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International criminal jurisdiction

A guarantee of greater security and peace or political shadow-boxing?

In this text Hankel reviews the history and origins of the International Criminal Court. He shows just how difficult it is to keep international courts free of the particular interests of individual countries. If it becomes acceptable for some countries to be "more equal" than others, then, according to Hankel, international jurisdiction will be nothing more than a means to self-assertion.

It may seem curious and even absurd, to want to talk today about international criminal jurisdiction. Our first response is, that the second of the two alternatives mentioned in the title is probably more true, and that international criminal jurisdiction should indeed be described as shadow-boxing, as an illusion, which is supposed to pull the wool over our eyes, while, as always, pure power politics prevails.

The reasons for such a reaction can quickly be listed. The first is the refusal of the only remaining superpower to accept international criminal jurisdiction. Whatever may be good for others – Yugoslavs, Rwandans and in future also Cambodians – it rejects and opposes for itself. The fact that other powerful states such as Russia or China are sceptical of this jurisdiction is of little more than marginal interest in this context. First, Russia has already signed the statute creating an International Criminal Court and not subsequently withdrawn its signature like the USA. Second, neither Russia nor China foster a human rights, democracy and freedom discourse which would lead one to expect the idea of international jurisdiction to be compelling and makes its vehement rejection all the more incomprehensible.

The second reason for a pessimistic reaction is directly related to the Second Iraq war. This war, whose illegal character can easily be demonstrated, has harmed the international legal order. At the same time the belligerent powers and the alliance supporting them, by disregarding the ban on force in the United Nations Charter, damaged the foundation on which the idea of international jurisdiction could arise, namely that there is a minimum standard of human rights binding on all states, which if not met must be penalised. The *tu quoque* [you also] argument with reference to the prohibition on a war of aggression, apparently long ago abandoned, threatens in future to be brought into play again as justification; and everything that we have thus far learned about the conduct of the war in Iraq shows once more that *ius in bello* [law in times of war] appears in its perception and application to be subject to varying standards. So what is the point of international criminal jurisdiction? Given what has just been outlined, is it not miles away from what, in 1945, reflecting the pathos of the moment, no doubt, but conscious of speaking on behalf of the conviction of the community of nations, the American chief prosecutor at the

Nürnberg (War Crimes) Trials, Jackson, conjured up: "We must never forget that tomorrow history will measure us by the same standard by which we measure the accused today. To hand these accused a poisoned cup, is also to raise it to our own lips."¹

The first proposal to set up an international criminal court, which went beyond mere expression of a wish and contained concrete ideas with regard to structure and areas of competence, was made by the Swiss Gustave Moynier with the atrocities committed in the Franco–Prussian War of 1870/71 still fresh in his mind.² Like others who advocated a humanitarian minimum level of protection in wartime and argued for the elaboration of appropriate conventions, Moynier believed in the triumphal march of reason, in reason not only in technology and science, but also in international politics. In future, wars, so he and many others were convinced, would no longer be fought, thanks to a sober cost–benefit analysis, and if they should nevertheless occur, then in a restricted form, which would set tight limits on the use of force.

The picture of a future peaceful world was shattered in the First World War. It was the German Empire which bore the greatest blame. The invasion of neutral Belgium and of Luxemburg, unrestricted submarine warfare, a conduct of war directed against civilian populations, as exemplified by mass executions and deportations, very quickly brought calls in the countries fighting Germany for punishment of those responsible. The principle of *In amnestia substancia pacis* [amnesty is the substance of peace] established since the Peace of Westphalia was to be consigned to the past. A new peaceful order only seemed possible, if the determination of the victorious powers no longer to accept violations of fundamental norms of international law found expression in it. Thus Articles 228 and 229 of the Versailles Treaty³ contained the demand, that German military and civilian personnel, who according to the Allies were suspected of having committed war crimes should be tried by an Allied military court and even, if the crimes had been committed in several Allied countries, by an international court. The former German head of state, the ex–Emperor Wilhelm II, was also to stand trial before an international tribunal (Article 227 of the Versailles Treaty) for violating international morality and the sanctity of treaties (the peace–makers were thinking in particular of the German invasion of the neutral countries of Belgium and Luxemburg). Nothing came of it. Wilhelm II had been given asylum in the Netherlands and was not extradited, which the Allies came to terms with, some very quickly, eg the USA, which referred to the legal principle *par in parem non habet iurisdictionem*, in its opinion valid in customary law. Other Allied states, France and Great Britain, for example, found the refusal to extradite the Kaiser harder to accept, because they posed the far from irrelevant question, how one could sentence one of the Emperor's subordinates, if the latter appealed to an order of the Emperor, but the Emperor himself had not been called to account.⁴

Ultimately this concern was of no further interest, since neither did anything come of the planned sentencing of suspected German war criminals. The government of the Reich refused to hand over the accused, and after a great deal of diplomatic wrangling the Allies accepted the decision in return for an undertaking by Germany to put the accused – there were about 900 – on trial itself.⁵

This did indeed occur, although on a very limited scale compared to the number just mentioned: In 1921 and 1922 trials took place before the Reich Court in Leipzig of a total of 17 accused, in ten cases resulting in prison sentences of between six months and five years and in the other seven in

acquittal. The legal basis of the proceedings was primarily German law, solely the question as to the unlawfulness of the act was judged in accordance with international law. An example: A major was accused of having given his soldiers the order, after an engagement in France in August 1914, to shoot the captured and wounded French soldiers. The order was carried out in 30 to 50 cases – the precise number could not be determined. The major, however, maintained, that the order was not his own, but that he had merely passed on an order from his superior brigadier-general. This was, in turn, vehemently denied by the brigadier, and the Reich Court believed him. It sentenced the major to a two year prison sentence for manslaughter through culpable negligence (para. 222 of the StGB – German Criminal Code).⁶ According to the court he had acted without closer scrutiny of an order contrary to the conventions of war (Article 23 c of the Hague Land Warfare Convention forbids the "killing [...] of an enemy who is laying down his arms or is defenceless, who has surrendered unconditionally").

The judges of the Reich Court were, of course, not impartial. Some had themselves served in the war and their value system and class sympathies acquired under the Empire stood in the way of the thought, that a senior officer, a general no less, could have been involved in something like a war crime. In addition the judges, too, were part of a population, which in the face of a defeat which came as a surprise after all the wartime propaganda, felt – in the words of Sebastian Haffner – like someone "who for years has been taking large sums of money to the bank, and one day asks for a statement only to discover that instead of a fortune he has a crushing burden of debt [...]".⁷ They didn't want another disappointment and humiliation and least of all participate in it.

On the other hand, when Germany refused to hand over those accused of war crimes to Allied states, the German justice minister, Schiffer, had given the following assurance: "The high regard which the German supreme court enjoys in all civilised states, provides a complete guarantee that justice alone will prevail regardless of person."⁸ And the German National Assembly had passed a "Law for the Prosecution of War Crimes and War Offences" which obliged the Reich public prosecutors to pursue all criminal acts "which a German has committed in Germany or abroad during the war up to 28th June 1919 against citizens of enemy states or enemy property."⁹

This self-imposed standard is, however, incompatible with the fact, that in numerous proceedings, despite indisputable evidence, nothing happened and that the soldiers responsible – if objectively a crime could not be overlooked – were allowed mitigating circumstances due to a lack of awareness of wrongdoing and so absence of intent. That's one thing. The other is, that in the grounds for its orders to stay, proceedings at the Reich Court involuntarily made clear how far removed the German conception of law was from that of international law, for example in the interpretation of the concepts of the custom and necessities of war. Thus the Court saw no legal problem where members of the civilian population had been victims of summary executions (that with reference above all to the suppression of the alleged Belgian popular war and was sweepingly justified with the custom of war), although international law at that time already no longer permitted executions without a preceding trial.¹⁰ Nor did the Court see a problem where the law of war was breached in order to secure a tactical or strategic advantage. It thereby made observance of the rules of the Land Warfare Convention dependent on considerations of pure expedience. What the states at the Hague Conferences had thought obligatory for the conduct of war, and only to be breached in

specifically indicated cases, was in the German view something that could be administered as any commander thought fit. The principle "the manner of war goes before reasons of war", that is, the way in which war is conducted must take precedence in the determination of war goals, was reversed and became "reasons of war go before manner of war", that is, the goal of war determines and legitimates the means necessary to its achievement.

In view of this outcome it can be no surprise, that what had merely been discussed after the First World War was now put into action after the Second: An international tribunal was set up, which was to be responsible for the punishment of war crimes, of crimes against humanity and of crimes against peace. In terms of international law this complex of crimes was not new. Already after the First World War the Allies had put on record a list of 32 offences, which acts they regarded as contrary to the laws of war and therefore criminal.¹¹ As far as crimes against peace and/or against humanity were concerned, these, too, had already come up during the First World War. They were discussed, but then the idea was deemed not yet useful: To begin a war was not a crime, it was, however, an act that should be politically condemned, was the consensus of opinion at the time. In other words, it is not yet an unlawful act, but one whose assessment suggests it is one.¹²

Crimes against humanity are distinguished from war crimes, which are committed against enemy soldiers and civilians, in that in the first instance they refer to crimes against the civilian population of a state conducting a war, committed precisely by this state. It was brought up for the first time in order to include and punish the mass murder of the Armenians in 1915/16. At the time, however, matters got no further than the intent, because the offence of "crimes against humanity" was rejected, in particular by the USA, which considered it too imprecise and held that the concept of humanity changed according to the times and point of view; morally speaking it was arbitrary.¹³

It is a matter of dispute, whether crimes against peace and crimes against humanity were already acknowledged in law in 1945 or not. In Germany, majority opinion held that it was newly created law and their introduction was considered a violation of the prohibition on retroactive effect. Elsewhere, however, there was a different opinion. The strict principle *nullum crimen, nulla poene sine lege* [no crime, no punishment without a law] did not apply in international law. Only no crime without a law applied, which required simply that a certain act be acknowledged as unlawful, nothing more. It must be emphasised, however, that German reservations with respect to developments in international law were of no great significance. Since Nürnberg the three groups of serious crimes in international law, against which every state macro-criminality has to be measured, are

a) Crimes against peace,

b) War crimes,

c) Crimes against humanity

involving specific kinds of punishable acts (murder, manslaughter, ill-treatment, deportation, wilful destruction etc.). Yet another crucial development had taken place: The three sets of crimes were original norms of criminal law, they did not serve as indicators of unlawfulness on the basis of a national law as had been the case in the proceedings before the Leipzig Reich Court, but were a direct authority for individual sentencing. And in the context of this individual sentencing it was now the case that even the occupation of high and highest offices is no protection against punishment (Article 7 of the Statute for the International Military Tribunal). Whether head of state or military commander in chief, each would have to justify his actions and would

not be granted any immunity.

That was, all in all, a significant step. A state which, thanks to its criminal policies had excluded itself from the community of nations, is, personified in its military and political decision-makers, put on trial and sentenced. But how did practice after Nürnberg turn out? At first what happened looked altogether promising. In December 1946 the UN General Assembly confirmed the legal principles which had found expression in the Nürnberg judgements as the "Nürnberg Principles". A few years later they were adopted by the UN International Law Commission (ILC) and have since then constituted the foundation of all reflections on a liability to punishment directly derived from international law.¹⁴ They are:

- responsibility under international law is independent of the provisions of a national system of laws;
- acting in an official capacity does not exclude liability to punishment, so that a head of state is also subject to international law;
- acting on orders is fundamentally no grounds of justification or excuse;
- the three Nürnberg complexes are the centrepiece of the substantive criminal law.¹⁵

However, the codification of a substantive criminal law was one thing, its enforcement quite another. Realistically that could only be achieved if there existed an international criminal court. But that was precisely the problem, as demonstrated in exemplary terms by the controversy over the Genocide Convention. This Convention, whose full name is the "Convention on the Prevention and Punishment of Genocide" and which was accepted by the UN General Assembly in 1948, declares in Article I, that genocide is a crime "in accordance with international law", and consequently obliges the signatories to the convention to punish it. Article VI, accordingly, contains the ruling, that "persons, accused [...] of genocide, will be put on trial before a competent court of the state, on whose territory the act was committed, or before the international court, which is competent for the parties to the agreement, which have recognised its jurisdiction."

Probably no one would ever have denied, nor would they be likely to do so today, that there is something absurd about the idea of a state pursuing through its courts a crime, which would not have been possible without its participation. Only slightly less unrealistic was and is the hope, a change of regime could guarantee a punishment of the mass murderers.¹⁶ There remains the alternative of the punishment of genocide by an international criminal court. But such a court was precisely what many states, anxious to preserve their sovereignty, did not want. Already at the drafting conferences the delegate of the Soviet Union declared that the prevention and punishment of genocide must be the business of national legislation and not "be left to a vague international criminal law and jurisdiction."¹⁷ The delegate of the USA warned, "that the principle of universal jurisdiction was one of the most dangerous and unacceptable principles, and he hoped that the [Drafting] Committee would reject it".¹⁸ China appeared less negative. The decision was admittedly of little practical importance, according to the Chinese delegate, however, it contained "the expression of a hope."¹⁹

Only a few years after the murder of the European Jews and the recognition that because of the extensive participation of German state organs in this crime those responsible would have to be sentenced by an international tribunal, the then most powerful states in the world were coming out against an international criminal jurisdiction. When the Soviet Union signed up to the Convention in 1954, it did, however, not lodge any reservation against Article

VI, nor did China in 1983. The USA, on the other hand, accompanied its accession in 1988 inter alia with a reservation and an interpretative understanding, both of them rejecting any obligation to set up an international court.²⁰ This uncompromising attitude on the part of the USA and the fact, that it could be used by other states as a justification or excuse for their own position was largely responsible²¹ for blocking the work of the ILC on the Statute of a permanent International Criminal Court. Not until almost the end of the Cold War did the consequent resignation within UN committees disappear. An international criminal jurisdiction was part of a new world order, so it was thought.

In 1993 an International Court for the Former Yugoslavia was set up by the UN Security Council. This was followed in 1994 by the establishment of a second international court, that was supposed to be responsible for dealing with the genocide in Rwanda. In both cases the Security Council referred to Chapter VII of the UN Charter, confirming a threat to world peace, for whose restoration and preservation the work of the courts was the most suitable means.²² The courts were intended to have a deterrent effect, they were intended, as the resolution to establish the Rwanda Tribunal states, "to make a contribution to putting a stop to these violations [of humanitarian international law] and creating effective remedial measures".

If we recall the events of the time, we must conclude, that this desire was carried along by a great sense of helplessness and also that there is an element of hypocrisy involved. When the resolution was accepted in November 1994 the genocide in Rwanda had already come to an end four months earlier and had cost the lives of about 800,000 people. There was no longer any need to "put a stop or create remedial measures", the *Front Patriotique Rwandais* had already taken care of that, by driving out the Hutu mass murderers, to whom the United Nations had earlier surrendered the country without a fight.²³ And as far as the war in the Former Yugoslavia was concerned, the massacre at Srebrenica was still to come, where almost 8,000 people were murdered in the course of a few days.²⁴ The war was only brought to an end, when the United States attacked Serbian positions from the air and forced the warring parties to agree to the Dayton Peace Treaty. So here, too, the setting up of an international court had no discernible influence on the restoration of peace.

It's very evident, that the aim and object of an international criminal jurisdiction is not the short term deterrence of perpetrators. The machinery of violence spins too fast for it to be stopped by legal means. In the first instance an international court will act in the same way as a national one, i.e. it will designate an action as lawful or unlawful and concern itself with the possible punishment of the perpetrator. To what extent this also serves, as does internal state law, for the clarification of norms and positive prevention, must be left open for lack of empirical evidence.²⁵ What is certain, is that by clarifying a particular course of events and the background to it, international justice can make clear to the victims, that what happened to them, should not have happened, that they were the victims of crimes, that they will be recognised as such and consequently have a right to help and financial compensation. At the same time this is also a means of combatting the emergence and consolidation of historical myths, which again and again give rise to a desire for revenge on the alleged enemy. In this they make a crucial contribution to the historiography of events. The ascription of individual responsibility prevents the accusation of a collective guilt and establishes an important prerequisite for something like a process of rapprochement and reconciliation to become possible at all. However, a further qualification is necessary here: The court

must never, whether through the conduct of proceedings by the judges or through the investigations of the prosecution, allow the suspicion of partiality or – put more cautiously – of political compliance to arise. The Rwanda Tribunal was from the start dogged by the accusation that it owed its establishment solely to the bad conscience of the international community, which wanted to make up for looking the other way before and during the genocide. Hardly anyone in Rwanda today has something positive to say about the court, indeed reference is also made to the degrading manner of the examination of witnesses, the corruption in the court's administration and above all the extremely meagre outcome – only eight sentences in the last instance in the almost nine years of the court's activity.²⁶ The balance sheet of the Yugoslavia Tribunal certainly looks better, yet it too is often accused of calling Serbian suspects to account with great zeal, while suspects from Croatia and Bosnia–Herzegovina are hardly touched.²⁷ Furthermore, one can hardly fail to notice, that the first charge against Milosevic, which even favourable commentators on the work of the court describe as "cobbled together",²⁸ coincided with the start of the illegitimate (in terms of international law) Kosovo War, raising the suspicion that there had been prior consultation between the tribunal and NATO. The impression of an instrumentalisation of the tribunal is further reinforced if the decision of Carla del Ponte, the chief prosecutor of both ad hoc tribunals, not to initiate any inquiries against Nato states for committing war crimes in Kosovo, is taken into account.²⁹ The claim that Nato "air attacks did not target civilians", as del Ponte maintains, is contradicted, for example, by the raid at Varvarin (in the course of two attacks on a bridge near the small Serbian town of Varvarin on 30th May 1999 ten civilians were killed and 16 wounded).³⁰

One can try to refute such misgivings or objections by arguing that the punishment of war criminals or of demagogic, genocidal politicians cannot be regarded as an evil. Even if it occurs as a result of political calculation or of a deal – granting of a loan in exchange for surrendering an accused – then no harm is done. And the fact that not all criminals of this kind are punished, does not mean that no one at all should face trial.³¹ On the other hand, it will have to be admitted, that these reflections, while in accordance with the idea of retribution³², which is in fact very controversial, otherwise clearly violate the principle of equal treatment. The law will be experienced as arbitrary by those affected and lose its authority. With time it will become very difficult and in the end impossible to communicate to what extent it is intended to promote justice or reconciliation, if almost exclusively members of one party to a war are sentenced.³³

The danger of a selective application of law was then the primary impulse lending the working out of a statute for a permanent international criminal court its particular urgency. It should no longer be possible to make the accusation, that an international criminal jurisdiction was being set up for "the others". Whether small and weak or large and powerful, all states should be subject to the same legal standard. Jackson's appeal, so it appeared, would finally gain a hearing.

On 18th July 1998 everything was ready. In Rome the overwhelming majority of a conference of states adopted the Statute for the Establishment of an International Criminal Court.³⁴ According to Article 1 of the Statute the Court has jurisdiction over persons, who have committed "crimes of international concern". Article 5 lists them. Genocide, crimes against humanity, war crimes and the crime of aggression fall under the jurisdictional authority of the court, the crime of aggression, however, only when there has been substantive

clarification of what is to be understood by it. On July 1 2002, after the 60th ratification document had been deposited, the statute came into force. In March 2002 the 18 male and female judges of the Court were chosen and one month later the assembly of treaty states elected as chief prosecutor Luis Moreno Ocampo of Argentina. At present, more than 200 petitions have already been registered, all of them concerning possible crimes, which have occurred since 1st July 2002, since the temporal jurisdiction of the court does not begin until that date. As numerous posts still remain to be filled, the court will not begin its work before 2004.

That all sounds very positive and it would be, too, if the International Court enjoyed acceptance and support. Almost 140 states, who have signed the Statute and a good 90 states, who have ratified it, should speak for itself. Yet it's often possible to get the impression, that enthusiasm for the establishment of an international criminal court is in inverse proportion to its anticipated real importance. The fact, that China rejects an international criminal jurisdiction, has already been mentioned. And the fact that of the states which emphatically advocate the necessity of a world criminal law and its observation, it is France that has excluded the competence of the court for war crimes committed by French citizens for a period of seven years,³⁵ gives off a particularly bad smell. On the other hand this does not weigh so heavily thanks to the time limit, especially as on the occasion of this declaration, France once again reaffirmed the general obligation to prosecute the most serious crimes against international law. Much worse, because of the exemplary role long accorded it, is that the United States bitterly opposes everything which even has anything remotely to do with a criminal jurisdiction which would bind it also.

If one looks for the reasons, then there is first of all the ruling in Article 12 of the Statute for an International Criminal Court. Thus Article 12 (1) provides that the Court can exercise its jurisdiction over citizens of treaty states, Article 12 (2) (a), however, extends this competence to include cases where the criminal acts have taken place on the sovereign territory of a state, which is a signatory of the statute. That means, therefore, that the Court can then also extend its investigations to citizens of non-treaty states, insofar as they participated in the crime. It was precisely to avoid this, that the USA pressurised³⁶ the UN Security Council into adopting a resolution,³⁷ which – first of all for the duration of one year and subsequently renewable for one year at a time – prevents investigation of citizens of non-Treaty states for actions related to peace-keeping or peace establishing operations authorised by the United Nations Organisation. Furthermore, the USA has concluded non-extradition agreements with approximately 30 states, once again applying considerable pressure.³⁸ And to make quite certain, that its international criminal law special status is maintained at any event, on 3rd August 2002 President Bush signed the *American Service members Protection Act*, which, in addition to a prohibition on US government bodies co-operating with the International Criminal Court, contains in Section 2008 (a) an authorisation for the use of force to free American citizens, threatened with proceedings by the Court.³⁹

All this is happening, let it be emphasised, in the face of the fact, that the competence of the International Court is much more restricted than those of the Yugoslavia or Rwanda Tribunals. Whereas the latter take precedence over the jurisdictions of individual states, and can at any time take over ongoing proceedings, the International Criminal Court merely has complementary competence, i.e. in its case individual state jurisdiction takes precedence. Were therefore a US court to initiate proceedings because of a serious violation of

international law, then the International Court would be excluded. Pursuit of the crime would be a matter for the American courts. It could only then become the concern of international criminal justice, if the proceedings are in some sense spurious and are evidently not aiming at a prosecution of the crime, but at covering it up. But, as Richard Goldstone, the former prosecutor of the ad hoc tribunals explained, it is next to impossible to prove such "bad faith investigation" with respect to a state under the rule of law.⁴⁰

That leaves the question as to the real reasons for the brusque rejection of international jurisdiction. The frequently advanced argument, that differing codes of criminal procedure prevented a ratification of the Statute, is, in fact, no reason at all.⁴¹ First, the procedures of the International Court are structured in such a way, that they follow very closely the guarantees of the American *Bill of Rights* and other liberal constitutions. Second, in the past the US Congress explicitly supported the Yugoslavia and Rwanda Tribunals, whose procedure is not identical with that of the United States and whose judgements nevertheless affect the life and property of American citizens.⁴² The reasons, not surprisingly, are therefore to be found in the sphere of American views of themselves and in the partly self-imposed, partly conferred role as custodian of international order. Convinced of the values of American democracy and inspired by a sense of mission impervious to critical objections, the idea of having to answer to an international court in any way is intolerable to the US administration. The American fear is that some of the judges of this instance, swayed by anti-American prejudices, will not dispense justice but follow ideological orientations and thus inevitably condemn American policies. It is this "tyranny of judges"⁴³ which is unacceptable to the USA.

In many areas of the world this attitude will be seen as confirmation of the general suspicion that internationally a double standard is being applied. And if this general suspicion is reinforced by concrete events, in which the supposed upholder of the law proves to be a law-breaker, then that robs international jurisdiction of precisely what it needs in order to function effectively, namely authority. A justice, which is only valid among equals, of whom there are few, will, however, turn international jurisdiction into a deceptive instrument of self-assertion and not into a means of promoting security and peace.

¹ Quoted from the prosecutor's speech of 21 November 21 1945, in *Der Prozess gegen die Hauptkriegsverbrecher vor dem Internationalen Militärgerichtshof Nürnberg, 14 November 1945 – 1 October 1946* vol I (Nürnberg 1947) p 118.

² Cf Hans-Peter Kaul "Durchbruch in Rom. Der Vertrag über den Internationalen Strafgerichtshof, in *Vereinte Nationen* 4/1998, p 125.

³ RGBL. 1919, pp 980–983.

⁴ Cf the exchange of notes between the Allies and the Dutch government in, Fritz Berber (ed.) *Das Diktat von Versailles. Entstehung, Inhalt, Zerfall. Eine Darstellung in Dokumenten* (Essen 1939) pp 1194–1202.

⁵ See in detail Walter Schwengler *Völkerrecht, Versailler Vertrag und Auslieferungsfrage. Die Strafverfolgung wegen Kriegsverbrechen als Problem des Friedensschlusses 1919–20* (Stuttgart 1982) pp 233–343.

⁶ On this and other trials before the Leipzig Reich Court, their prehistory and their consequences cf Gerd Hankel *Die Leipziger Prozesse. Deutsche Kriegsverbrechen und ihre strafrechtliche Verfolgung nach dem Ersten Weltkrieg* (Hamburg 2003).

⁷ Cf Sebastian Haffner *Geschichte eines Deutschen. Die Erinnerungen 1914–1933* (Stuttgart/Munich 2000) p 31 [English title: Resisting Hitler].

⁸ Bundesarchiv Berlin–Lichterfelde, R 3003, ORA/RG, Generalia, vol. 46.

⁹ RGBL. 1919, p 2125.

¹⁰ This was not the case if the civilian concerned was "encountered in the act".

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La Paix de Versailles. Responsabilités des auteurs de la Guerre et Sanctions (Paris 1930) pp 473.

- 12 Ibid. pp 477–479.
- 13 Ibid. p 459; Robert Lansing "Some legal questions of the Peace Conference" in, *The American Journal of International Law* 8 (1919), p 647.
- 14 Cf Christian Tomuschat "Die Arbeit der ILC im Bereich des materiellen Völkerstrafrechts" in, Gerd Hankel/Gerhard Stuby (eds.) *Strafgerichte gegen Menschheitsverbrechen. Zum Völkerstrafrecht 50 Jahre nach den Nürnberger Prozessen* (Hamburg 1995) p 270.
- 15 GAOR A/1316, 5th Session, Appendix 12. The final principle determines culpability of complicity in the perpetration of a crime against peace, a war crime or a crime against humanity.
- 16 Rwanda, too, which could be mentioned here as an exception, faces great problems despite all the efforts undertaken. Cf Gerd Hankel "Wir möchten, dass ihr uns verzeiht". Die Anfänge der Gacaca–Justiz in Rwanda' in, *Rwanda Revue* 2/2002, pp 16–21.
- 17 Cf William A. Schabas *Genocide in International Law* (Cambridge 2000) pp 90, 356.
- 18 Ibid. p 358.
- 19 Ibid. p 375.
- 20 Ibid. p 378.
- 21 The fact that China did not accede to the Genocide Convention until 1983, was not because of Article VI, but the unclarified status of Taiwan in international law. Cf *ibid.* p 508.
- 22 Cf Resolution 827 (1993) of 25 May and Resolution 955 (1994) of 8 November 1994, printed in, *Vereinte Nationen* 41 (1993) p 156 as well as no. 43 (1995) p 39.
- 23 On the background see Alison Des Forges *Kein Zeuge darf überleben. Der Genozid in Ruanda* (Hamburg 2002) pp 707.
- 24 Cf David Rohde *Die letzten Tage von Srebrenica. Was geschah und wie es möglich wurde* (Reinbek b. Hamburg 1997) pp 209.
- 25 Comprehensive on this aspect: Christina Möller *Völkerstrafrecht und Internationaler Strafgerichtshof – kriminologische, straftheoretische und rechtspolitische Aspekte* (Münster/Hamburg/London 2003) pp 413, pp 521, as well as Herbert Jäger "Makroverbrechen als Gegenstand des Völkerstrafrechts – kriminalpolitische–kriminologische Aspekte" in, *Hankel and Stuby* (note 14), pp 339.
- 26 The negative opinion of the court is, however, also vigorously promoted by the government of Rwanda. This is because the possible crimes which the currently dominant party and its military arm committed during the liberation of the country in 1994 are increasingly in the sights of the investigators.
- 27 Cf Monique Chemillier–Gendreau "Progrès et carences de la justice internationale" in, *Le Monde Diplomatique* 9/2001, p 29; Norbert Mappes–Niediek "Kann denn Strafe Sünde sein?" in, *Freitag* 12/4/2002, p 8; Slavenka Drakulic "Vor dem Tribunal. Kroatien und seine Kriegsverbrecher" in, *Süddeutsche Zeitung* 30/11 – 1/12/2002, p 17.
- 28 E.g. Christian Schmidt–Häuer "Supermacht gegen Welttribunal. Die Uno stellt Milosevic vor Gericht – Amerika macht dem Völkerrecht den Prozess" in *Die Zeit* 7/2/2002, p 4.
- 29 Cf Norman Paech "Sinn und Missbrauch internationaler Strafgerichtsbarkeit" in, *Blätter für deutsche und internationale Politik* 4/2002, p 449.
- 30 Cf Gabriele Senft/Lutz Herden "Die Brücke von Varvarin" in, *Freitag* 8/6/2001, p 11.
- 31 In greater detail on these arguments see Jäger (note 25) pp 336.
- 32 Thus judgements of the Yugoslav Tribunal only once refer to retribution as the purpose of punishment: "Retributive punishment by itself does not bring justice." This argument is also used by scholars to reject the idea of retribution. Because of the nature of the crimes dealt with in international criminal law it is even more difficult to harmonise degree of guilt and extent of punishment than in national criminal law. Cf Möller (note 25), pp 443–447.
- 33 The question arises, whether there would have been a different line of development, if the Ad hoc Tribunals had not been established as a compulsory measure in accordance with Chapter VII of the UN Charter. The alternative to the resolution of the Security Council would have been an international treaty, which all the parties to the war would have had to approve and which would also have to have been in accordance with the ruling in Article 14 I 2 of the international pact about civil and political rights (every accused has a right to the statutory judge). Aside from the fact, that the genocidal regime in Rwanda would never have assented to such a treaty, it is also doubtful whether states involved in the Balkan War would have accepted it. And even if they had accepted the treaty, it is quite another question, whether it would not have become untenable again after the chief prosecutor had begun his investigations or after the first sentences had been handed down. How difficult it is to instal an ad hoc jurisdiction by treaty, is and was shown by the efforts to set up such tribunals for Cambodia and Sierra Leone, although the wars there had a much more marked

internal quality than those in the former Yugoslavia.

- ³⁴ 20 states voted for the Statute, 21 abstained, 7 (China, Iraq, Israel, Yemen, Qatar, Libya, USA) voted against. Cf Kaul (note 2), p 125.
- ³⁵ This exclusion of competence for a limited period of time is based on Article 124 of the Statute.
- ³⁶ Otherwise the USA would have withdrawn from the worldwide UN peace missions.
- ³⁷ S/RES/1442 of 12/7/2002.
- ³⁸ At present appropriate negotiations are being conducted with the government of Bosnia–Herzegovina. Cf Gemma Pörzgen "Die Regierung in Sarajewo möchte zwei Herren dienen" in, *Frankfurter Rundschau* 10/5/2003, p 1.
- ³⁹ Cf Anne Kindt "Die USA und der Internationale Strafgerichtshof" in, *Kritische Justiz* 4/2002, pp 428; Claus Kress "Der Internationale Strafgerichtshof und die USA" in, *Blätter für die deutsche und internationale Politik* 9/2002, p 1099; recently a bill was even introduced in the House of Representatives, which is opposed to the principle of world law. In it all states applying this principle, which provides for the prosecution of serious violations of international law irrespective of the location and nationality of perpetrators and victims, are threatened with compulsory military sanctions, should they arrest US citizens. Cf Stefan Ulrich "Anschlag auf die Weltjustiz. Washington will Rechtssysteme anderer Staaten aushebeln" in, *Süddeutsche Zeitung* 17–18/5/2003, p 1.
- ⁴⁰ Cf Rolf Paasch "Das Völkerrecht ist keine Speisekarte" in, *Frankfurter Rundschau* 3/7/2002, p 3.
- ⁴¹ Cf David J. Scheffler "The United States and the International Criminal Court" in, *The American Journal of International Law* 93/1999, p 12–22.
- ⁴² Cf Kindt (note 40), p 439.
- ⁴³ Cf Henry A. Kissinger "The Pitfalls of Universal Jurisdiction" in, *Foreign Affairs* July and August 2001, pp 86–96.

Published 2003–10–08

Original in German

Translation by Martin Chalmers

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