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## International Courts and Tribunals

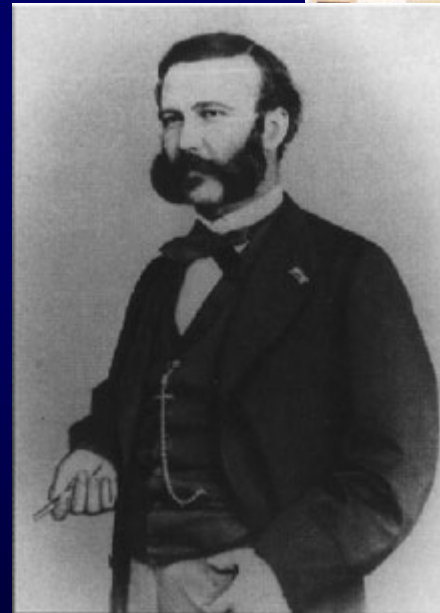
# International Committee of the Red Cross

In co-operation with

**EULEC**

The European Institute for  
Freedom, Security and Justice

- Conventions
- Treaties
- Courts
- Tribunals
  
- And the host Country



Henri Dunant in 1901  
Nobel Peace Prize

# Impact on the work of the national judiciary

- The position of the Dutch judiciary in relation with international courts seating in The Hague.
- Maxime of Boutros Boutros Ghali during the fiftieth anniversary of the United Nations (1995):
- THE HAGUE,  
LEGAL CAPITAL OF THE WORLD.





BOS. & HERZ. - BOSNIA AND HERZEGOVINA  
C.A.R. - CENTRAL AFRICAN REPUBLIC  
CRO. - CROATIA  
CZ. REP. - CZECH REPUBLIC  
EST. - ESTONIA  
F.Y.R.O.M. - THE FORMER YUGOSLAV  
REPUBLIC OF MACEDONIA  
LAT. - LATVIA  
LITH. - LITHUANIA  
SLO. - SLOVENIA  
SLOV. - SLOVAKIA  
U.A.E. - UNITED ARAB EMIRATES

Mont. - Montenegro  
Ser. - Serbia

# Dutch Government:

- The Hague,  
Legal capital of the world,
- One of the dearest aspirations of the  
Government
  - Dutch Constitution:  
"To promote the development of  
international law and the international  
legal order is a mandatory task of the  
Government."  
(article 90: The Government promotes  
the development of international legal  
order)
- The Government considers it as a duty to  
host international Courts and Tribunals.



# Dutch tradition

- As of the first The Hague peace conference (1899) the Dutch Government is the promoter of
- an overall substantive codification of international humanitarian law
- the redefinition of
  - crimes against humanity,
  - war crimes,
  - the crime of aggression and
  - the elements of crimes
- the listing of
  - laws,
  - principles and customs
  - applicable in inter statal armed conflict
- the establishment of an international universal criminal tribunal apt to impose criminal responsibility on the individual by virtue of self executing international law.



Kaiser Wilhelm II



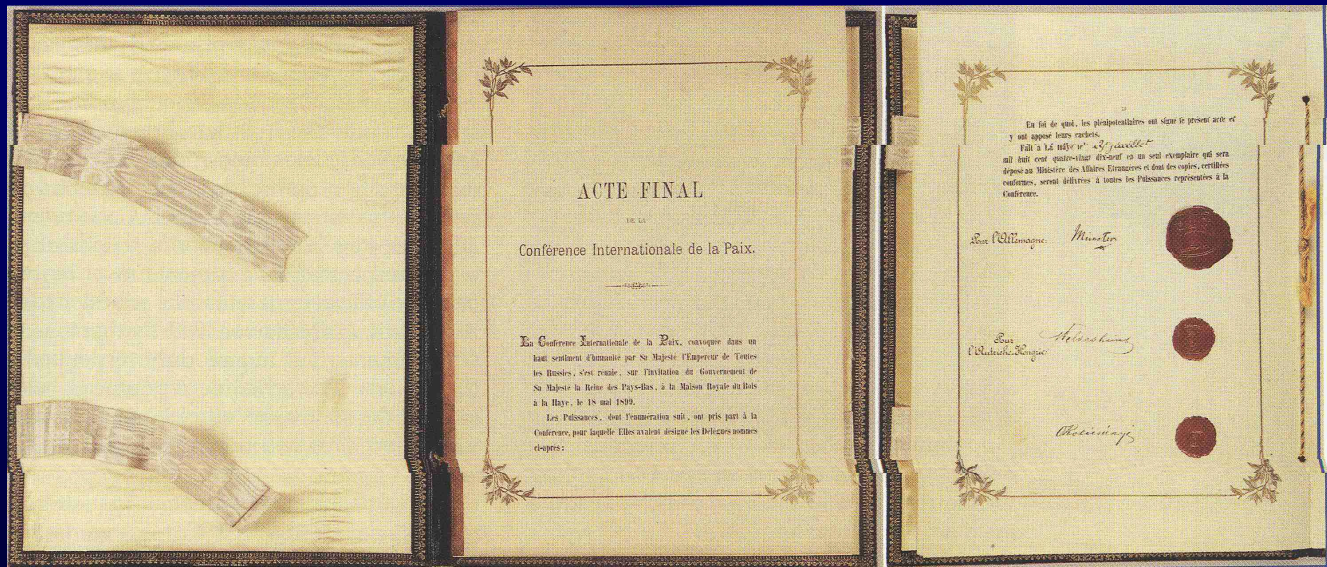
Queen Wilhelmina



Czar Nicolaas II

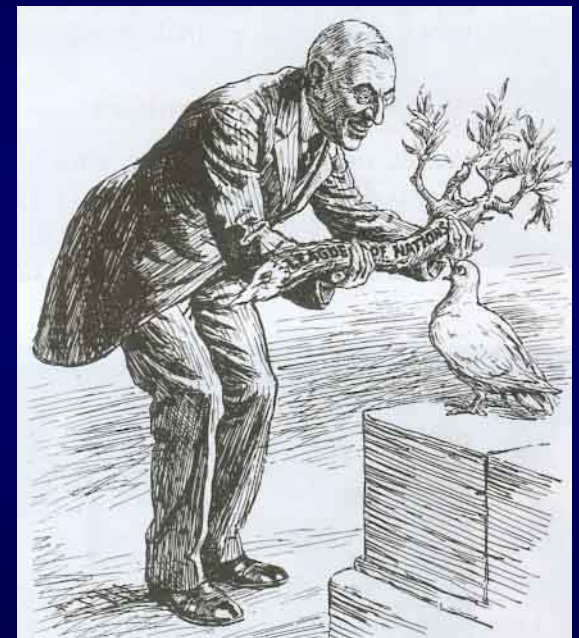
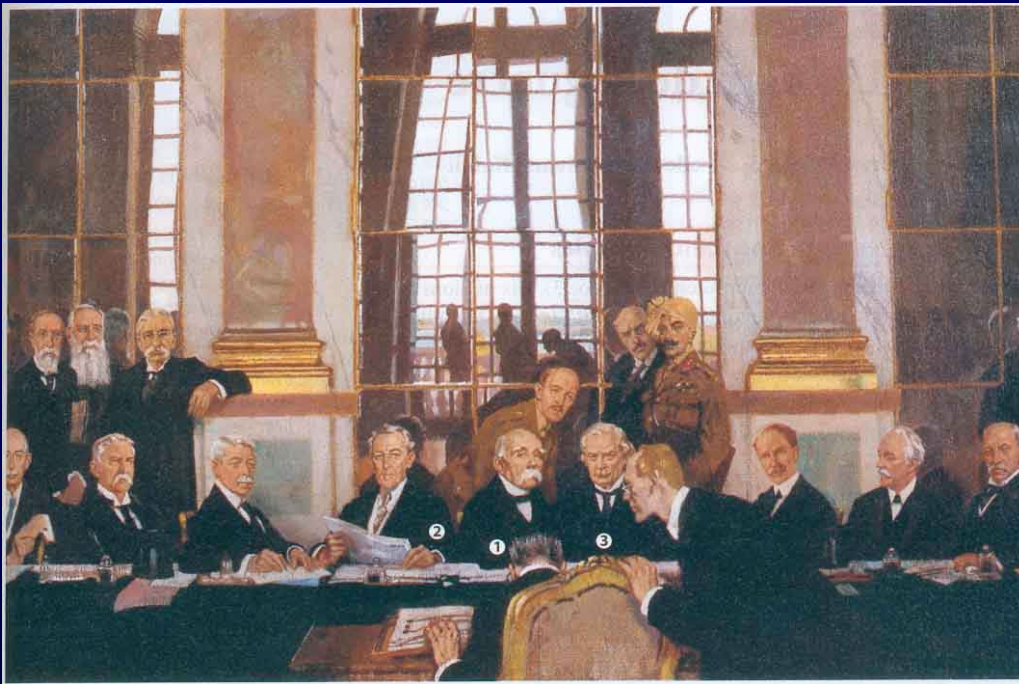
# Dutch tradition <sup>(2)</sup>

- The Dutch Government offered (1899) The Hague as seat of the International Court of Arbitration.
- Thus prompting positive jurisdictional conflicts between that Court and national Courts at the domestic level.



# End of the Great War 1918

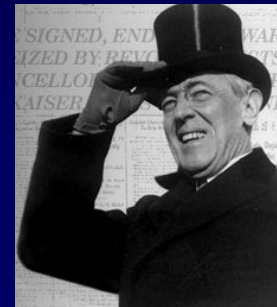
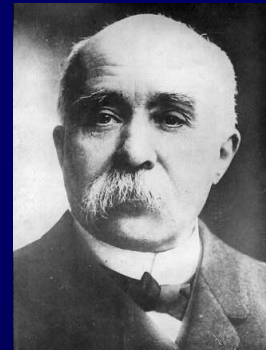
## Treaty of Versailles 1919





## Results of The Great War (WWI)

- The USA president, Woodrow Wilson, wanted to establish an International Criminal Court by virtue of an annex to the 1919 Versailles Treaty, a Court being a principal organ of the League of Nations.
- The Court should be seating in The Hague.
- Key role players at the time,
  - Clemenceau (France)
    - Le Boche payera
  - Lloyd George (UK) political slogan:
    - Hang the Kaiser
- France and the UK were not in favor of such a Court



# The Great War (2)

- Wilson could not succeed:
  - the Netherlands refused to comply with the request for extradition of William II, the German emperor to the allies;
  - the United States did not want to ratify the Covenant of the League;
  - United Kingdom, in the end, abandoned the idea of criminal responsibility for war crimes at the international level.



# Results of WW II

- The world had to wait for a second Armageddon:  
World War II.
- As from 1946 the United Nations International Law Commission came forward with several proposals in line with Wilson's ideas.



# IHL Treaties

- 1864 >> 1906 >> 1929  
GC on wounded and sick soldiers
- 1. 1949 Geneva Conventions:– wounded and sick soldiers  
(art.49 – 51)
- 2. wounded, sick and shipwrecked  
(art. 50 – 52)
- 3. prisoners of war (art. 129 – 131)
- 4. civilian population (art. 146 – 148)



## Common Art. 49/50/129/146

- Obligation to enact special legislation
- Obligation to search for persons accused
- Obligation to try such persons or to extradite them

# IHL Treaties - continued

- 1977  
Protocol Additional I (art. 11, 85) > 2005  
  
Protocol Additional III (art.6) to the Geneva Conventions of 1949
- 1954  
Hague Convention on Cultural Property (art. 28) >  
its Second Protocol of 1999 (art. 15)

# IHL Treaties - continued

- 1980 CCW – amended (1996) Mines Protocol II (art. 14)
- 1997 Ottawa Convention on Anti-Personnel Landmines (art. 9)



# Human Rights Treaties

- 1948 Genocide Convention (art. 4 - 6)
- 1984 Tortures Convention (art.4-9)
- 2000 Optional Protocol to 1989 Convention on the Rights of a Child (art. 4)
- 2005 Forced Disappearances Convention (art. 3 - 14)





## International Criminal Law Sources establishing Ad Hoc Tribunals

- 1919 Versailles Treaty – dead letter
- 1945 London Agreement > Nuremberg Tribunal
- 1946 military order > Tokyo Tribunal
- 1993 UNSC Resolution > ICTY
- 1994 UNSC Resolution > ICTR



# International Criminal Law Source establishing Permanent Tribunal

- 1998 Rome Statute > International Criminal Court

Importance of 2000

„Elements of Crimes“ and

„Rules of Procedure and Evidence“

# ICC

- In 1993 the United Nations launched a final resolution, to prepare an
  - overall codification of international humanitarian law,
  - the definition of international crimes and
  - the establishment of an International Criminal Court.
- During negotiations, the basic idea to define the Court as  
....**principal organ of the United Nations**  
...  
turned out **not to be sustainable**:
- Breaking open the United Nations Charter would be opening Pandora's Box....



FAO building, Rome 1993 - 2000

# ICC established

- The 1998 Statute of Rome defines the Court as an independent self standing entity, entering into relations with the United Nations.
- According to article 3, the Seat of the Court is in The Hague.
- Hierarchically, the host Country has to consider the Court as "superseding" its national jurisdictions.
- It prompts a particular jurisdictional relation at the national level.

H. E. Mr. Jean-David Levitte, signing on behalf of France



# Courts and Tri seating in The

- The Yugoslavia-tribunal (ICTY)
- The appeals chamber of the R'wanda tribunal (I
- The Lockerbie-tribunal (seating in Camp Van Z
- The Sierra Leone Tribunal's annex for sittin  
Taylor's case
- The Harriri-tribunal
- The International Criminal Court (ICC)
- The International Court of Justice
- The International Court for arbitration
- The Iraqi claims tribunal



ICC building, The Hague 2003 -

## International Criminal Law Sources establishing Mixed Tribunals

- 2002 Agreement between Sierra Leone and UN
- 2003 Agreement between Cambodia and UN

# Custom

## „Customary IHL Study”

- Rule 151
  - „Individuals are criminally responsible for war crimes they commit”
  
- Rule 158
  - „States must investigate war crimes (...) and, if appropriate, prosecute the suspects...”
  
- Rule 161
  - „States must make every effort to
    - cooperate (...)
    - to facilitate the investigation of war crimes and the
    - prosecution of suspects”



- Treaty of Rome signed  
July 17<sup>th</sup> 1998
- July 1<sup>st</sup> 2002:  
ICC operational ready  
to wield jurisdiction





## Netherlands: The host State

- The Netherlands provides for facilities to have the courts functioning properly.
- Let's look at CRIMINAL Courts wielding jurisdiction with a view to hand down penalties.
- Distinction between
  1. United Nations related Courts on one hand and
  2. Courts standing on their own footing.

# ICTY and ICTR

- Established by Security Council Resolution
- Subsidiary Organs of the United Nations
  - To be considered as “measures” under Chapter VII of the UN-Charter (see article 41, first sentence of the Charter: “The security council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures.”)
  - All countries – including the host State— have to consider those judiciaries as “emanations of their own national judiciaries”
  - These Tribunals enjoy the primacy of their respective jurisdictions in case of positive jurisdictions conflicts
  - Cooperation and statal assistance is mandatory
  - These judiciaries can rely on article 103 of the UN Charter (“In event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.”)



# All other Courts:

- Autonomous,
  - self standing entities
  - wielding jurisdiction on its own footing
- For the host State and its national judiciary this distinction is of the utmost importance
- If a culprit or suspect falls within the jurisdictional ambit of ICTR or ICTY, there is no access to the Dutch judiciary, albeit that the culprit or suspect really stays within the “jurisdiction” of the Netherlands as a ratifier of the ECHR (article 1)

# Example: Milosevic

- The defence sought access to the Hague district Court via a preliminary injunction motion for a writ of habeas corpus
- Stipulation: the surrender had been illegal, a breach of article 5 ECHR, the subsequent detention had been unlawful according to Dutch law
- The district Court denied access and the motion, relegating the case to ICTY, being the only competent court



# Conflicts with ECHR

- If the pre-trial detention on behalf of ICTY and ICTR prompts flagrant breaches of artt. 3, 5 or 6 ECHR?
  - NO access to
    - the Dutch judiciary
    - or the European Court for Human Rights?
- The jurisprudence of the European Court shows clearly that it considers itself competent to sit on ICTY and ICTR related provisional measures;
- it will be the host State which is to stand trial



# manus ministra

- The host State "manus ministra" of ICTY and ICTR?  
As ECHR ratifier?
- No responsibility at all for its pre trial detentional measures?
- What if the medical conditions are unsatisfactory? What if family or the next of kin sues the host State in a civil procedure for tort?
- Prompting jurisdictional conflicts not easily to be solved
- If the Tribunal is not to be considered as UN-organ, what about the access to the Dutch courts?
- If a person has been surrendered to ICC in flagrant violation of the ICC-Statute (by infringement on the principle of complementarity):
- *no access to the Dutch judiciary at all?*



## Disputes with Courts and Tribunals

- What if the ICC pre trial measures are antithetical to human rights treaties (excessive lapse of time, detention conditions not in line with the European Prison Rules)
- No national habeas corpus provision available according to art. 5, second indent ECHR?
- What if the ICC procedures are incompatible with principles of due process as underlying art. 6 ECHR?
- Here, always a triangular relation between
  - host State
  - assembly of States Parties or the recognising State
  - and the international Court or Tribunal itself

## Disputes with Courts and Tribunals

- The Host Agreement always contains a provision for the settlement of disputes.
- But what, if the dispute cannot be settled according to the Agreement?
- There is the overarching responsibility of the host State, even in enforcement cases.
- Once, there will be an insoluble conflict between the statal jurisdictional ambit and those of the Courts and Tribunals. We will see as to whether The Hague will be acting as the real LEGAL capital of this world.





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