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”Back to the Future” - Reflections on the Beginning of the Beginning: International Criminal Law in the Twenty-First Century

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Abstract

Part I begins by stating that though there has been atrocity throughout our history, certainly the last century has earned the title “the bloody century.” The author then discusses the past conflicts that have earned that title for the last century. Next, the author acknowledges that in just ten years, the international community created the justice mechanisms to show that the rule of law is more powerful than the rule of the gun. In Part II, the author cites examples of what justice mechanisms have been implemented. Part III focuses on the challenges ahead for the international justice mechanisms. In Part IV the author concludes that it is only the beginning of the beginning, but it is certainly a movement forward in seeking justice for victims of war crimes, crimes against humanity, and genocide.

TRANSITIONAL JUSTICE: WAR CRIMES TRIBUNALS AND ESTABLISHING THE RULE OF LAW IN POST-CONFLICT COUNTRIES

SPEECH

“BACK TO THE FUTURE”— REFLECTIONS ON THE BEGINNING OF THE BEGINNING: INTERNATIONAL CRIMINAL LAW IN THE TWENTY-FIRST CENTURY

*David M. Crane**

I. A BLOODY CENTURY!

The previous century was remarkable in its propensity to commit atrocity. Within one hundred years, over 150 million human beings lost their lives violently at the hands of their own governments.¹ These numbers do not account for those who were raped, maimed or mutilated, as well as displaced. While I am not aware of those numbers, it has been my experience that there is a three or four to one ratio between these crimes and actual deaths. Doing the mathematics, one can see that the ravages of conflict and governmental policies and programs impacted almost a billion human beings.

Though there has been atrocity throughout our history, certainly the last century has earned the title “*the bloody century*.” Starting with the ravages of King Leopold II of Belgium at the turn of the twentieth century, to the Near East Asia Minor holocaust in Turkey, the European Holocaust, and the sad

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1. See R.J. RUMMEL, DEATH BY GOVERNMENT 4 tbl.1.2 (1997) [hereinafter RUMMEL, DEATH BY GOVERNMENT].

phenomenon of communist political theory, and, finally, to the modern day horrors of Yugoslavia, Rwanda, Sierra Leone, and Iraq, among others, mankind has shown a remarkable and sustained propensity for mass killings, rapes, and mutilations.

In the middle of all this suffering, mankind paused for a brief and shining moment to lay the cornerstone of modern international criminal law. After the Second World War, the world gathered in Nuremberg and Tokyo to seek justice for the victims of tyranny perpetrated by the Axis powers.² Additionally, they created the United Nations with the hope that the international community would settle its disputes peacefully.³ Moreover, recognizing that all human beings have a right to exist and that their lives mattered, the nations of the world crafted and signed the Universal Declaration of Human Rights⁴ and the Genocide Convention.⁵ Finally, during this four-year period, the customs and laws of war were codified in four conventions that protected those found on the battlefield.⁶ Specifically, the Geneva Convention Relative to the Protection of Civilian Persons in Time of War (“Fourth Geneva Convention”) remains the central protection of civilians caught in international and internal armed conflict.⁷

2. See, e.g., Int’l Law Comm’n, Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal, U.N. Doc. A/1316 (July 29, 1950), *reprinted in* [1950] 2 Y.B. Int’l L. Comm’n 374, U.N. Doc. A/CN.4/SERA/1950/Add.1; International Military Tribunal for the Far East, Jan. 19, 1946, T.I.A.S. No. 1589.

3. See U.N. Charter art. 1, para. 1 (describing as a purpose of the United Nations “to maintain international peace and security”).

4. Universal Declaration of Human Rights, G.A. Res. 217A, at 71, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc A/810 (Dec. 12, 1948).

5. Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277.

6. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

7. See, e.g., Damien S. Donnelly-Cole, *Not Just a Few Bad Apples: The Prosecution of Collective Violence*, 5 WASH. U. GLOBAL STUD. L. REV. 159, 173 n.85 (2006) (“During international armed conflicts . . . Geneva Convention IV [(“Geneva Convention Relative to the Protection of Civilian Persons in Time of War”)] protects civilians.”); Manooher Mofidi & Amy E. Eckert, “*Unlawful Combatants*” or “*Prisoners of War*”: *The Law and Politics*

The Cold War and its political evolution largely negated the legal, political, and practical inertia of these important four years. The world's two superpowers were locked in a nuclear death grip of mutually assured destruction. Split largely in two, the world moved along for over forty years with the lofty principles of the Nuremberg trials, the United Nations Charter, the Universal Declaration of Human Rights, and the Genocide convention neutralized. During this time, the worst atrocities were committed in the Soviet Union, China, and Cambodia—a majority of those deaths at the hands of those governments. The number of deaths is approximately sixty to sixty-five million.⁸

The West turned a blind eye to these killings, loath to intervene because many of the responsible parties had their fingers on the nuclear button. On the periphery, minor dictators, thugs, and despots flourished. Following the purpose of the Truman Doctrine, the democracies "danced with the devil" to keep in check the threat of worldwide communist domination. Actors like the Shah of Iran, the junta in Argentina, Pinochet of Chile, and Idi Amin of Uganda worked their destructive policies under the umbrella of anticommunist rhetoric. Tens of thousands died, largely unaccounted for and forgotten, with little or delayed justice.⁹

As the Iron Curtain rusted and fell in the early 1990s and the Soviet Union disappeared, the world breathed a sigh of relief. Was this truly the beginning of a new world order? Sadly, the break-up of the Republic of Yugoslavia and genocide in Rwanda answered that question. The old ways had never left, there was no new world order, but one of disorder. Behind the curtain of world politics, the West African joint criminal enterprise worked

of Labels, 36 CORNELL INT'L L.J. 59, 74 (2003) (using Geneva Convention IV to interpret the legal status of modern terrorist actors).

8. See RUMMEL, *DEATH BY GOVERNMENT*, *supra* note 1, at 83 (approximating victims in the Soviet Union after 1946 at 22,485,000); *id.* at 100 (approximating victims in China from 1949-1987 at 35,236,000); R.J. RUMMEL, *STATISTICS OF DEMOCIDE: DEMOCRACY AND MASS MURDER SINCE 1900* 67 (1998) [hereinafter RUMMEL, *STATISTICS OF DEMOCIDE*] (approximating victims in Cambodia from 1967-1987 at 6,118,000).

9. See RUMMEL, *STATISTICS OF DEMOCIDE*, *supra* note 8, at 258-59 (approximating victims under Amin in Uganda); *id.* at 270-71 (approximating victims under Argentina's military juntas); *id.* at 280-81 (approximating victims under Pinochet in Chile); *id.* at 304-05 (approximating victims under the Shah's government in Iran).

its terror, destroying almost three countries and over a million West Africans.¹⁰

But the world reacted in a surprising way this time, by deciding to hold accountable those responsible for these atrocities. In 1993, with the establishment of the International Criminal Tribunal for the Former Yugoslavia,¹¹ modern international criminal law began. In 1994, the International Criminal Tribunal for Rwanda came into being to punish those who perpetrated the genocide in Rwanda.¹² Later, the world sat down in Rome to create the world's first international criminal court to hold accountable those who commit war crimes, crimes against humanity, and genocide.¹³ During these negotiations, a plea for help from Sierra Leone saw the creation of the world's first hybrid international war crimes tribunal, the Special Court for Sierra Leone.¹⁴ As the bloody century turned, a domestic hybrid in Cambodia was finally established to account for the killings fields of that Southeast Asian country, a quarter-century earlier. In just ten years, the international community created the justice mechanisms to show that the rule of law is more powerful than the rule of the gun. Looking back, there have been some remarkable strides.

II. *THE BEGINNING OF THE BEGINNING*

A. *The Spirit of Nuremberg Lives!*

All this being said, is this the beginning of a beginning? I believe that it is. First, the spirit of Nuremberg lives! Consider

10. See generally DAVID PRATT, *SIERRA LEONE: THE FORGOTTEN CRISIS* (1999), available at <http://www.globalsecurity.org/military/library/report/1999/crisis-e.htm>. For a more detailed history of the eleven-year civil war in Sierra Leone and its destabilizing effect on the region, see Babafemi Akinrinade, *International Humanitarian Law and the Conflict in Sierra Leone*, 15 *NOTRE DAME J.L. ETHICS & PUB. POL'Y* 391 (2001).

11. See generally Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991, S.C. Res. 827, U.N. Doc. S/RES/827 (May 25, 1993).

12. See Statute of the International Criminal Tribunal for Rwanda, S.C. Res. 955, ¶1, U.N. Doc. S/RES/955 (Nov. 8, 1994).

13. See Rome Statute of the International Criminal Court art. 5(1), July 17, 1998, 2187 U.N.T.S. 90, 92.

14. See Statute of the Special Court for Sierra Leone arts. 1-3, S.C. Res. 1315, U.N. Doc. S/RES/1315 (Aug. 14, 2000).

the last forty years and the lack of any justice mechanisms to address tyrants gone wild. Accountability during this time never reached the highest levels of government—Uganda's Idi Amin was the closest, exiled into a life of comfort in Saudi Arabia until his death. Now, consider the creation of two ad hoc tribunals, a hybrid international court, an internationalized domestic court, and a permanent international criminal court with well over a hundred state parties.¹⁵ The jurisprudence considered at Nuremberg has been realized and has expanded to address the myriad of issues facing the atrocities of today and the future. Considered a court of victor's justice at the time, the principles of Nuremberg live on in law and in the precedents that are being developed by the various tribunals and courts of the modern era.

B. Shielding Heads of State from Accountability on an Ancient Legal Principle is Gone

Just a few years ago, the idea of indicting a sitting head of state for war crimes, crimes against humanity, and genocide was a theory. Head-of-state immunity is no longer a shield to international crime, as demonstrated by the prosecutions of Slobodan Milosevic, Charles Taylor, Saddam Hussein, and possibly Omar el-Bashir. Though always a political "hot potato," the international community has been forced to deal with the indictments of these individuals for what they had done to their own countries and peoples. Considering the past bloody century and all of the heads and chiefs of state who were given a pass for their acts of impunity, international criminal law has come a long way. The phrase "no one is above the law" is actually beginning to ring true.

C. Crimes Against Women and Children Are No Longer Ignored

Civilians have borne the brunt of conflict, with women and children suffering the most. This suffering remains a serious problem. However, crimes against women and children are being actively prosecuted today, including rape as a tool of

15. Respectively, the International Criminal Tribunal for the Former Yugoslavia, the International Criminal Tribunal for Rwanda, the Special Court for Sierra Leone, the Extraordinary Chambers in the Courts of Cambodia, and the International Criminal Court.

genocide, sexual slavery, and even a new crime against humanity—forced marriage in times of armed conflict.¹⁶

The cruel condition of child soldiers has been particularly brutal over the past twenty-five years with over two million children dying in combat.¹⁷ This is a sad commentary on our society. Little was done until the groundbreaking indictments against the various combatants of the civil war in Sierra Leone for the unlawful recruitment of children under the age of fifteen into an armed force. This new international crime has been upheld as such by the appellate chamber of the Special Court for Sierra Leone.¹⁸ No longer can cynical war lords, tyrants, and thugs drag children, some as young as six or seven years of age, into battle without suffering the legal and political consequences of those criminal acts. This is truly a step forward.

III. *THE CHALLENGES AHEAD—“BACK TO THE FUTURE”?*

A. *State Responsibility, Indifference and Support*

One of the anomalies in the development of modern international criminal law is how states continue to drag their feet when deciding to act against alleged international crimes. As I have stated many times, the bright red thread to how the international community reacts to atrocity is politics. At the end of the day, it is a political decision, not a legal one that results in accountability. This is not necessarily a bad circumstance, but it can be. Despite the legal obligation to arrest, investigate, and, when necessary, handover those who commit these crimes,

16. See David Scheffer, *Rape as Genocide*, INT’L HERALD TRIB., Dec. 4, 2008, at 6 (describing current ICC prosecution of rape as genocide); see also Rome Statute of the International Criminal Court, *supra* note 13, art. 7(1), 2187 U.N.T.S. at 93 (defining rape and sexual slavery as a crime against humanity “when committed as part of a widespread or systematic attack directed against any civilian population”); Prosecutor v. Brima, Case No. SCSL-2004-16-A, Judgment, ¶¶ 181-203 (Feb. 22, 2008) (holding that forced marriage during armed conflict qualifies as a prosecutable crime under customary international law).

17. The Secretariat (Graça Machel), *Promotion and Protection of the Rights of Children: Impact of Armed Conflict on Children*, ¶ 2, delivered to the General Assembly, U.N. Doc A/51/306 (Aug. 26, 1996).

18. See Valerie Oosterveld, *The Special Court for Sierra Leone, Child Soldiers and Forced Marriage: Providing Clarity or Confusion?*, 45 CANADIAN Y.B. INT’L L. 131, 131 (2007).

political and diplomatic expediency with a glaze of reality win the day.

This has not been a unique feature in the past century. In fact, the atrocities perpetrated in Greece and in Bulgaria in the mid-nineteenth century were resolved from a political perspective. This is more understandable because, at the time, there was no legal mechanism to hold accountable those responsible for those crimes. Political solutions have always been the default reaction despite the codified legal obligation to hand over suspects for justice.¹⁹

B. *Peace Versus Justice*

Closely allied to the issue of state responsibility and politics is the debate over peace versus justice. I say that it is not peace versus justice, but peace and justice. Justice brings peace. Take as an example the indictment, arrest, and trial of my old nemesis, former President Charles Taylor, indicted for war crimes and crimes against humanity on March 3, 2003.²⁰ When I unsealed his indictment in June of 2003, the international community declared that this would disrupt the peace process started in Accra, Ghana, that very day. Predictions of doom and gloom echoed throughout the halls of the United Nations and the capitals of the world. Yet, the two months of instability that fateful summer ended with Taylor stepping down as President of Liberia and being shunted aside in a villa near Calabar, Nigeria, to await his fate. Only then did the true peace process begin, with the establishment of a framework which led to the election of the first female head of state in modern African history and a consequent seven years of relative peace. It was the indictment of Taylor that brought the peace that Liberia enjoys today. I predict that the indictment of President el-Bashir of the Sudan for similar crimes will eventually bring peace also to Darfur. The indictment of Taylor is a good case study. The parallels to the el-Bashir indictment are significant and useful to appreciate the

19. See Rome Statute of the International Criminal Court, *supra* note 13, art. 89(1), 2187 U.N.T.S. at 141; S.C. Res. 955, *supra* note 12, art. 28; S.C. Res. 827, *supra* note 11, ¶ 4.

20. See Prosecutor v. Taylor, Case No. SCSL-03-01-I, Indictment (Mar. 3, 2003), available at <http://www.sc-sl.org/cases/charlestaylor/tabid/107/default.aspx>.

power of justice in bringing peace to a war-torn region of the world.

C. *Is the Justice We Seek the Justice They Want? Other Justice Mechanisms*

An issue that remains is that, despite the important advancements made in the past decade related to international criminal law, we need to consider, appreciate, and respect other ways to seek justice. The international approach to justice may not be the correct one. In considering how best to account for an atrocity in a region of the world, the international community needs to ask itself: is the justice we seek the justice they want? A justice not appreciated or understood by victims may not be justice at all, and this can impact how that justice brings peace and stability to a region.

I believe that the complementary principles of the Rome Statute are a step in the right direction.²¹ Justice must be done, first, domestically. The International Criminal Court is a court of last resort for all intents and purposes. But we also need to consider other culturally accepted methods of justice and dispute resolution when seeking that justice for the victims of atrocity, as it may be the most efficient and effective way to establish peace and a respect for law. Beware of the cookie-cutter approach to international justice—it may hinder peace, not enhance it.

D. *Is the Bar Set Too High for These International Justice Mechanisms?*

I have mentioned above that the spirit of Nuremberg lives, yet that noble assertion has come back to haunt us as well. Over the past fifteen years, we have equated the success or failure of the ad hoc tribunals, the hybrid courts, even the international court, to Nuremberg, to the lofty assertions coming from that justice experience. My question to all of us is: Have we set the expectation bar too high, thus frustrating the international community and giving pause to cynical or skeptical politicians and diplomats over the advancements made in modern international criminal law?

21. See Rome Statute of the International Criminal Court, *supra* note 13, art. 17, 2187 U.N.T.S. at 100-01 (setting out rules and considerations of inadmissibility when a case is being investigated or prosecuted by another competent tribunal).

Justice is not inherently efficient, nor is it completely effective in some instances. Metrics that work well for a business model may not be the appropriate metrics to measure the performance of an international justice organization. I am not asserting that efficiency and effectiveness are not important—they are, but the international community needs to realistically assess the performance of the various tribunals and courts. Nuremberg may have been *a* model to consider, but not *the* model. Nuremberg was as expensive as the modern day tribunals. Cost is not the only metric to consider.

IV. CONCLUSION

These are the beginning steps of a process that mankind began at Nuremberg and carried forward on the shoulders of the tribunals and courts in Yugoslavia, Rwanda, Sierra Leone, and Cambodia, through to the International Criminal Court. It is only the beginning of the beginning, but it is certainly a movement forward in seeking justice for victims of war crimes, crimes against humanity, and genocide.

Mankind has come a long, long way in its journey towards international justice. I am hopeful—indeed encouraged—by the past fifteen years. Justice Robert Jackson declared in his opening statement before the International Military Tribunal at Nuremberg: “But the ultimate step in avoiding periodic wars, which are inevitable in a system of international lawlessness, is to make statesmen responsible to law.”²²

22. See Robert H. Jackson, Opening Statement for the Prosecution Before the International Military Tribunal (Nov. 21, 1945), *in* INTERNATIONAL MILITARY TRIBUNAL: THE TRIAL OF GERMAN MAJOR WAR CRIMINALS BY THE INTERNATIONAL MILITARY TRIBUNAL SITTING AT NUREMBERG GERMANY 45 (1946).