and the People's Republic of China. The second major stumbling-block for the court is the inability of the contracting parties to reach a consensus on the definition of aggression, the crime that was the centerpiece of the Nuremberg prosecutions. This is critical in light of Russia's intervention in Georgia in 2012, and the annexation of Crimea in 2014, and the US/British invasion of Iraq in 2003, and NATO operations in Kosovo in 1999. The third major stumbling-block has been the preoccupation with situations in Africa. Since the court does not sit in Africa, its operations have been criticized as neo-colonial, and the non-participation of the leading powers mentioned earlier means that we will not find nationals from those states facing justice at the ICC. These problems may be overcome with time, but they are far from ideal.

What may reasonably be concluded from this short overview of the attempts to control the crimes of the powerful through the law of genocide? If we take the longer view, there has been a remarkable diminution of the impunity with which sovereigns can evade criminal accountability in international law. This fact is offset by another: just as the world has evolved a mechanism to achieve cosmopolitan justice through the creation of the International Criminal Court, the major

superpowers have absented themselves from its jurisdiction by failing to support the convention on which it is based. This raises several points. First, legal change of the sort underpinning the creation of the ICC is extremely slow to materialize. This is because justice and politics are so densely intertwined, and parties with power can choose the conditions of submission under which to advance their self-interests. This power dynamic is at the heart of the UN and the Security Council because the superpowers control the political veto over any international sanctions that could challenge their hegemony. Another impediment to the development of an effective system of restraint is the bias in the focus on developing nations in Africa which have little power either to introduce security on their own terms, or resist the neo-colonial incursions made by the ICC which fill the legal vacuum. Costs are another impediment to restraining the misconduct of the powerful. Every case of every warlord in Africa will require tens of millions of dollars to resolve, and will test the tolerance of the middle powers who actually fund the new court.

Last word. The best hope for a system that provides a significant check on the excesses of sovereigns is a renegotiation of the scope of sovereignty. Nuremberg provided a check on sovereign immunity, but globalization may offer keys for future development in which the power of sovereigns is re-conceptualized as a balance of political autonomy combined with a responsibility to the community of nations and to the governed. Since this is not likely to be a priority of the current superpowers, the initiative devolves to the middle powers – Germany, Canada, Nigeria, Brazil, Japan and so on – to negotiate the demise of the obsession with power in favor of the endorsement of the value of freedom. That will take time, but globalization may force the issue.

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