

JURNAL HUKUM HUMANITER

Vol. 1 No. 1

Juli 2005

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Diterbitkan oleh:
PUSAT STUDI HUKUM HUMANITER DAN HAM 
FAKULTAS HUKUM UNIVERSITAS TRISAKTI



ICRC

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JURNAL HUKUM HUMANITER

Diterbitkan oleh Pusat Studi Hukum Humaniter dan HAM (**terAs**)
Fakultas Hukum Universitas Trisakti Jakarta

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Jurnal Hukum Humaniter terbit setiap enam bulan pada bulan Juli dan Desember

EDITORIAL

Para pembaca yang kami hormati,

Puji syukur kami panjatkan ke hadirat *Allah Subhanahu Wata'ala* karena berkat rahmatNya jualah maka JURNAL HUKUM HUMANITER ini dapat hadir di tangan para pembaca semua. Jurnal ini merupakan jurnal yang pertama kali terbit di tanah air, secara khusus mengulas berbagai masalah hukum humaniter, dan akan terbit setiap enam bulan sekali.

Penerbitan jurnal ini dimaksudkan sebagai wahana bagi semua lapisan masyarakat, baik dari kalangan militer, aparat penegak hukum, birokrat, LSM, akademisi, mahasiswa, maupun kalangan lainnya yang ingin mengetahui secara lebih mendalam mengenai seluk-beluk hukum humaniter. Di samping itu, konflik-konflik yang terjadi di berbagai wilayah Republik Indonesia dalam dekade terakhir juga menjadi pertimbangan lain bagi diterbitkannya jurnal ini.

Pada edisi perdana ini, topik utama JURNAL HUKUM HUMANITER adalah tentang “kejahatan perang” (*war crimes*). Kejahatan perang merupakan salah satu tindak pidana yang belum sepenuhnya diakomodasikan ke dalam aturan hukum nasional Indonesia. Oleh karena itu, sejarah dan praktik-praktik negara serta beberapa substansi dasar dari peraturan-peraturan mengenai tindak pidana kejahatan perang akan dikemukakan dalam artikel-artikel utama dan pendukung. Tidak hanya itu, pemaparan hukum nasional serta upaya-upaya yang telah dilakukan khususnya dalam Rancangan Kitab Undang-undang Hukum Pidana Nasional juga akan ditampilkan guna melengkapi edisi kali ini.

Di samping materi pokok tersebut, disertakan pula “Kolom” yang pada edisi kali ini berisikan tentang Konvensi Den Haag IV (1907) yang mengatur mengenai hukum dan kebiasaan berperang di darat. Pemilihan materi ini sengaja dilakukan mengingat urgensi Konvensi ini yang sudah menjadi hukum kebiasaan internasional dan berlaku bagi semua negara serta merupakan aturan penting dalam hal pengaturan alat dan cara berperang yang masih relevan dan berlaku pada saat ini.

Atas diterbitkannya jurnal ini, kami mengucapkan terima kasih kepada *International Committee of the Red Cross* (ICRC) yang memiliki komitmen tinggi dalam upaya mengembangkan hukum humaniter di Indonesia dengan mendukung penerbitan jurnal ini.

Akhir kata, kami berharap semoga penerbitan jurnal ini dapat memenuhi kebutuhan dan keingintahuan yang mendalam terhadap hukum humaniter. Untuk itu, kami dengan segala kerendahan hati akan menerima segala kritik maupun saran-saran yang konstruktif bagi penyempurnaan jurnal ini di masa datang.

Redaksi

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SIXTY YEARS FROM NUREMBERG: WHAT PROGRESS FOR INTERNATIONAL CRIMINAL JUSTICE?

Timothy L.H. McCormack¹

Abstract

The commencement of the Nuremberg Trials is one other major event of 1945. There is no question that in the period since the Nuremberg Trials opened on 19 November 1945 there has been tremendous development in international criminal law. The Nuremberg Trial also represented a major breakthrough for international criminal justice and promised much for the future. But, the Nuremberg Trial (and the Tokyo Trial as well) had own weaknesses in terms of the conduct of the legal process. In this paper, the author also explains the establishment of the *Ad Hoc* International Criminal Tribunals, International Criminal Court and Trials by the US Military Commission.

A. Introduction

Major anniversaries seem to prompt particular pause for reflection – a phenomenon we experience at all levels – from the personal to the global and at every level in between. This year of 2005 is replete with milestone anniversaries of major international significance and the collective reflective analysis seems endless. The ninetieth anniversary reflections on the Gallipoli Landing in 1915 have recently passed; there has been extensive media coverage and discussion about the thirtieth anniversary of the Fall of Saigon at the end of the Vietnam War; and, later in the year, the international community will acknowledge the tenth anniversary of the Srebrenića Massacre with sober reflection on that particular atrocity as one of the most egregious to have occurred in Europe since World War II.

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Of course, throughout this sixtieth anniversary year of the end of World War II, there are a succession of significant anniversaries of major events that occurred in that tumultuous year of 1945. I was in The Hague again recently for my involvement in the Milosevic Trial and my trip coincided with the end of the extensive commemorations and major events across many European cities to mark the sixtieth anniversary of the end of World War II in Europe. Commemorations have been held to mark the sixtieth anniversaries of the liberation of a succession of Nazi extermination camps. Later this year there will be similar events marking the sixtieth anniversary of the end of World War Two in the Pacific and of particularly outrageous examples of Japanese abuse of prisoners of war and of civilian populations in occupied countries. The international community will also mark the sixtieth anniversary of the dropping of the atomic bombs on Hiroshima and Nagasaki with a sober reflection on the horrendous consequences flowing from those first and, to date, only use of such weapons in war. The international community will also be celebrating the sixtieth anniversary of the signing of the UN Charter and the consequent establishment of the United Nations – no doubt reflecting on key successes as well as failures of the organisation.

One other major event of 1945 will also receive significant media coverage later this year at the time of its sixtieth anniversary and that event is the topic for this article - the commencement of the Nuremberg Trials. An obvious and entirely appropriate question to ask is “what progress for international criminal justice since then”?

B. The Significance of Nuremberg

There is no question that in the period since the Nuremberg Trials opened on 19 November 1945 there has been tremendous development in international criminal law: it is quite extraordinary just to reflect on what has happened as a consequence of that first international criminal trial.² But we

² See generally on the extraordinary recent developments in International Criminal Law Philippe Sands (ed), *From Nuremberg to The Hague: The Future of International Criminal Justice* (2003); Dominic McGoldrick, Peter Rowe and Eric Donnelly (eds.), *The Permanent International Criminal Court: Legal and Policy Issues* (2004).

should not celebrate the achievements of Nuremberg and the developments since without acknowledging the atrocities that lamentably require the response of a criminal trial process. Whenever we talk about international criminal law or about the trials of alleged war criminals we ought not overlook or fail to acknowledge the atrocities that those individuals are on trial for. Perhaps it also should be said that for every individual who does face trial and is called to account so many others do not. For all the “success” of international criminal law in the growing multilateral commitment to reign in impunity for atrocity it cannot be claimed that impunity is even an endangered species let alone extinct. One principal reason for the significance of Nuremberg is that, on this particular occasion, the victorious Allied Powers were so collectively shocked and appalled by the scale and the nature of the Nazi atrocities that they refused to passively ignore individual responsibility. Instead, the level of political resolve led to the establishment of the institutional structures and processes to hold responsible individuals to account.

In utilising the title 'Sixty Years from Nuremberg', it is readily accepted that we are using the name of the German city to refer to an actual event. Some events in some cities, towns and villages come to have historically profound consequences to the extent that popular reference to the event and all that it stands for is conveniently abbreviated to the name of the place alone – Solferino, Waterloo, Hiroshima and Nagasaki, Pearl Harbour, Long Tan. The Trial of the Major German War Criminals at Nuremberg has such profound historical significance that we refer to the event as Nuremberg and we all know what we mean. Twenty-two German defendants were indicted in an attempt to cover a broad cross-section of those responsible for the initiation, planning and perpetration of major wars of aggression throughout Europe - leaders from the political, military, business and industrial spheres of German life. The trial commenced in November 1945 and judgement was delivered in October 1946: eleven months to try twenty-two defendants. The contrast with the trial of the lone defendant Slobodan Milošević in The Hague could hardly be more stark. The Milošević Trial has gone on already

now for three and a half years, and judgement is not likely to be delivered until the end of 2006 – only a few months shy of the fifth anniversary of the start of that trial.

The Nuremberg Trial was not the only post-World War II war crimes trial: in fact, relative to the numbers of people that were actually tried by the Allies in the aftermath of the War, twenty-two defendants in this one trial is a very insignificant number. Much less well-known than the Nuremberg Trial is the significant Australian involvement in the Tokyo Trial which commenced in 1946 and involved the trial of twenty-nine Japanese defendants before an international military tribunal. The presiding judge of the Tokyo Tribunal was a former Chief Justice of the Supreme Court of Queensland, Justice William Webb, who subsequently went on to serve on the bench of the High Court of Australia.

In addition to those two major trials in Nuremberg and Tokyo, there were literally hundreds and hundreds of trials held at the so-called 'subsidiary' level, including a number at Nuremberg before a US military tribunal.³ Australian Military Tribunals, established pursuant to the *War Crimes Act 1945* undertook more than three hundred trials involving over eight hundred Japanese defendants. That particular episode of our national legal and military history is very little-known in this country.

Nor was Nuremberg the first time an international criminal trial had been proposed. In the aftermath of World War I there was a great deal of discussion about the possibility of establishing Allied tribunals to deal with those leaders from the defeated powers allegedly responsible for the waging of war and atrocities committed during the War. Those trials and tribunals never materialised and instead, controversially, Germany and the Ottoman Empire were allowed by the victorious Allied nations to try some of their own nationals under domestic rather than international law.⁴ The depth of

³ For an authoritative overview of many of the trials see the 15 volume work entitled *Law Reports of Trials of War Criminals* published in 1949.

⁴ For a brief summary of the Leipzig and Istanbul Trials see Timothy L H McCormack, 'Their Atrocities and Our Misdemeanours: The Reticence of States to Try Their 'Own Nationals' for International Crimes' in Mark Lattimer and Philippe Sands (eds.), *Justice for Crimes Against Humanity* (2003) 107, 121-125.

resentment by many within Allied nations at the perceived inadequacies of the German and Ottoman trials post-World War I was a catalyst for ensuring that the same experience did not recur in 1945. The establishment of the Nuremberg and Tokyo Tribunals owed much to allied perceptions of farce at Leipzig and at Istanbul.

While acknowledging other influences and developments, Nuremberg still remains the first international criminal tribunal established to try individuals for their alleged international crimes – a unique position in the historical development of international criminal law. It is also true that the seniority of those tried and the nature of the atrocities they committed adds to the aura attached to the Nuremberg Trial to this day.

Apparently the decision to subject the Nazi leadership to a criminal trial was not the preferred approach of some. Stalin, for example, with some support from Churchill, was keen to save time, money and avoid providing a forum for Nazi propaganda by lining up the defendants and shooting the lot of them. Fortunately President Truman (by the end of the War President Roosevelt had died and Harry Truman had become President of the United States) was deeply convinced of the need for a trial by law and after strenuous and, ultimately, persuasive, argument his position prevailed amongst the Allied leadership.⁵

Justice Robert Jackson of the US Supreme Court, on secondment to head up the US prosecution team at Nuremberg, immortalised the importance of commitment to a proper judicial process in his opening speech at the Trial:

“That four great nations, flushed with victory and stung with injury, stay the hand of vengeance and voluntarily submit their captive enemies to the judgement of the law is one of the most significant tributes that Power has ever paid to Reason.”⁶

⁵ See Geoffrey Robertson, *Crimes Against Humanity* (2nd ed, 1999), 198; and Philippe Sands, *Lawless World: America and the Making and Breaking of Global Rules* (2005), 49-50.

⁶ Opening speech delivered by Justice Robert H Jackson, Chief of Counsel for the United States, before the Tribunal on 21 November 1945. Text of the speech available at: http://www.yale.edu/lawweb/avalon/imt/document/nca_vol1/chap_05.htm

I contemplated making the subtitle of this lecture 'Whatever Happened to Power Paying Tribute to Reason?' The opportunity existed at the end of World War II for the Allied nations to engage in a vengeful and punitive response to Nazi atrocity. Instead, they chose to use a legal process. Let me contrast Jackson's claim about the significance of the Trial with a comment from his Chief Justice Harlan Stone from the US Supreme Court:

"Jackson is away conducting his high-grade lynching party in Nuremberg. I don't mind what he does to the Nazis but I hate to see the pretence that he is running a court and proceeding according to the Common Law. This is a little too sanctimonious a fraud to meet my old-fashioned ideas."⁷

There has always been scepticism about international criminal justice and the notion of trying alleged war criminals for their violations of international law. Chief Justice Harlan Stone articulated a view that has been reiterated by many others since – even if the particular words used have varied. The reality of ongoing scepticism about international criminal law is a recurring theme throughout this article.

C. Criticisms of the Nuremberg Trial

I do not agree with the Chief Justice's view of the Nuremberg Trial as a 'high-grade lynching party' dressed up as a legal process. However, I agree with much of the criticism that both the Nuremberg and the Tokyo Trials had their own weaknesses in terms of the conduct of the legal process. There is some substance to three separate criticisms of the two Tribunals. First, there was some engagement by the Allies in *ex post facto* creation of criminal law for the purposes of the drafting of the Statutes of the Nuremberg and Tokyo Tribunals. Secondly, the criticism of Victors' Justice does have some merit and thirdly, there were significant procedural irregularities that raise questions about the fairness of the trials. I intend to

⁷ See Gary Jonathan Bass, *Stay the Hand of Vengeance: The Politics of War Crimes Tribunals*, (2000), 25 where the author quotes from A T Mason, *Harlan Fiske Stone: Pillar of the Law* (1956), 716.

deal with all three bases of criticism before turning to the positive legacies of both Tribunals – legacies which, in my view, outweigh the criticisms.

Both the Nuremberg and Tokyo Statutes included three categories of international crime: war crimes, crimes against humanity and crimes against peace.⁸ There was never any controversy about the definition of war crimes, - a category of international crime already well accepted in customary international law at the end of World War II. However, the same could not be said of either crimes against peace or crimes against humanity. Crimes against peace involved allegations of the involvement in, the preparation for, the initiation of, or the waging of aggressive war. The fact is that prior to the end of World War II and the drafting of the Nuremberg Charter, although there had been an attempt in international law to outlaw resort to war, there certainly had been no attempt to criminalise it and to translate an international wrong - a violation of international law - into an international crime. The Nuremberg and the Tokyo Charters created new international criminal law by punishing responsibility for aggressive war. It can be, and certainly has been, argued that by applying the Charter to past events the Nuremberg and Tokyo Charters created criminal law *ex post facto* – in violation of the fundamental principle *nullem crimen sine lege*.⁹

At least in respect of crimes against peace there had been previous efforts to outlaw resort to war. The problem of retrospectivity was even more pronounced in respect of crimes against humanity. After World War I, in the discussions between the Allied Powers about the intention of setting up tribunals to hold accountable those on the losing side responsible for the waging of the war, US and Japanese representatives rejected the idea of an international tribunal. Other Allied States wanted to prosecute Turkish nationals for their involvement in the massacre of Armenian people. The US and Japanese representatives argued that these were not international

⁸ See Article 6 of the *Charter of the International Military Tribunal (Nuremberg)*, 8 August 1945, 82 UNTS 279; and Article 5 of the *Charter of the International Military Tribunal for the Far East*, Special Proclamation by the Supreme Commander for the Allied Powers, 26 April 1946, TIAS No. 1589.

⁹ John F Murphy, 'Crimes Against Peace' in George Ginsburgs and V N Kudriavtsev (eds.), *The Nuremberg Trial and International Law* (1990) 121, 141-153.

crimes – these were atrocities perpetrated by the Ottoman Empire against its own citizens. Crimes against humanity did not exist as a category of international crime at the end of World War I, nor did they at the end of World War II. There was no unambiguous criminalisation of a category of crimes known as crimes against humanity prior to the drafting of the Nuremberg Charter.

The drafters of the Nuremberg Charter attempted to blur the issue of criminal law being applied retrospectively by including in the definition of crimes against humanity a requirement that any such crimes be perpetrated 'in the course of war'. The motivation for such a nexus was to minimise any potential criticism of retrospective creation of international criminal law. By requiring the perpetration of crimes against humanity in the context of war this new category of international crime would hopefully be seen to constitute an extension of war crimes.¹⁰

In addition to the problem of *ex post facto* application of the law, the criticism that the trial process was one of 'Victors' Justice' is well-known. The Nuremberg and Tokyo trials were established by the winning side in World War II and imposed on the losing side. There was never any suggestion that Allied nationals would be subject to the same Tribunal, the same subject-matter jurisdiction and the same procedure as defeated German and Japanese defendants.¹¹

However, it would be wrong to assume that the victorious Allies failed to prosecute any of their own nationals for alleged war crimes. The label 'Victors' Justice' is often used disparagingly on the basis of an assumption of a lack of Allied willingness to hold their own nationals criminally accountable. Any such assumption is fallacious. Allied nations did undertake disciplinary proceedings against their own servicemen and women for alleged violations of the law of war. The US, for example, tried hundreds of its own personnel, including for violations of the law against the civilian populations of various

¹⁰ M. Cherif Bassiouni, *Crimes Against Humanity in International Criminal Law* (2nd revised ed, 1999) 41, 60.

¹¹ Gerry Simpson, 'War Crimes: A Critical Introduction' in Timothy McCormack and Gerry J. Simpson (eds.), *The Law of War Crimes: National and International Approaches* (1997), 5.

areas they occupied. Many of those US nationals convicted of violations were awarded severe sentences and over one hundred were sentenced to death and subsequently executed.

The third problem with the Nuremberg and Tokyo Trials was the procedural irregularities which raised questions of fairness of trial. These problems were more pronounced at Tokyo and led to two scathing dissenting opinions from Judge Pal of India and Judge Röling of The Netherlands.¹²

D. The Legacy of Nuremberg

For all the weaknesses though, the International Military Tribunal represented a major breakthrough for international criminal justice and promised much for the future. In his opening speech Jackson claimed that:

“The wrongs which we seek to condemn and punish have been so calculated, so malignant, and so devastating, that civilization cannot tolerate their being ignored because it cannot survive their being repeated.”¹³

It is tragic that so many malignant and devastating wrongs have been ignored by the international community so often and so consistently since Jackson’s highly principled rhetoric late in 1945.

Despite the somewhat negative points I have been making, it remains unequivocally the case that the Nuremberg Trials made a tremendous contribution to the subsequent development of international criminal law. I will now identify some of the key legacies.

I referred above to the problem of crimes against peace and crimes against humanity not existing in international criminal law before the Nuremberg Charter was drafted. Despite the questionable legality of the subject matter jurisdiction of the Tribunal all three categories of international crime in the Nuremberg Charter have subsequently become well and truly entrenched in the corpus of customary international criminal law. The

¹² B. Röling and C. Rüter (eds.), *The Tokyo Judgment: The International Tribunal for the Far East (IMTFE)* (1977), 530 (Judgment of the Member from India, Justice Pal and Opinion of the Member from the Netherlands, Justice Röling).

¹³ Jackson speech, above n 6.

international legal status of the so-called 'Nuremberg Principles' was endorsed by the UN General Assembly soon after judgment was delivered in the Trial¹⁴ and the inclusion of all three categories of crime reinforces the legal status they enjoy.

The inclusion of crimes against humanity in the Nuremberg Charter has an element of 'double-edged sword' about it. It is an unassailable fact that since Nuremberg crimes against humanity have existed as a distinct category of international crime. But it is also true that the particular definition in the Charter had a negative legacy. The tying of crimes against humanity to the context of war to soften the impact of retrospective application of the law effectively guaranteed the nexus with armed conflict as an element of the offence for decades after Nuremberg. It was not until 1998 when, in the negotiations for the Rome Statute, the majority of States recognised that crimes against humanity can happen in peacetime and in conflict and that such crimes ought to be characterised by the nature of the offence, irrespective of the particular context in which the crime occurs. Finally, the requisite nexus with armed conflict has been removed.¹⁵

The establishment of and commitment to the principle that individuals can be held accountable for their own alleged violations of international criminal law at the Nuremberg trials spawned a succession of subsequent treaties criminalising particular conduct. Soon after the Nuremberg Trial was over, the Genocide Convention of 1948 was opened for signature. The following year, the four Geneva Conventions of 1949 were adopted, all utilising this principle of individual criminal responsibility, and imposing obligations on States' Parties to enact provisions in their domestic penal legislation to criminalise grave breaches of each of the Conventions. Later

¹⁴ *Affirmation of the Principles of International Law recognised by the Charter of the Nuremberg Tribunal*, GA Res 95(1), UN GAOR, 1st sess, (55th plen mtg), UN Doc G/RES/95(1) (1946).

¹⁵ See the *chapeau* to Article 7 of the Rome Statute (at: <http://www.icc-cpi.int>). For discussion of the significance of the removal of the nexus with armed conflict in the definition of crimes against humanity in the Rome Statute see Daryl Robinson, 'Defining "Crimes against Humanity" at the Rome Conference' (1999) 19 *American Journal of International Law* 43; Timothy L. H. McCormack, 'Crimes Against Humanity' in Dominic McGoldrick, Peter Rowe and Eric Donnelly (eds.), *The Permanent International Criminal Court: Legal and Policy Issues* (2004) 179, 184-185.

developments included the Apartheid Convention, the Hostage-Taking Convention and the Torture Convention - all of them criminalising particular practice in international law and requiring States Parties to extend that criminalisation at the domestic level. This succession of treaties extended the principle of individual criminal responsibility beyond the limited context of war to circumstances of peace - or alleged peace - where atrocities also occurred.

This particular legacy of Nuremberg – a proliferation of international criminal law instruments - is incontrovertible but there has been frustration too. Until the last ten years or so, there has been a lack of commitment by the international community to take the principles established at Nuremberg and to apply them in any sort of systematic or comprehensive way. Despite Jackson's very impressive rhetoric about civilisation ignoring atrocities at its peril, the international community allowed a succession of atrocities throughout the 1950s, '60s, '70s, '80s - even into the early 1990s - to take place with no willingness to repeat the performance at Nuremberg and establish the international criminal institutions to deal with them. It was left to States individually, and under their own domestic legislation, to respond to atrocity and to prosecute those allegedly responsible for it. There is no stronger argument for establishing a permanent international criminal court than this lack of international enforcement of international criminal law between the end of World War II and the early 1990s.¹⁶

E. Establishment of the *Ad Hoc* International Criminal Tribunals and the Permanent International Criminal Court

It was in 1993 that the first *ad hoc* international criminal tribunal was established - for the Former Yugoslavia. The second - for Rwanda - was established the following year. These two tribunals, established by the UN

¹⁶ For a more detailed argument see McCormack, 'Their Atrocities and Our Misdemeanours: The Reticence of State to Try Their 'Own Nationals' for International Crimes' in Lattimer and Sands, above n 4, 170.

Security Council,¹⁷ involved the appointment of judges from multiple countries (Sir Ninian Stephen was one of the foundation judges of the Tribunal for the Former Yugoslavia and also acted as an Appeal Judge in respect of the Rwandan Tribunal), and the development of international rules of evidence and procedure by judges from Common Law and Civil Law jurisdictions holding individuals from the Balkans and Rwanda to account.¹⁸

There was a great deal of scepticism in the mid 1990s of precisely the sort articulated by Chief Justice Harlan Stone of the US Supreme Court in 1945: that these tribunals were not feasible; would be too expensive; would only ever deal with the 'small fish', not those who were most responsible for the atrocities. The very first case to come to the Tribunal – the trial of Duško Tadić – only seemed to confirm what the critics had been saying. Tadić was hardly a senior figure responsible for the policies of ethnic cleansing. The lessons of the ICTY (the International Criminal Tribunal for the Former Yugoslavia) provide an excellent case study to demonstrate the way in which the tribunal has been utilised to bring those at the very senior levels to justice. The Hague experience reaffirms the importance of the existence of institutional structures to try alleged international criminals because those structures can be used for political and economic leverage. No one would have been prepared to predict in 1993 when the tribunal was established that Slobodan Milošević would be in The Hague, in custody, in 2001.¹⁹ Nor would anyone have predicted, as has occurred in the last few months, the so-called 'voluntary' surrender of nearly twenty indicted suspects from the Former Yugoslavia – all handing themselves over to the Tribunal. None of

¹⁷ The International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia, established pursuant to SC Res 827, 48 UN SCOR (3217th mtg), UN Doc S/Res/827 (1993), 32 ILM 1203 and The International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide in the Territory of Rwanda and Other Such Violations Committed in the Territory of Neighbouring States established pursuant to SC Res 955, 49 UN SCOR (3452nd mtg), UN Doc S/Res/955 (1994), 33 ILM 1598.

¹⁸ See The Rt Hon Sir Ninian Stephen, 'International Criminal Law and Its Enforcement' (2000) 74 *Australian Law Journal* 439, 441.

¹⁹ For a more detailed argument see Timothy L. H. McCormack, 'The Importance of Effective Multilateral Enforcement of International Humanitarian Law' in Liesbeth Lijnzaad, Johanna van Sambeek and Bahia Tahzib-Lie (eds.), *Making the Voice of Humanity Heard* (2004) 319, 330-335.

this could have occurred if the Tribunal had not been established in the first place.²⁰

One telling consequence of the establishment of the two *ad hoc* international tribunals was a tremendous surge in expectation internationally. Nuremberg and Tokyo had promised so much, but the international community had failed to deliver on that promise. Now, for the first time since the mid-1940s, the international community - through the Security Council - was prepared to establish some international criminal tribunals again. Admittedly, these Tribunals were established selectively for particular conflicts – not, on this occasion, by the winners of the war imposing the trial process on the losers – in which none of the five permanent Security Council members had a particular vested national interest in obstructing the conduct of international criminal trials. Despite the troubling selectivity of the establishment of *ad hoc* tribunals for certain conflicts (and not for others), there is no question that the Tribunals represented a major breakthrough and raised expectations around the globe that the international community had found a new appetite for reigning in impunity.

It can be argued that the extradition proceedings against General Pinochet in London may never have happened but for the establishment of the two *ad hoc* international criminal tribunals. This is not because of a lack of legal capacity - the legislation underpinning the proceedings implemented the UK's obligations pursuant to the Torture Convention and was enacted in 1988. The law had existed for years but had never been utilised. The Spanish willingness to initiate proceedings and the English Judges' interpretation of the law were all influenced by the growing expectation that the international community will no longer conveniently ignore responsibility for atrocity. In relation to General Pinochet domestic legislation was utilised

²⁰ For more information on the voluntary surrender of indicted criminals see press release <<http://www.telegraph.co.uk/news/main.jhtml?xml=/news/2005/01/29/wserb29.xml&sSheet=/news/2005/01/29/iworld.htm>> at 29 January 2001; <http://www.un.org/icty/glance/defaultindex-e.htm>.

but in other situations there has been a combination of international as well as national initiatives consistent with the general motivation.²¹

Sir Ninian Stephen, for example, was involved with two other colleagues in considering the possibility of establishing an international criminal tribunal for Cambodia, to hold former leaders of the Khmer Rouge to account. There has been much discussion of the need for an international criminal tribunal for East Timor. In relation to the civil war in Sierra Leone, there has actually been a special court established, adopting a different model to the two *ad hoc* international criminal tribunals for the Former Yugoslavia and Rwanda: this time utilising a composite melding of both Sierra Leone and international judges, Sierra Leone and international prosecutors, and Sierra Leone and international law. That is a really promising hybrid model for how international criminal justice may continue in the future. In the case of the Iraqi Special Tribunal the judges, prosecutors and criminal procedure are all intended to be exclusively Iraqi. The substantive crimes in the Statute of the Tribunal are all derived from the Rome Statute with one glaring exception: the provision from Iraqi domestic criminal law which details the crime of invasion of another Arab State.

All of these developments are indicative of the rise in expectation for a substantive response to atrocity, and all of these developments are part of the same momentum which contributed greatly to the success of the five-week diplomatic conference in Rome in 1998 concluding negotiations on a statute for a permanent international court. Fortunately the sceptics did not prevail.

I visited the International Criminal Court last week for the first time. I went to see His Honour Judge Slade of Samoa, the first Pacific Island national ever to be elected to an international court or tribunal. We discussed some of the work that the Court is currently involved in. There are three Pre-Trial Chambers examining three separate conflicts - Uganda, the

²¹ Clare Montgomery, 'Criminal Responsibility in the UK for International Crimes Beyond Pinochet' in Lattimer and Sands, above n 4, 271.

Congo and the Central African Republic.²² The Governments of all three States, all States Parties to the Court's Statute, have requested assistance from the Court in dealing with alleged crimes within their own physical territories as they do not believe they have the capacity to deal with them at the national level. The Court is, therefore, already very actively engaged in investigations and pre-trial proceedings and there is an expectation that the first indictments in respect of one or more of those three conflicts will be issued publicly before the end of this year.

Just a few weeks ago, the International Criminal Court experienced a real breakthrough in addition to the approaches from those three national governments. That breakthrough came through Security Council Resolution 1593 in which the UN Security Council, acting pursuant to Chapter VII of the UN Charter, referred the situation in Darfur in Sudan to the prosecutor of the International Criminal Court.²³ Unlike Uganda, the Congo and the Central African Republic, Sudan is not yet a party to the Statute. However, the Security Council has the capacity to override the requirement of Sudanese consent and request the prosecutor to investigate the situation.

Resolution 1593 is particularly noteworthy because the United States chose not to exercise its power of veto. The intensity of US opposition to the International Criminal Court is well known and for some time US officials have threatened to veto any attempt by the Security Council to refer a situation to the Court. At the same time it has also been obvious that unless the Security Council is prepared to refer situations to the International Criminal Court then the early work of the Court will be extremely limited. Fortunately, the US agreed to support this resolution in respect of Darfur, qualified somewhat by an inclusion in one of the clauses that nationals of non-State Parties to the Rome Statute who may be deployed in a multinational peace mission in the Darfur region of Sudan cannot be subject to the ICC's jurisdiction without the consent of the contributing State. The US has been prepared to support the Resolution with that particular

²² For information on the work of the court see <http://www.icc-cpi.int/cases.html>

²³ SC Res 1593, 60 UN SCOR (5158th mtg), UN Doc S/Res/1593 (31 March 2005).

qualification. There is hope that the International Criminal Court, despite being the subject, like the ICTY, the ICTR, Nuremberg and Tokyo before it, of so much scepticism when it was first established, will be able to start its work without further delay. There is hope that the Court will be able to demonstrate to the US and other governments yet to participate that this Court is about responding to atrocity: not about politically-motivated prosecutions; not about rogue prosecutors running out of control to see which former heads of State or politicians they can bring to trial; that it is about responding to what has previously been impunity for atrocity in so many different situations over so many decades.

I now come to some comments on the current attitude of the US to matters of international criminal law - in particular, US opposition to the International Criminal Court and the approach to the Military Commissions in Guantanamo Bay.

F. Proposed Trials by US Military Commission

The United States articulates its primary objection to participation in the Rome Statute on the basis that there is an unacceptable possibility that US nationals could be tried by the International Criminal Court without US consent, and that if that happens, the Court, or at least the Statute of the Court, has insufficient guarantees of minimum standards of fair trial as required under the US Constitution for US nationals. Yet, while articulating that position, the US has set up a process which fails to meet any acceptable standard of fair trial in Guantanamo Bay and is subjecting, or is intending to subject, only non-US nationals to the process of those Military Commissions. All the US nationals previously held in Guantanamo Bay have been removed and have been processed through US domestic courts. The previous Ambassador of the US to Australia, Tom Schieffer, explaining the differentiation between the treatment of US and non-US nationals in Guantanamo Bay, said that US nationals were being tried for treason and that was not something the military commissions could try. The document establishing the subject matter jurisdiction of the military commissions

indicates that the Commissions can just about try anything they like. The removal of US nationals from Guantanamo Bay was not about the specific subject matter of the crimes alleged but about a US Constitutional guarantee of the right to a fair trial for any US citizen. By Washington's own admission, the military commission process fails to meet that standard.

Lex Lasry QC of the Victorian Criminal Bar Association has reported his observations of the pre-trial proceedings that he attended in Guantanamo Bay to the Law Council of Australia.²⁴ Mr Lasry has identified the lack of independence of the Military Commission: the relaxed rules of evidence allowing the possibility for evidence obtained by torture to be freely admitted and admitted by way of written document eliminating any chance of cross-examination of the witness in person; no guarantee that the accused must be present for every part of the proceedings against him (the military commission members have the power to physically exclude a defendant from the proceedings under certain circumstances and to prohibit his legal representatives from keeping him informed of the process); no requirement that members of the military commission have basic legal training; no requirement that the panel provide written reasons for its judgement; and no genuine appeal process.

In addition to these procedural aspects; there are also problems in relation to the substantive law that is relied upon for the charges that can be laid. In the case of David Hicks, although the military commission document setting out the subject matter jurisdiction (the equivalent of the Nuremberg Charter) states that the Commission will try violations of the law of armed conflict,²⁵ some of the offences that are listed are not known in International Humanitarian Law.²⁶

²⁴ See Lex Lasry Q. C., 'United States v. David Mathew Hicks: First Report of the Independent Legal Observer for the Law Council of Australia', September 2004 at: <http://www.lawcouncil.asn.au/HicksTrial.html>

²⁵ See US Department of Defense, Military Commission Instruction No. 2: Crimes and Elements for Trial by Military Commission at p. 1. Text of Instruction available at: http://www.defenselink.mil/news/Aug2004/commissions_instructions.html

²⁶ See Defense Motions to Dismiss Charges 1, 2 and 3 for Failure to State an Offense Triable by Military Commission, all available at: http://www.defenselink.mil/news/Dec2004/commissions_motions_hicks.html

David Hicks is charged²⁷ with the offence of conspiracy. Normally, conspiracy is regarded as an alternate basis of criminal responsibility in respect of a substantive crime but, in this Military Commission statute, conspiracy exists as a substantive crime in its own right and the crime requires nothing more than association with a particular group – such as Al Qaeda. The individual accused does not need to know that other members of the group are planning to commit atrocities – it is enough that they are associated with a particular group.

David Hicks is also charged with attempted murder and with aiding the enemy. Both of these other two counts relate to the fact - not that he is alleged to have committed any violation of international humanitarian law - but that he was on the wrong side in the conflict. There is no allegation that David fired any rounds, any bullets, in anger: just that he was part of a particular Al Qaeda unit that was guarding some Taliban tanks and military vehicles. These particular alleged offences are not violations of international humanitarian law at all. Under international humanitarian law it is permitted for combatants on either side of the conflict to shoot at each other, a permission that some people find difficult to mentally process, but international humanitarian law allows some killing in armed conflict. It places limitations on killing - but there is certainly no offence for taking part in hostilities; it is when the laws are violated that an offence occurs.

In relation to procedure as well as substance, there are real issues of concern. Fortunately, in response to all of this, US courts themselves have challenged the approach of the US Administration and it is interesting to contrast Chief Justice Harlan Stone's scepticism back in 1945 with some of the comments of the US Supreme Court, or with the District Court in Washington DC, and to look at Justice Jackson's comments in contrast with those of senior people in the current US Administration. Here is just one of many examples by the US Secretary of Defence, Donald Rumsfeld, on the detention of hundreds of people at Guantanamo Bay:

²⁷ See *United States v. Mathew David Hicks*, Charge Sheet, 10 June 2004. Text of the Charge Sheet is available at: http://www.defenselink.mil/news/Nov2004/charge_sheets.html

“Very simply, the reason for their detention is that they’re dangerous. ... Detention is not an arbitrary act of punishment ... they’re enemy combatants and terrorists who are being detained for acts of war against our country and that is why different rules have to apply. [*including, apparently, the relaxation on the total prohibition on torture*].”²⁸

Contrast that comment with the US District Court in Washington D.C. in the proceedings brought by one of the detainees in Guantanamo Bay, Hamdan, against the Secretary for Defence:

“It is at least a matter of some doubt as to whether or not Hamdan is entitled to protections of the Third Geneva Conventions as a prisoner of war, and he must be given those protections unless and until the competent tribunal [*competent tribunal referred to in Article 5 of the Third Geneva Conventions*] concludes otherwise.”²⁹

According to Judge James Robertson of the US District Court in Washington D.C., Hamdan may not be tried for the war crimes he is charged with by military commission but only by a court martial duly convened. This particular part of the judgment is all about the extent to which the military commissions fail to satisfy minimum standards of fair trial and the requirement that a decision about whether or not a person is entitled to the protections of the Third Geneva Convention can only be determined by a competent tribunal that meets minimum standards.

It is a reason for celebration that, within the US court system, there is a willingness to challenge the excesses of the Administration in respect of the importance of proper legal process, the importance of minimum standards of fair trial, as well as the importance of holding those responsible for atrocities to account.

G. Concluding Comments

Sixty years from Nuremberg we have certainly made some tremendous strides in the right direction as an international community in

²⁸ Donald Rumsfeld, Speech delivered at the Greater Miami Chamber of Commerce, Florida, 13 February 2004. Text of speech available at: <http://www.pentagon.mil/speeches/2004/sp20040213-secdef0883.html> (emphasis added).

²⁹ *Hamdan v Rumsfeld*, (US District Court for the District of Columbia, No.04-5393, 15 July 2005), (emphasis added).

responding to impunity for atrocity. There are some weaknesses: there is still selectivity - the law is still not being applied consistently - and there are some major challenges to fundamental principles of fairness and justice, some of which have been identified here. I hope that many of you will be prepared to not just think about some of these things and reflect on how positive some of the developments have been but will actually commit yourselves to a more substantive response. There are plenty of people in the room that I can see who are doing that in their own way, in their own place, and I encourage you to keep on going for it. The fact is that there will always be those who are sceptical and say that it is not going to work, it is not going to happen, it is not worth the effort, but there will always be others who believe, in contrast, that these are really important principles that we are arguing about. May it be the latter that prevail.