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From Nuremberg to Rome and Beyond: The Fight Against Genocide, War Crimes, and Crimes Against Humanity

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Abstract

More than 200 years ago in his work "Perpetual Peace," Immanuel Kant called for peace and human rights to be protected under international law. Ever since, the United Nations, which was founded in 1945 as part of the worldwide fight against tyranny and heinous crimes, has been considering the idea of setting up a permanent International Criminal Court (or "Court"). Already in 1948, the Convention on the Prevention and Punishment of the Crime of Genocide of December 9, 1948 ("Convention") demanded the creation of an international tribunal. In 1993 and 1994, the Security Council of the United Nations established the International Tribunals for the Former Yugoslavia⁴ and for Rwanda. In July 1998 an overwhelming majority of States-including Germany-adopted the Rome Statute of the International Criminal Court (or "Statute"). By the end of November, the third meeting of the Preparatory Commission for this Court will begin in order to complete the necessary preparatory work for the entry into force of the Statute. Germany wholeheartedly contributes to these efforts in order to ensure that the Court can commence its work in the next years. The general debate of the fifty-fourth U.N. General Assembly focused in an unprecedented manner on the question of humanitarian intervention versus State sovereignty. These "milestones" roughly describe the increasingly dynamic development of international law and politics in the fight against genocide, war crimes, and crimes against humanity. They describe a long journey, which is still far from over.

Part I addresses the background and basis of the signatories of the Convention. Part II discusses Germany's policy belief that there is no peace without justice. Part III discusses the positive impact that the establishment of the International Tribunals for the Former Yugoslavia and for Rwanda (and other ad hoc tribunals) have had, but also how the effort falls short of universal justice. Part III A. outlines the Rome Statute of the International Criminal Court as a quantum leap in the development of international law. Part III B. addresses the process of ratifying the Rome Statute as well as a description of the establishment of a Preparatory Commission. Part IV discusses sovereignty versus humanitarian intervention, the principle of non-use of force versus effective protection of human rights. Part V discusses the importance of developing the existing U.N. system in such a way that in the future it is able to intervene in good time in cases of very grave human rights violations, but not until all means of settling conflicts peacefully have been exhausted and-this is a crucial point-within a strictly limited legal and controlled framework.

FROM NUREMBERG TO ROME AND BEYOND: THE FIGHT AGAINST GENOCIDE, WAR CRIMES, AND CRIMES AGAINST HUMANITY

*Dieter Kastrup**

INTRODUCTION

More than 200 years ago in his work "Perpetual Peace,"¹ Immanuel Kant called for peace and human rights to be protected under international law. Ever since, the United Nations, which was founded in 1945 as part of the worldwide fight against tyranny and heinous crimes, has been considering the idea of setting up a permanent International Criminal Court² (or "Court"). Already in 1948, the Convention on the Prevention and Punishment of the Crime of Genocide of December 9, 1948 ("Convention")³ demanded the creation of an international tribunal. In 1993 and 1994, the Security Council of the United Nations established the International Tribunals for the Former Yugoslavia⁴ and for Rwanda.⁵ In July 1998 an overwhelming majority of States—including Germany—adopted the Rome Statute of the International Criminal Court (or "Statute").⁶ By the end of November, the third meeting of the Preparatory Commission for this Court will begin in order to complete the necessary preparatory work for the entry into force of the Statute. Germany wholeheartedly contributes to these efforts in order to ensure that the Court can commence its work in the next years. The general debate of the fifty-fourth U.N. General Assembly focused

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1. IMMANUEL KANT, *PERPETUAL PEACE* (Columbia University Press, 1939).

2. Karen Berg, *A Permanent International Criminal Court*, U.N. CHRON., Dec. 12, 1997, at 30.

3. *Convention on the Prevention and Punishment of the Crime of Genocide*, Dec. 9, 1948, 78 U.N.T.S. 277 [hereinafter *Genocide Convention*].

4. *Statute for the International Criminal Tribunal for the Former Yugoslavia*, S.C. Res 827, U.N. SCOR, 48th Sess., 3217th mtg., U.N. Doc. S/RES/827 (1993).

5. *Statute for the International Criminal Tribunal for Rwanda*, S.C. Res 955, U.N. SCOR, 49th Sess., 3453rd mtg., U.N. Doc. S/RES/955 (1994).

6. Rome Statute of the International Criminal Court, opened for signature July 17, 1998, 37 I.L.M. 999.

in an unprecedented manner on the question of humanitarian intervention versus State sovereignty.

These “milestones” roughly describe the increasingly dynamic development of international law and politics in the fight against genocide, war crimes, and crimes against humanity. They describe a long journey, which is still far from over.

I. THE INTERNATIONAL COMMUNITY'S STARTING POINT?

The intention of the signatories of the Convention, was to avoid a repetition of the horrifying crimes during World War II, committed by the Nazi regime that culminated in the murder of millions of Jews and other groups regarded as “sub-humans” from all over Europe. In the aftermath of the sentences pronounced by the International Military Tribunal in Nuremberg,⁷ the United Nations prepared a Draft Convention on the crime of Genocide, which was adopted unanimously by the General Assembly with no abstentions on December 9, 1948 and came into force on January 12, 1951.⁸ Today 130 States have ratified or acceded to the Convention, including all Member States of the European Union (or “EU”) and all Permanent Members of the Security Council. The United States ratified this important document in 1989. Article 6 of this Convention stipulated, already in 1948, that an International Criminal Court be created. In the very same year the United Nations adopted the Universal Declaration on Human Rights.⁹ A year later the Geneva Conventions provided the hitherto most comprehensive document on humanitarian law with provisions on the repression of abuses and infractions. These provisions foresee the enactment of national legislation to provide effective penal sanctions for persons committing grave breaches of the Conventions, *i.e.*, war crimes. Similar provisions are found in the Additional Protocols of 1977 to the Geneva Conventions. But, despite the growing and impressive body of international law, the world community has been almost helpless in the face of the failure of national criminal law systems to punish the perpetrators of atrocities and those behind

7. Berg, *supra* note 2.

8. Genocide Convention, *supra* note 3.

9. Universal Declaration of Human Rights, Dec. 10, 1948, G.A. Res. 217A, U.N. GAOR, 3d Sess., 67th plen. mtg., U.N. Doc. A/810 (1948).

them. Since the Nuremberg¹⁰ and Tokyo Tribunals,¹¹ many of the worst criminals responsible for genocide, crimes against humanity, and war crimes were never brought to justice, because national courts had ceased to exist or were tools in the hands of the perpetrators. Genocide, mass executions of political opponents, pogroms, "ethnic cleansing," and systematic rape went unpunished not because of a lack of national and international norms criminalizing genocide, war crimes, and crimes against humanity, but because of the inability or unwillingness of national courts to act. This situation is the reason why the long cherished dream of universal justice seemed to be hopeless and was written off as naive or at least premature.

II. *THE DESTINATION: WHAT DOES GERMANY WANT TO ACHIEVE?*

Germany's policy is based on the firm belief that there is no peace without justice. Therefore the vicious circle of impunity must be broken. When genocide, war crimes, and crimes against humanity go unpunished, murder and torture will not only carry no risk; above all it would be tantamount to a negation of the very essence of justice. Together with our partners in Europe and many parts of the world, we heed U.N. Secretary General Kofi Annan's appeal to the General Assembly at the commemoration of the fiftieth anniversary of the Universal Declaration of Human Rights: we want to globalize justice in the age of globalization. We agree with the Secretary General, who said in his brilliant speech to the fifty-fifth session of the Commission of Human Rights that "[n]o government has the right to use the cover of the principle of State sovereignty to violate Human Rights!" We want, and here I quote German Foreign Minister Joschka Fischer that, "in future dictators and perpetrators of Human Rights violations will no longer be able to rely on not

10. Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis Powers and Charter of the International Military Tribunal, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 280 (entered into force Aug. 8, 1945), annexed to the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Aug. 8, 1945, 82 U.N.T.S. 279;

11. Charter of the International Military Tribunal for the Far East, Special Proclamation by the Supreme Commander for the Allied Powers at Tokyo, Jan. 19, 1946, T.I.A.S. No. 1589, *reprinted in* 4 TREATIES AND OTHER INT'L AGREEMENTS OF THE UNITED STATES OF AMERICA, 27 (1946).

being called to account for their actions.”¹² This warning must apply not only to the perpetrators of genocide, war crimes, and crimes against humanity in Rwanda in 1994 or in the former Yugoslavia, but also to “ethnic cleansers,” murderers, and torturers everywhere. Obviously the international community has not achieved this aim. A long way is still to be covered, and relevant instruments of international law must be completed and implemented.

III. *AD HOC TRIBUNALS: A MILESTONE, BUT NOT THE FINAL DESTINATION*

The establishment of the International Tribunals for the Former Yugoslavia and for Rwanda by the Security Council in 1993 and 1994 was certainly a step in the right direction, if not a milestone on the path to effectively preventing and punishing genocide, war crimes, and crimes against humanity. Germany has been closely cooperating with the two Tribunals, swiftly enacting the necessary national legislation in this context and delivering one of the most wanted criminals to the International Tribunal for the Former Yugoslavia. As the third largest contributor, Germany has provided about US\$50 million of funding for these Tribunals. Both Tribunals have passed important judgments, which will help to interpret and further develop existing norms of international law in the areas of war crimes and crimes against humanity. Yet, both Tribunals fall short of our quest for universal justice and our endeavor to fight the gravest breaches of international law worldwide and for an indefinite future. The two Tribunals are limited in their territorial and temporal jurisdiction.¹³ They, furthermore, do not cover the full range of war crimes established under international law. Their legal bases are Security Council Resolutions, which do not reflect the same resolve of the international community as a multilateral treaty with a wide or universal acceptance would. The same will be true for

12. Joschka Fischer, Minister for Foreign Affairs of Germany, *Statements at the 54th Session of the U.N. Assembly*, (Sept. 22, 1999) (visited on Nov. 24, 1999) <http://www.germany-info.org/UN/un_state_09_22_99.htm> (on file with the *Fordham International Law Journal*).

13. See S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg., U.N. Doc. S/RES/827 (1993) (establishing international tribunal for human rights violations in former Yugoslavia); S.C. Res. 955, U.N. SCOR, 49th Sess., 3453rd mtg., U.N. Doc. S/RES/955 (1994) (establishing international tribunal for human rights violations in Rwanda).

possible future *ad hoc* Tribunals, be it for Cambodia or East Timor.

A. *Milestone Rome 1998*

The Rome Statute of the International Criminal Court was adopted by a Diplomatic Conference on July 17, 1998 with 120 States voting in favor (including all EU Member States), twenty-one abstaining, and seven voting against. It has since then been signed by ninety-two states, including all European Union Member States, and ratified by six States: Fiji, Ghana, Italy, San Marino, Senegal, and Trinidad and Tobago.

The Statute is an important milestone, indeed. It marks a quantum leap in the development of international law. Therefore it seems appropriate to recall some of its most important elements that prove its high juridical quality and wise political balance:

- The principle of complementarity: The International Criminal Court can only act when national courts are unable or unwilling to prosecute a crime.
- The limitation to four universally recognized core crimes: Genocide, Crimes against Humanity, War Crimes and the Crime of Aggression.
- The Prosecutor of the International Criminal Court can start investigations on his or her own initiative (“*proprio motu*”).
- The Statute of the International Criminal Court provides for automatic jurisdiction. The Court can exercise its jurisdiction if either the State of which the conduct in question occurred or the State of which the person accused of the crime is a national to a Party to the Statute.
- The U.N. Security Council acting under Chapter VII of the Charter of the United Nations can refer situations to the Court and can request the Court to hold an investigation or prosecution for a period of twelve months.¹⁴

The Statute contains the first precisely negotiated and exactly defined catalogue of crimes under international law, Articles 6, 7, and 8: Genocide, War Crimes, and Crimes against Humanity. The definition of Genocide corresponds with that of the

14. *See id.*; *see also*, Charter of the United Nations, June 26, 1945, 59 Stat. 1031, Ch. VII [hereinafter U.N. Charter].

Convention. It is particularly important that Genocide and Crimes against Humanity—for the first time exactly defined in a treaty—may be prosecuted in all circumstances, not just when committed in an armed conflict. Therefore, especially the definition of Crimes against Humanity, as contained in Article 7 of the Statute, constitutes a very important, unprecedented breakthrough in the codification of international law in this area. It is also very significant that War Crimes fall under the jurisdiction of the Court committed in international or in non-international, internal armed conflicts, *i.e.*, civil wars. Since about ninety percent of all modern conflicts are of a predominantly internal nature, this wide scope of jurisdiction is of particular importance. The Statute contains in Article 8 fifty individual war crimes and thus a very comprehensive definition, including grave breaches of the Geneva Conventions. It is noteworthy that these final definitions were for a good part based on work coordinated by Germany and prepared during two international workshops in Bonn in 1997. Turning to the inclusion of the Crime of Aggression in the Statute—a matter to which the German side has been committed to for a long time—the Statute contains a difficult starting point for further negotiations. On the one hand, Article 5 of the Statute stipulates that the crime is subject to the Court's jurisdiction. On the other hand, however, the crime has yet to be defined—what exactly is aggression?—before the Court can exercise its jurisdiction. An agreement must also be reached in the future on the appropriate role of the Security Council in this context *i.e.*, can the Court exercise its jurisdiction on the Crime of Aggression only after the Security Council has explicitly stated that an act of aggression has occurred? A definition elaborated by Germany together with a group of other interested States, which covered the most serious and obvious acts of aggression, did indeed dominate discussions in Rome. In the end though, it was not possible to reach consensus, because other States saw a different, much wider definition of aggression or rejected a role for the Security Council in ascertaining whether an aggression has been occurred.

B. *The Next Milestones Ahead*

The early entry into force of the Statute and the swift operability of the International Criminal Court are the main aims for the coming months and years. The most important precon-

dition for this is the ratification of the Statute by sixty States. This process will probably last a few years, allowing States to complete the rest of the work required for the establishment of the ICC. Alongside with the adoption of the Statute, the Diplomatic Conference in Rome called in a resolution for the establishment of a Preparatory Commission ("PrepCom"), with a far-reaching mandate, namely:

- elaboration of the Court's rules of procedure and evidence;
- elaboration of so called "Elements of Crimes," which will assist the Court to interpret the Articles 6, 7, and 8 of the Statute;
- elaboration of an draft text of a relationship agreement between the Court and the United Nations;
- elaboration of the basic principles governing a headquarters agreement to be negotiated between the Court and the host country;
- drafting an agreement on the privileges and immunities of the Court;
- drafting the Financial Regulations and Rules for the Court and preparing a budget for the first financial year;
- elaboration of rules of procedure of the Assembly of States Parties.

On December 8, 1998, the fifty-third General Assembly adopted by consensus a resolution establishing the PrepCom and a first schedule for its meetings. The draft texts of the Rules of Procedure and Evidence and of the Elements of Crimes shall be completed before June 30, 2000.

The first session of the PrepCom—February 16–26, 1999—took place in a business-like, constructive atmosphere. Reasonable progress was achieved in the field of the elaboration of the rules of procedure and evidence. Also the first discussion of the "Elements of Crimes" in accordance with Article 9 of the Statute took place in a constructive manner. At the same time, it became obvious that efforts to develop a complementary set of "Elements of Crimes" for all the definitions of crimes contained in Articles 6 to 8 of the Statute will not be easy and will probably consume much time and energy. It was particularly encouraging that the U.S. delegation, which opposed the Statute, contributed actively and with flexibility to the work of the PrepCom. The second session of the PrepCom was from July 26 to August 13,

1999 and showed even more satisfactory results. In a cooperative atmosphere, major progress was achieved in the elaboration of "Elements of Crimes." A working group on the Crime of Aggression was established to discuss this extremely sensitive issue in depth, with a view to finding a viable compromise until the first Review Conference. It was also established to consider amendments to the Statute and convened seven years after the entry into force of the Statute in order to adopt provisions defining the crimes and setting out the conditions under which the Court shall exercise jurisdiction with respect to the crime.

Germany is getting prepared to ratify the Statute in the very near future. We stand ready to cooperate closely with our EU partners, the group of like-minded States, and the non-governmental organizations that all had an important impact on the Statute and, thereby, encourage all States to sign and ratify the Statute soon. Germany will actively contribute to the upcoming sessions of the PrepCom in order to guarantee speedy and efficient work. We hope that the States that abstained in Rome or even voted against the Statute will soon "come on board."

IV. BEYOND ROME: "HUMANITARIAN INTERVENTION?"

Sovereignty versus humanitarian intervention, the principle of non-use of force versus effective protection of human rights was the central issue discussed during this year's general debate at the United Nations. And it was also the most contentious one: what is more important, human rights or sovereignty? Which principle prevails in case the conflict cannot be resolved otherwise? Does international law allow a forceful intervention, as a last resort, for humanitarian purposes even without the mandate of a Security Council? About eighty heads of State and of government, foreign ministers, and ambassadors contributed to this discussion and were deeply divided. The Secretary General himself took the lead in this important debate, selecting the prospects for human security and intervention in the next century as *leitmotiv* of his opening speech. In his trail-blazing speech, he noted that state sovereignty, in its most basic sense, is being redefined by the forces of globalization and international cooperation. And, he added, there is "the dilemma of what has been called 'humanitarian intervention:' On one side, the question of the legitimacy of an action taken by a regional organization with-

out an U.N. mandate; on the other, the universally recognized imperative of effectively holding gross and systematic violation Human Rights with grave humanitarian consequences." German Foreign Minister Fischer raised similar questions by asking his colleagues in the general debate the following questions:

What is to be done when entire States collapse and a civilian population is massacred in never-ending civil wars from all sides? What if ethnic tensions in a State are partly provoked by criminal governments that then respond with pogroms, mass expulsions, and mass murders, even genocide? Should the United Nations then regard state Sovereignty as more important than protection of individuals and their rights? Rwanda, Kosovo, and East Timor are dramatic examples of this.

The debate amply demonstrated that there is no consensus of the State community on precedence of human rights over sovereignty. It also proved that there are several schools of thought as to the concept of humanitarian intervention. While the United States, most European, and quite a number of African and Latin American countries argued that Human Rights should take precedence over sovereignty and that in exceptional cases even a military intervention without Security Council mandate might be justified, a number of other countries including China, Iraq, Libya, North Korea, and Sudan saw a clear priority for sovereignty over human rights and expressed their adamant opposition to any kind of humanitarian intervention. Many others positioned themselves somewhere in the middle. It may be concluded from these speeches that the respect for human rights over the last decades has gained in weight and is constantly gaining in relation to the absolute respect for sovereignty.

V. *AT A DIFFICULT JUNCTURE: WHICH WAY TO GO?*

Contemporary international law establishes beyond any doubt that serious violations of human rights are matters of international concern. Such international concern has crystallized into impressive networks of rules and institutions both at a universal and regional level. In the presence of genocide, the right of States, or groups of States, to counter gross violations of human rights has probably turned into an obligation (*cf.* the judgment of the International Court of Justice in the Genocide

(Bosnia-Herzegovina v. Yugoslavia) Case of 1996). In such cases, international law allows States, acting individually, collectively, or through international organizations, to apply a whole range of peaceful responses. According to the prevailing doctrine in the law of State responsibility, developed by the U.N. International Law Commission, the obligations of States to respect and protect the basic rights of all human persons are the concern of all States, *i.e.*, they are owed *erga omnes*. In the case of grave human rights violations, every other State can thus consider itself legally "injured" and entitled to resort to countermeasures. But, under international law in force since World War II and confirmed in the General Assembly's Declaration on "friendly relations" of 1970, reprisals must not involve the threat or use of armed force.

Turning to the issue of enforcement of respect for human rights by military means, the fundamental rule from which any legal scrutiny has to proceed is Article 2, paragraph 4 of the U.N. Charter, according to which "all members of the U.N. shall refrain in their international relations for the threat or use of force against the territorial integrity of political independence of any State, or in any other manner inconsistent with the purposes of the United Nations." This prohibition was and is meant to be of comprehensive scope. Therefore, the question is whether, beyond the cases of Article 51 of the Charter (individual or collective self-defense) and Chapter VII (military enforcement action mandated by the Security Council), the threat or use of force can be justified in international law for other purposes.

The genocide in Rwanda and the more recent conflict in Kosovo may represent important turning points in international politics and international law. Here, again, I quote the Secretary General who said before the fifty-fourth General Assembly: "While the genocide in Rwanda will define for our generation the consequences of inaction in the face of mass murder, the more recent conflict in Kosovo has prompted important questions about the consequences of action in the absence of complete unity on the part of the international community." Indeed, how will the international community decide in the future, when it comes to preventing massive human rights violations against an entire people? Looking back to Rwanda and Kosovo different developments seem possible: a practice of "humanitarian interventions" outside the U.N. system, *i.e.*, without Security Council mandate, could evolve; but this practice might endan-

ger the imperfect, yet internationally accepted security system created after World War II and set a dangerous precedent for future interventions without clear criteria to decide whether the preconditions for a humanitarian intervention really exist. Germany believes that the intervention in Kosovo was justified, since the Security Council had its hands tied and all efforts to find a peaceful solution had failed. Kosovo was a special situation, which must not set a precedent for weakening the U.N. Security Council's authority on legalizing the use of force. Nor must it become a license to use force under the pretext of humanitarian assistance. This situation would open the door to the arbitrary use of power and anarchy, and throw the world back to the nineteenth century.

The only solution to the dilemma, therefore, seems to be to further develop the existing U.N. system in such a way that in the future it is able to intervene in good time in cases of very grave human rights violations, but not until all means of settling conflicts peacefully have been exhausted and—this is a crucial point—within a strictly limited legal and controlled framework. The U.N. Charter remains the proper basis for this undertaking. The Charter is a living document, affirming in its very letter and spirit fundamental human rights. It is our common task, politicians, diplomats, legal scholars, and others to further develop international law in order to effectively protect civilians from wholesale slaughter and to harmonize this protection with a modern concept of State sovereignty. To take up once again the words of the U.N. Secretary General: there must be no contradiction between the concepts of State sovereignty and individual sovereignty.