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GLOBALIZATION OF CRIMINAL JUSTICE

Michael Bohlander

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Edited by

Michael Bohlander

Durham University, UK

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Series Preface

Globalization is as much a process as a phenomenon of our age with forceful transformative qualities that affect conventional knowledge of politics, economic and the law. In most cases, but not always, globalization has led to an increasing convergence of values that affect different sectors of society unequally. Of the diverse dimensions of globalization, its tangible impact on economic processes is illustrative of the transformative potential and impact. Economic globalization has so fundamentally affected the roles and relationships of national and international actors that conventional rules of law have come under intense scrutiny. With economic globalization comes the confirmation of neo-classical economic doctrine as a dominant theme in policy-making and with it the diminution of the State and other symbols of sovereignty, coupled with a noticeable empowerment of actors such as transnational corporations, civil society groups and intergovernmental economic organizations. In this rapidly changing environment the law continues to play its usual defining and facilitative role but with a responsive twist to the demands of the phenomenon and processes of globalization. As a thematic collection of essays put together by experts in different fields transformed by globalization, the International Library of Essays on Globalization and Law seeks to capture the changing role of the law in modern society. In addition to containing key articles, each volume has an authoritative introduction which explains the context and significance of the essays which have been selected. Considerable care and attention have gone into selecting essays for each volume and I am grateful to each editor for this.

MICHAEL K. ADDO
Series Editor
University of Exeter, UK

Introduction[1*]

People should not be afraid of their governments; governments should be afraid of their people.

V for Vendetta

I open my books about rights and morals. I listen to scholars and legal experts, and inspired by their suggestive discourses, I deplore the miseries of nature, admire the peace and justice established by the civil order, bless the wisdom of public institutions and find consolation for being a man by seeing myself as a citizen. Well instructed as to my duties and my happiness, I close the books, leave the lecture room, and look around me. There I see a miserable people groaning under an iron yoke, the whole human race crushed by a handful of oppressors, and an enraged mob overwhelmed by pain and hunger whose blood and tears the rich drink in peace. And everywhere the strong are armed against the weak with the formidable power of the law.

Jean-Jacques Rousseau, *The State of War* (1756–1758)

Global Justice[2] – A 'Symbolic Gesture'?[3]

Genocide, crimes against humanity, war crimes, ethnic cleansing – these concepts are just a few among many that have become household concepts over the last two decades, although they had already been around for most of the twentieth century or even longer. Nevertheless, it was undeniably the Yugoslav secession conflict and the slaughterhouse of Rwanda at the beginning of the 1990s, as well as the establishment of the International Criminal Tribunals for the Former Yugoslavia (ICTY) and Rwanda (ICTR) by the United Nations as a response to the atrocities committed there, that made the general public, and the legal community in particular, sit up and take notice. Things were going to be different from then on. There was a clearly discernible wind of change blowing through the hitherto hallowed and dignified halls walked by the members of international diplomatic circles and academy of public international

[1] * I would like to thank Caroline Fournet (Exeter Law School), Stefan Kirsch (Hamm & Partner Attorneys, Frankfurt) and Dawn Rothe (Old Dominion University, Norfolk, VA) for their comments on an earlier draft. All remaining errors are mine.

[2] In this collection, issues of transnational criminal justice and international or regional assistance and cooperation in criminal matters, especially those in the European Union – for example, the European Arrest Warrant – have been left out for reasons of space and because the developments of the international tribunals represent a better picture of the globalization effects engendered when the international community concerns itself with matters of criminal justice.

Note: some of the sections in this introduction have been excerpted and modified based on earlier work not reprinted below and are referenced *in situ*.

[3] Reflecting the title of the book by Dawn Rothe and Christopher Mullins, *Symbolic Gestures and the Generation of Global Social Control – The International Criminal Court*, (2006).

law. For the first time since the late 1940s the idea of an international mechanism for providing criminal accountability of the perpetrators was taking recognizable shape, leaving the ethereal realm of permanent possibilities behind and entering the material world. A new breed of lawyer was born along with this incarnation, the international criminal justice practitioner, many of whom soon filled the ranks of prosecutors, investigators, defence counsels, judges and the myriad legal support staff at the international tribunals. International criminal law was given more prominence in academic education and research. In 1998, riding on the crest of the wave fuelled by the 'no impunity' movement, as well as the experience of, and quite possibly guilt about, their abject failure to intervene in a timely fashion when the killing started, many states signed the Rome Statute of the International Criminal Court. Justice had prevailed over state power. Impunity was to be extirpated forever. 'Never again', already a rallying cry after the Nazi regime and the Japanese imperialist government had been routed, was once more the inscription on the banner of the new age of human empowerment versus the mighty elites which abused their powers. The countless victims were going to be given a forum where their voices could be heard, even from beyond the grave. The powerful countries were going to throw their political and, if necessary, military weight behind this noble enterprise. Governments were finally going to be afraid of their peoples. All was going to be well. Or was it?

Among the states that did vote against the adoption of the Rome Statute, did not sign it or waited until the last minute, signed and then unsigned it were the three most powerful of the permanent members of the United Nations Security Council: the United States of America, Russia and China. They were in the company of what used to be termed the 'rogue states' which were accused of supporting terrorism at the time: Syria, Libya, Iran and others. Another country which, more than any other, should be a fervent adherent of punishing state-sponsored atrocities after the experience of the Jews in Germany in the first half of the twentieth century, also refused to sign: Israel. The Arab world almost uniformly declined to ratify the Statute, mainly worried about the issues of immunity of heads of state and potential alleged clashes between the human rights-based offences and the traditional values of the Shari'a.

The crime of aggression, which in one form or another had already been part of the repertoire of international criminal law after the First and Second World Wars, is still awaiting its definition as these lines are being written, decades after the Federal Republic of Germany, out of the bitter lessons of history, included the crime of aggression in its constitution under Article 26. It is not, for example, the countries of the former Eastern bloc or the poor nations of Africa[4] that have a problem with that offence in its traditional understanding – it is the three Security Council members mentioned above. It is the State of Israel which, to this very day, successfully avoids any international scrutiny worth the name of the Zionist policy of ethnic cleansing in Palestine – a policy which had already begun while the Jews themselves were still being persecuted in Germany under the Nazis (Pappe, 2007). There are others. The United States, that paragon of inalienable human rights and democracy, of due process and the pursuit of happiness,[5] balked at the prospect of having to face an independent prosecutor it could

[4] See Mullins and Rothe (2008) on the African situation and its idiosyncrasies which remove it to some extent from the classical aggression scenario.

[5] As is the case so often, reality did not always match the Founding Fathers' aspirations, nor those of the drafters of the constitution. See, for example, the popular account by Kinzer, *Overthrow* (2007) and his earlier book, *All the Shah's Men* (2004). The CIA has recently disclosed a number of its previous

not control via the power of veto in the Security Council. It blackmailed the United Nations into passing Security Council Resolution 1422 by threatening to withhold funds for ongoing peacekeeping operations (Mokhtar, 2003). It then enacted a shameful piece of legislation, the American Service-Members' Protection Act of 2002,[6] which came to be called the 'Hague Invasion Act' on account of the following provision:

> SEC. 2008. AUTHORITY TO FREE MEMBERS OF THE ARMED FORCES OF THE UNITED STATES AND CERTAIN OTHER PERSONS DETAINED OR IMPRISONED BY OR ON BEHALF OF THE INTERNATIONAL CRIMINAL COURT.
>
> a. AUTHORITY – The President is authorized to use all means necessary and appropriate to bring about the release of any person described in subsection (b) who is being detained or imprisoned by, on behalf of, or at the request of the International Criminal Court.
> b. PERSONS AUTHORIZED TO BE FREED – The authority of subsection (a) shall extend to the following persons:
>
> 1. Covered United States persons.
> 2. Covered allied persons.
> 3. Individuals detained or imprisoned for official actions taken while the individual was a covered United States person or a covered allied person, and in the case of a covered allied person, upon the request of such government.

All of this makes one doubt the sincerity of the ubiquitous protestations of goodwill and benign intentions. The five permanent Security Council members are all also among the top traders in small arms (Guardian.co.uk, 2010), one of the main scourges[7] of the so-called 'Third World'. Despite the mantra repeated at the beginning of and during every major bombing campaign about the deployment of 'surgical weaponry' and the avoidance of civilian collateral damage regardless of the type of weaponry used, 90 per cent of the 4 million war-related deaths in the 1990s were civilians, 80 per cent of which – in absolute numbers, 2,880,000 – were women and children (Guardian.co.uk, 2010). As Jean-Jacques Rousseau wrote in the eighteenth century:

> As for what is called the law of nations, it is clear that without any real sanction these laws are only illusions that are more tenuous even than the notion of natural law. The latter at least addresses itself

operations from the 1950s to the 1970s, the so-called 'Family Jewels' and other documents; they are available online at: http://www.foia.cia.gov/.

[6] Online at: http://www.state.gov/t/pm/rls/othr/misc/23425.htm.

[7] The usual preoccupation with the so-called weapons of mass destruction (nuclear, chemical and biological) would appear to be misdirected. This often neglected concern has in the meantime reached the general, non-specialist public domain, a fact that is brought home concisely by the following quote from the 2005 movie *Lord of War* by a law-enforcement agent investigating a small arms gun-runner: 'Do you know why I do what I do? I mean, there are more prestigious assignments. Keeping track of nuclear arsenals – you'd think that'd be more critical to world security. But it's not. No, nine out of ten war victims today are killed with assault rifles and small arms – like yours. Those nuclear weapons sit in their silos. Your AK-47, that's the real weapon of mass destruction.' See http://www.imdb.com/title/tt0399295/quotes. The estimate given by the 2005 Small Arms Survey is that small arms and light weapons are responsible for 60–90 per cent of all war and conflict deaths; see Small Arms Survey (2005).

> to the hearts of individuals, whereas decisions based on the law of nations, having no other guarantee than the utility of the one who submits to them, are respected only as long as those decisions confirm one's own self-interest. (Rousseau, *The State of War*, cited in Reichberg, Syse and Begby, 2006, pp. 482–83)

Even after the entry into force of the ICC Statute in 2002 and on the basis of the attitude displayed by the powerful nations, this quote still appears to ring true.[8] It is taken up, for example, in Chapter 7 of this volume by Jeremy Rabkin in his essay first published in the *Cornell International Law Journal*, when he says:

> Justice is a serious and often difficult responsibility. It is far too serious to be left to an entity so distracted, so divided, so diffuse as 'the international community.' What hope there is for justice in this world must be a hope that resides, where justice has always been sought in the past: in the governments of sovereign nations. It was possible to forget this fact in the giddy, frivolous atmosphere of the 1990s. What previous generations took for granted, the world of the early 21st Century has now relearned. In a more serious world, the lesson is not likely to be forgotten. It is certainly not likely to be effaced by an international criminal court, promising to do justice for humanity, but equipped only to divert a specialized coterie of legal scholars. Justice is too serious to be left to international bureaucrats. (p. 279)

But that is, of course, where Rabkin is both right and wrong: the international community is still more or less in the state that Rousseau described so long ago, but it is simply naïve to think that national governments and judiciaries would be in a position to take up the baton and prosecute, try and convict the masterminds behind these atrocities. It is naive because of the all-pervasive concept of state sovereignty which makes any attempt at the practical and pragmatic application of the ideas behind universal jurisdiction into a juridical farce. What good is the fact that you can investigate and possibly indict a head of state sitting in his office 5,000 miles away if you cannot get at the evidence you need, because the evidence is also 5,000 miles away and the same head of state controls access to the territory? After the brief euphoria over the Pinochet case in the UK (Brody and Ratner, 2000), the 2002 decision of the International Court of Justice (ICJ) in the so-called *Arrest Warrant* case between Congo and Belgium made it abundantly clear in basically three short paragraphs that immunity of heads of state and other government officials was still very much alive for prosecutions by another state, but not for genuine international criminal courts:

> 55. In this respect, no distinction can be drawn between acts performed by a Minister for Foreign Affairs in an 'official' capacity, and those claimed to have been performed in a 'private capacity', or, for that matter, between acts performed before the person concerned assumed office as Minister for Foreign Affairs and acts committed during the period of office. Thus, if a Minister for Foreign Affairs is arrested in another State on a criminal charge, he or she is clearly thereby prevented from exercising the functions of his or her office. The consequences of such impediment to the exercise of those official functions are equally serious, regardless of whether the Minister for Foreign Affairs was, at the time of arrest, present in the territory of the arresting State on an 'official' visit or a 'private' visit, regardless of whether the arrest relates to acts allegedly performed before the person became the Minister for Foreign Affairs or to acts performed while in office, and regardless of whether the

[8] It may thus be too early to speak of a paradigm change from the 'law of force' to the 'force of law' in international relations. See on this generally Neubacher and Klein (2006).

arrest relates to alleged acts performed in an 'official' capacity or a 'private' capacity. Furthermore, even the mere risk that, by travelling to or transiting another State a Minister for Foreign Affairs might be exposing himself or herself to legal proceedings could deter the Minister from travelling internationally when required to do so for the purposes of the performance of his or her official functions... .

58. The Court has carefully examined State practice, including national legislation and those few decisions of national higher courts, such as the House of Lords or the French Court of Cassation. It has been unable to deduce from this practice that there exists under customary international law any form of exception to the rule according immunity from criminal jurisdiction and inviolability to incumbent Ministers for Foreign Affairs, where they are suspected of having committed war crimes or crimes against humanity. ...

61. Accordingly, the immunities enjoyed under international law by an incumbent or former Minister for Foreign Affairs do not represent a bar to criminal prosecution in certain circumstances.

First, such persons enjoy no criminal immunity under international law in their own countries, and may thus be tried by those countries' courts in accordance with the relevant rules of domestic law.

Secondly, they will cease to enjoy immunity from foreign jurisdiction if the State which they represent or have represented decides to waive that immunity.

Thirdly, after a person ceases to hold the office of Minister for Foreign Affairs, he or she will no longer enjoy all of the immunities accorded by international law in other States. Provided that it has jurisdiction under international law, a court of one State may try a former Minister for Foreign Affairs of another State in respect of acts committed prior or subsequent to his or her period of office, as well as in respect of acts committed during that period of office in a private capacity.

Fourthly, an incumbent or former Minister for Foreign Affairs may be subject to criminal proceedings before certain international criminal courts, where they have jurisdiction. ... (ICJ, 2002, paras 55, 58 and 61).

Against this background, relying on domestic jurisdictions is pointless as far as the prosecution of the most serious offenders is concerned, because they will more often than not be in the positions covered by the immunities set out by the ICJ. The first, second and third exceptions to this rule mentioned in paragraph 61 above are illusory, to put it kindly. My Lai[9] should have put an end to such fantasies. This means that only international courts have the power to prosecute. The sobering realization is that, so far, the world has not come up with anything better, and it is unlikely that it will do so anytime soon. International criminal justice is a field that advances in small steps, often driven by a few tenacious individuals such as Cherif Bassiouni (see Chapter 6) and Antonio Cassese, from whose *Festschrift* that chapter is taken. The usual publications and speeches celebrating the march from 'Nuremberg to the Hague' as a huge step for mankind cannot belie that fact – after all, it took over 50 years after Nuremberg and Tokyo for a permanent international criminal court to come into existence, and, even then, the principle of complementarity (see, for example, Article 17 of the ICC Statute) which underlies the whole structure of the ICC gives precedence to national prosecutions unless they are sham proceedings. Ironically, the aim of the ICC is therefore not to have any cases at all. I am also sure that we would still be waiting for an international criminal court had it not been for the urgent necessity to create the ICTY and ICTR so that the international community could demonstrate some form of resolve and reaction short of military intervention, and the momentum created by that situation.

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9 *US* v. *Medina*, CM 427162 (1971).

Let us not forget: in both Yugoslavia and Rwanda the victims would have been better off and would have arguably been fewer in number, had the international community through the offices of the United Nations immediately sent in troops with a robust mandate rather than waiting until it was (almost) over to enact a spectacle of *post factum* moral condemnation of the very same perpetrators it had indulged or suffered previously. Yet diplomatic usage and comity made that impossible. That is the starting point for this volume. It is not an acclamatory collection of essays that is meant to celebrate the undoubted advances made by international criminal justice since 1945.[10] Its aim is to highlight the fact that had the international community really wanted to engage in building an international criminal justice mechanism, we would have progressed much further already and Rousseau's dictum could have been consigned to the scrap-heap of legal history. The outlook is thus critical, even sceptical, but not fatalistic.

The Basic Building Blocks – Comparative Research

When we talk of the globalization of criminal justice, we mean, of course, more than just international criminal justice as expressed in war crimes tribunals. In the highly networked and interfaced present-day legal community it is unavoidable that, even outside those formalized laboratories of criminal law amalgamation, different systems meet and sometimes even clash. International criminal justice is therefore unthinkable without comparative criminal law research. While in earlier decades this research appeared to be mainly restricted to the perennial face-off between common and civil law, adversarial and the misguidedly so-named inquisitorial systems, as described aptly by Diane Amann in her magisterial piece on 'Harmonic Convergence' (Chapter 1), the fray has recently been joined by at least one other major legal system, Islamic Shari'a. As Mohammad Hedayati-Kakhki and Michael Bohlander (2009) have pointed out, throughout the Muslim world there are calls for a re-Islamization of the legal systems, either for the strict application of the Shari'a in its traditional form based on *taqlid* or imitation, or for a return to the roots of the *Maqasid al-Shari'a*, a reopening of the door to *ijtihad* or independent legal reasoning, or even for a move towards the practice of Islam in a secular state (see, for example, An'Naim, 2008), or a combination of some of these. However, even amongst Islamic scholars there is no agreement on the approach to be taken. Such disagreements are made more difficult by the differences in interpreting primary sources of law between the Shi'a and Sunni schools of thought.

At the same time, it is noticeable that some Muslim states have taken steps which have resulted in a *rapprochement* of Islamic and secular principles. The recent constitutions of states such as Iraq and Afghanistan – countries that have, in the course of history, come under the influence of Western policies – declare the Shari'a to be the highest source of the law of the land, while at the same time subscribing to the ideals of democracy. Many Muslim countries have laws and justice systems based on post-colonial and secularized models left behind by the colonial powers. The government of the Maldives recently enlisted the services of an eminent American law professor, Paul Robinson, a non-Muslim, to help it revise its criminal

[10] Compare to this effect the excellent overview by Cryer (2005).

code[11] based on the Shari'a, and his report on these endeavours is reprinted in this volume as Chapter 4. Muslim states are engaged in international relations which are in fact dominated by Western thinking. Globalization will result in an ever closer contact between these societies and different spheres of law. Such processes are not uniform in the Islamic world, however, as liberalization in some countries occurs alongside radicalization and more literal interpretation of Islam in others which feel threatened by such Western interference. Despite the outward tendency towards such literalism within these countries, underlying currents of liberalism, often in the form of prominent intellectual and social figures, flow beneath the surface and create a potential for reform. An example is the development in Iran highlighted in the essay by Hassan Rezaei (Chapter 3).

The vehicle of comparative criminal law research is also highly useful in disclosing certain worrying tendencies in the international criminal law and transitional justice environments. The buzzword for these worries is 'legal colonialism': one sector of the global legal community, be it common law versus civil law or international law versus domestic law, tries to impose its own understanding of principles of law and general tenets of natural justice on the remaining participants in the dialogue. More often than not, this clash of legal systems is not a function of the respective merits of the substance of the individual legal order, but rather an expression of the political clout the countries representing them have on the global stage. To a similar degree, it can be either a consequence of language barriers leading to a weeding out of any sources not written in English, and to a lesser extent in French, or it can come as the baggage of nation-builders in transitional administrations, as, for example, in Kosovo where the French international judge Patrice de Charette had the following to say about the interference by American UNMIK lawyers with the national legal criminal procedure rules on witness police statements as evidence at trial:

> On peut, sans grand risque de se tromper, voir derrière cette brillante opération la main des juristes américains, présents en force à la Minuk. … Ignorant superbement la tradition juridique continentale et voulant imposer leurs propres standards, ils ont rédigé ce texte absurde qui accroît la confusion. (de Charette, 2002, p. 51)[12]

If it is the aim of the international community and the transitional administrations to help post-conflict countries achieve political stability and autonomy, any appearance of colonialism should be avoided. Lawyers who lend support to such states must therefore familiarize themselves thoroughly with the ideas underlying a country's legal system before they can reform it, and should do so as much as possible within the existing framework and traditions.

The wholesale replacement of legal traditions as a consequence of impatience based on lack of planning or foresight, ignorance or unwillingness to understand them is a violation of the

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[11] See Vikor (2005, pp. 254 ff), who calls the codification efforts 'Shari'a through Siyasa' – that is, implementing Shari'a through state-sponsored codification. On the situation in Pakistan, see Wasti (2009).

[12] Translation by the author: 'One may, without major risk of misunderstanding, see behind this brilliant operation the hand of the American lawyers, present in force at UNMIK … Utterly ignoring the continental legal tradition and wanting to impose their own standards, they drafted this absurd text which increases the confusion.

historical identity of a people. These countries and their citizens are also keenly aware of the issue of international double standards, both legal and political. Their respect for the alleged superiority of the rule of law based on Western democratic thinking will to a very large extent depend on their perception that the same rules apply to all. Recent history in that respect has been less than encouraging (Bohlander, 2004, p. 31).

Against this background, the use of so-called model codes for criminal justice as a tool of transitional justice law reform is a good example of the dangers arising from well-meaning 'systemic education' by external nation-builders; Vivienne O'Connor (Chapter 5) describes this movement.

A similar colonization has been said to have taken place at the international level, with the common law stealing a march on the civil law and, supported by the overwhelmingly adversarial procedural approach found in common law countries and adopted in international courts and tribunals, other legal traditions. Recent research on the use of domestic sources in the context of 'general principles' within Article 38 of the ICJ Statute, conducted by Mark Findlay and Michael Bohlander (Chapter 2), has shown that the use of common law or straightforwardly Anglophone source material seriously outweighs the approach of, and sources from, continental or other systems (see also Bohlander, 2008). To a large extent, that practice must be traced to the language skills of the people doing the research; the most worrying fact connected to this issue is the command of languages displayed by the judges, who should, after all, be the ones who decide which source merits mention and which does not – not their legal support staff. With the increasing practice of referring to their own case law as precedent adopted by the ad hoc tribunals and the hybrid courts created after them, such as the Cambodian and Sierra Leone courts, previous mistakes or, more generally, choices of path to be followed can become set in stone, despite the fact that these decisions are mere shorthand references to the results of research done with respect to the sources recognized by Article 38 and do not figure among the actual sources of international law in that Article. Bearing that in mind, the absence of any meaningful research into sources from the Arab and Asian world is more than questionable. The ICC with its Legal Tools database project[13] is on the right track towards remedying at least some of these discrepancies, leaving aside the work that went into the drafting of the Statute, the Elements of Crimes and the Rules of Procedure and Evidence in the first place.

The Blueprint – Putting the Blocks Together

Building blocks alone are of little use unless one knows how to put them together to form a coherent whole. Yet, the development of international criminal law, both procedural and substantive, appears to have gone ahead without anyone really taking the time to sit back and think about a proper strategy. This is certainly true for the Nuremberg and Tokyo tribunals as well as the ICTY and ICTR, but much less so for the ICC. The first four were all ad hoc responses to pressing situations and the first two at least were instruments that had to be forged quickly during an ongoing conflict. However, with the ICTY and ICTR, especially after the adoption of the Nuremberg Principles by the UN General Assembly,[14] there had

[13] See http://www2.icc-cpi.int/Menus/ICC/Legal+Texts+and+Tools/Legal+Tools+Extern/.

[14] GA Res. 95(I), UN GAOR, 1st Sess., pt 2, at 1144, UN Doc. A/236 (1946).

been time to think about having an international criminal court. The *aut dedere aut iudicare* provisions found in many international conventions of that period are testament to the fact that the potential of criminal liability for humanitarian law abuses was very much in the mind of the contracting parties, although they preferred to leave it to the domestic enforcement mechanisms to see that liability was established and, if necessary, practised. The International Law Commission had worked on a Draft Code of Crimes against the Peace and Security of Mankind for a long time, but with no tangible result until the advent of the ICTY and ICTR.[15] Because no usable groundwork had been laid in the meantime, the creation of the two ad hoc tribunals was again a matter of forging the iron while it was hot, and thus their founders had no opportunity to take a principled approach. Only slowly is the academic community beginning to address the fundamental issues that have been the object of contemplation in national jurisdictions for centuries.[16]

Issues such as general principles of criminal law, theories of *actus reus* and *mens rea*, of defences, the role and function of judges, and the (un)desirability of judicial law-making on procedure and evidence were treated as secondary, and their development was safely left in the hands of the judges as case law developed. The meandering of both the law of joint criminal enterprise and the principle of command or superior responsibility is a good example of this worrying attitude. The principle of superior responsibility, in particular, has an alternative that is repugnant to some legal traditions:

> ... [S]uperior responsibility which has been developed under international criminal law ... does apply ... also to acts of which the superior had no prior knowledge but omitted to punish when he learnt of them. What is often overlooked in the discussion is that the superior is punished as a murderer, *génocidaire*, rapist etc., and not for dereliction of duty. This means that the offence of the subordinate is attributed to the superior as if he had committed it himself, even if he did not know at the time of the commission of the offence and only failed to punish the offender after learning about it, which may be weeks or even months after the event. ...

In German eyes, e.g., this retro-active application of the principle is a violation of the 'Schuldprinzip' (principle of individual guilt). This legal construction has prevented the German legislature from copying Article 28 of the ICC Statute in its entirety into the national code of international criminal law (Völkerstrafgesetzbuch), and the government draft described the superior's liability as a perpetrator of the subordinate's crime merely because of the omission to punish as clearly exaggerated and irreconcilable with German criminal law principles.[17] (Bohlander, 2004, p. 30)

Nevertheless, the principle has, for example, also consistently been applied in the ICTY in those cases. However, it is difficult to understand how one can square that approach

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[15] See *Yearbook of the International Law Commission* (1996), vol. II, (Part Two) or online at: http://untreaty.un.org/ilc/texts/instruments/English/draft%20articles/ 7_4_1996.pdf.

[16] See, for example, the study by Stefan Kirsch (2009) on establishing a differentiated doctrinal approach to individual crimes against humanity which hitherto was all too often precluded by confusing the individual offence with aspects of an attack directed against a civilian population. See also, the attempt by Katrin Gierhake (2005) to found the concept and justification of international criminal law on Kantian philosophy.

[17] German original text: 'Dies erscheint als eine deutlich überzogene und nach deutschem Recht auch dogmatisch nicht haltbare Regelung'. See Lüder and Vormbaum (2002, p. 59).

of delegating vital law-making functions with the overwhelming need for legal clarity in criminal proceedings based on the *nullum crimen/nulla poena* axioms, even if one allows for the more flexible approach of the common law and international customary law. The essays on substantive law and sentencing by Robert Sloane, Mohamed Badar, Michael Bohlander and Wolfgang Schomburg and Ines Petersen (Chapters 9 to 12) try to not only address some of the issues that are, or were at the time, in need of that clarification, but also show how academic research in international law might be made into a meaningful contribution to an analytical approach to the fundamental questions of international criminal law. They are rounded off by three essays on procedural issues: first, a comprehensive essay by Kai Ambos (Chapter 13) on the nature of international criminal procedure, followed by a defence counsel's suggestions about the trial structure (Stefan Kirsch – Chapter 14) and a final contribution by Michael Bohlander (Chapter 15) on the establishment of the tribunals' power to punish contempt and the multipurpose use of the concept of 'inherent power'.

Black Letter Law versus Socio-Legal and Policy Research

The collection of essays in this volume could easily have been doubled to take into account the more socio-legal aspects, such as, for example, the selection and recruitment of judges, as well as judicial independence,[18] impartiality and discipline.[19] In 2001 the International Crisis Group expressed great concern, for example, about the work of the judges at the ICTR:

> Beyond the official explanations and arguments about procedure or bad legal administration which are given ample space in the 1999 expert report, the judges are held responsible to a large extent for this unjustifiable situation. The poor output of the Tribunal is linked to the mediocre productivity of judges, some of whom are incapable of running criminal trials and to their often-prolonged absences. Moreover, in their work, the tribunal chambers, which deal with the most serious crimes in cases that are often dense and complex, have relied to an abnormal extent on young legal assistants, even on interns.
>
> Given this assessment, judges should be held accountable for their work. International Crisis Group recommends, in the first instance, that the selection of judges should be more rigorously organised and that candidates who have not had solid experience as a judge in criminal affairs should be rejected. (International Crisis Group, 2001, p. 11)

As Bohlander explains elsewhere, the current system of recruitment and training of judges is in dire need of improvement, as is the regulation of judicial conduct (Bohlander, 2008, 2009). The references to the eligibility to the highest judicial offices in the judges' home countries are next to meaningless if the domestic system allows for non-lawyers to be appointed to the country's Supreme Court, as is the case in Japan and with the recently re-elected Japanese ICC judge. John Haley has highlighted the Japanese selection procedure in his work on the Japanese judiciary:

> Illustrative is the *Mainichi Shinbun* Social Affairs Bureau account of the appointment of Ryōhachi Kusaba as Japan's twelfth Chief Justice in February 1990. Two months before the appointment, soon-

[18] See, for example, the statement by the International Bar Association's Human Rights Institute related to one *ad litem* judge at the ICTY (International Bar Association, 2008).

[19] See, for example, Bohlander (2007, p. 325), with references to earlier articles.

> to-retire Chief Justice Kyōichi Yaguchi visited the official residence of then Prime Minister Kaifu. The purpose was to inform the prime minister of the judiciary's choice for his replacement; a choice made with the participation of the principal administrators of the judicial branch – all career judges themselves. Kaifu did not object. As one official is quoted to have said (translated into idiomatic English): '*We wouldn't have the vaguest idea who anyone they might suggest was, and we wouldn't have any way of finding out whether they would be suitable.* The Supreme Court people have researched this. We trust their judgment.' A similar procedure has been followed in the appointment of every Chief Justice since 1962. (Haley, 2007, p. 107, emphasis added)

Trans-systemic criteria for creating a uniformly trained and equally qualified pool of judicial candidates would make the 'or' in Article 36 of the ICC Statute between the categories of judges with criminal and those with international law experience factually moot without the need for amending the Statute (Bohlander, 2009). It remains to be seen whether the Assembly of States Parties wishes to examine such ideas more closely.

Already briefly alluded to above as a joint, but distinct, matter is the question of selective prosecution, moving from the original allegation of victors' justice in Nuremberg and Tokyo to that of the prosecution by the powerful of the powerless. All the situations and cases currently under way before the ICC, the UN ad hoc tribunals and the several hybrid tribunals – such as the Special Court for Sierra Leone, the Extraordinary Chambers in Cambodia and the Special Tribunal for Lebanon, as well as the non-international Iraqi High Tribunal – concern regions and countries that are geopolitically important, either directly or in the mid to long term, and thus worthy of the attention of the international community. Yet all the countries – Bosnia, Kosovo, Iraq, Cambodia, Sierra Leone and Lebanon – fall into the category of those that do not as such play an important role in the concert of the world's state community: to put it bluntly, one might say that they may be important *to* someone, but are not necessarily important in and of *themselves*. Yet not one single case before an international tribunal has addressed misbehaviour by the powerful states, either undertaken alone or in joint action such as the so-called 'humanitarian intervention' in Kosovo in 1999. In the latter instance, the prosecutor declined to open any proper formal investigation after the report of the working group recommended that she should not do so (Bohlander, 2009), despite evidence that NATO and its members had been less than forthcoming with specific information when requested to produce it.[20] But then, who would in all seriousness have thought that the result could be

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[20] The *Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia* of 13 June 2000 – online at http://157.150.195.168/sid/10052 _– concluded:

> 90. The committee has conducted its review relying essentially upon public documents, including statements made by NATO and NATO countries at press conferences and public documents produced by the FRY. *It has tended to assume that the NATO and NATO countries' press statements are generally reliable and that explanations have been honestly given. The committee must note, however, that when the OTP requested NATO to answer specific questions about specific incidents, the NATO reply was couched in general terms and failed to address the specific incidents.* The committee has not spoken to those involved in directing or carrying out the bombing campaign. The committee has also assigned substantial weight to the factual assertions made by Human Rights Watch as its investigators did spend a limited amount of time on the ground in the FRY. Further, the committee has noted that Human Rights Watch found the two volume compilation of the FRY Ministry of Foreign Affairs entitled *NATO Crimes in Yugoslavia* generally reliable and the committee has tended to rely on the casualty figures for