

International Courts and Tribunals

a historic overview

Prof. Dr. Gerard Strijards

Holding the Chair of
International Criminal Law
by special appointment at Groningen University

Senior Legal advisor in international matters
With the Higher Prosecutorial Office
of the Netherlands

The district Court of The Hague



On the 12th of January 2009

the district Court of the Hague had to sit on the admissibility of a request for extradition of a Serbian Citizen.

The request has been filed by the Ministry of Justice of Bosnia-Herzegovina.

Allegation



Allegation:

the claimed person killed prisoners of war during the armed conflict between Bosnia–Herzegovina and Serbia on the territory of Bosnia–Herzegovina.

Allegedly he was a member of the group of civilian combatants the so called Abdíc group.

This group tried to get autonomy for a province of Bosnia–Herzegovina. The group was supported by several States: Croatia, Slovenia and Macedonia. The group was dressed in a sort of military outfit. Its members carried rifles, used artillery and tanks.

Main questions

Was here a situation of armed conflict going on?
Only then one could speak of “**prisoners of WAR**”
in which case the four so-called 1949 Red Cross Geneva Conventions are applicable.

What is the difference between

- “war”,
- “international armed conflict” and
- “internal armed conflict”?

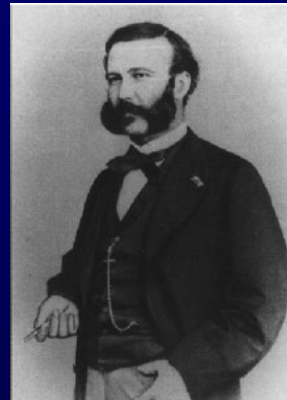
Which legal provisions do apply in each situation?

- what are the immanent rights of POW’s (prisoners of war)?
- could the Netherlands exert jurisdiction in this extradition case?
- what are war crimes?
- what are crimes against humanity?
- could an international criminal court claim jurisdiction in this case?
Under which conditions?

We are approaching the hard core stuff on the laws and treaties to be applied by international criminal tribunals.

The History of International Criminal Tribunals and Courts.

- Henry Dunant: the great instigator of this elevated ideal in the XIXth century
- Red Cross Organisation: the first international entity as a trustee of the legal community of mankind
 - Conventions
 - Treaties
 - Courts
 - Tribunals



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.
- Maxim of Boutros Boutros Ghali during the fiftieth anniversary of the United Nations (1995):



"THE HAGUE, LEGAL CAPITAL OF THE WORLD"





Dutch Government:

- The Hague,
Legal capital of the world,
- One of the most precious 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 a duty to
host international Courts and
Tribunals.





International substantive criminal law in development

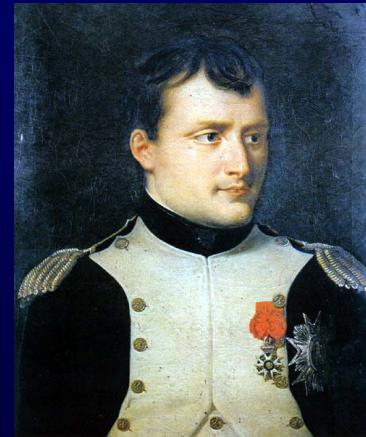
- from transformative law
- to self executing law

Before the Vienna congress (1814)

- International law working directly at the domestic level as a matter of course
 - Overall based on natural, customary law
 - Treaty law only subsidiary source of law
 - No international rule of mandatory legality

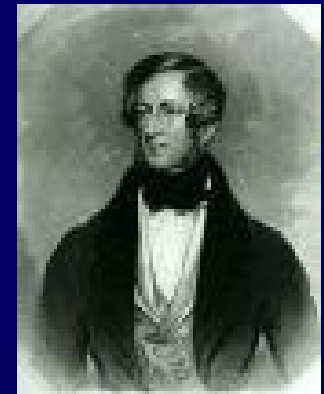


Napoleon
and his Waterloo



Leading persons during the Vienna Congress 1815

- Metternich (Austria):
legalistic restoration
- Castlereigh (UK):
Treaty Law: only legal source
for international binding
obligations
- Vienna Congress



After the Vienna Congress:



Interstatal law:

always treaty bound, written law

- There is no such thing as international customary law or *comitas gentium*
- Treaties are only binding if ratified by State Parties. For non-ratifiers treaties are “*res inter alios gesta*”
- At the domestical national level obligations stemming from treaties are only binding when implemented by enabling legislation

This rendition of legality prompts extreme dualism at the national level

- This extreme concept of legality is the result of the absolute concept of intern sovereignty and absolute nationality
- The law of war and armed conflict, international criminal law and international humanitarian law is a necessity
- Basic assumption:
in criminal matters treaty law can not be self executing
- First attempt to achieve codification: The Hague 1899

Peace Conferences

- 1869 the Geneva Treaty on warfare at high seas
- 1899 The First Hague Peace Conference
- Ideal: to codify IUS IN BELLO
 - Prohibition of the use of asphyxiating gasses in war
 - Prohibition of expanding DUM-DUM bullets
 - Prohibition of bombardments from balloons
 - Prohibition of civil reprisals
 - It is unsustainable to come to a codification of the IUS AD BELLUM
 - The ius ad bellum is conceived to be the main feature of statal sovereignty which is absolute
- States are not willing to bind themselves in this respect



Tsar Nicolaas II



Kaiser Wilhelm II



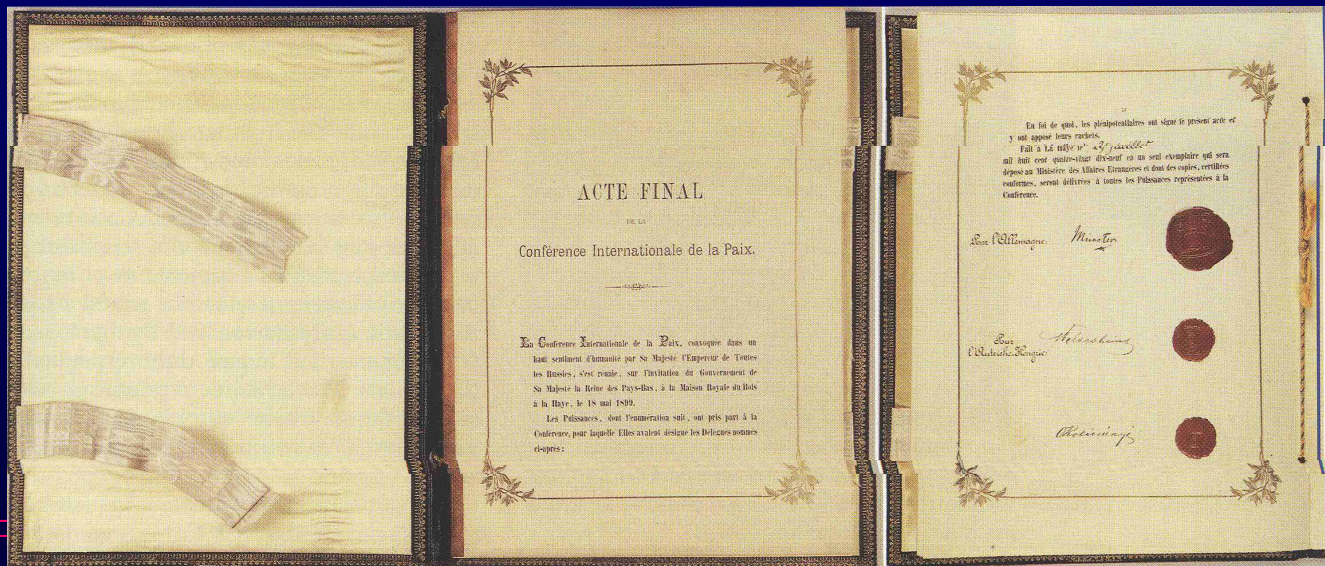
Queen Wilhelmina

Basic assumptions underlying the concept of IUS AD BELLUM in the end of the XIXth Century(1899)

- To wage or initiate a war of aggression is a deed of absolute sovereignty
- The right to do so can not be submitted to rules of international law
- Arbitration in this respect is unacceptable
- A moratorium on the use of certain weapons is unacceptable, certainly for Germany which has the most advanced army of the world.
Such as,
 - long reaching artillery
 - six shot carbines
 - machine gun companies
 - recoilless big guns

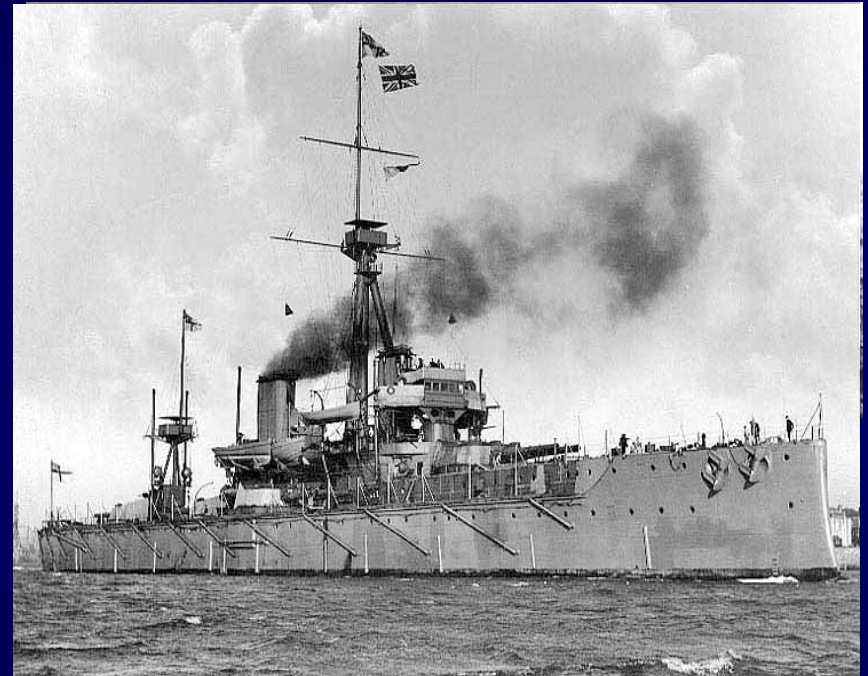
Dutch tradition ⁽²⁾

- 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.



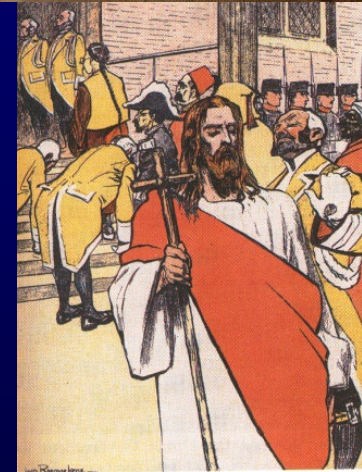
1899 and thereafter

- Development of U-boot (submarines)
- Advanced machine gun companies to be integrated into the infantry
- Zeppelins
- Long distance artillery
- Brisant explosives with temporised trips and spark control
- Dreadnoughts with 14 inch cannons
- Universal military service
- **EUROPE HAS PLUNGED INTO AN ARMS RACE**



The risk of a sudden outbreak of war is imminent

- This necessitates the codification of the IUS IN BELLO
- Attempt to achieve this during the second THE HAGUE PEACE CONFERENCE in the Knight Hall in 1907
- Result:
The The Hague Rules on the Warfare on Land
- Those Rules have to be implemented by the ratifiers via enabling legislation
- The definition of crimes have to be codified by statutes at the national level
- Codification is a restricted and limited one
- Germany and the United Kingdom do not implement
- **THUS:**
 - National dissimilarities in criminalisations
 - Vacua iuris
 - Jurisdictional conflicts



Christ
sent back at the Peace Conference:
"He has no army"

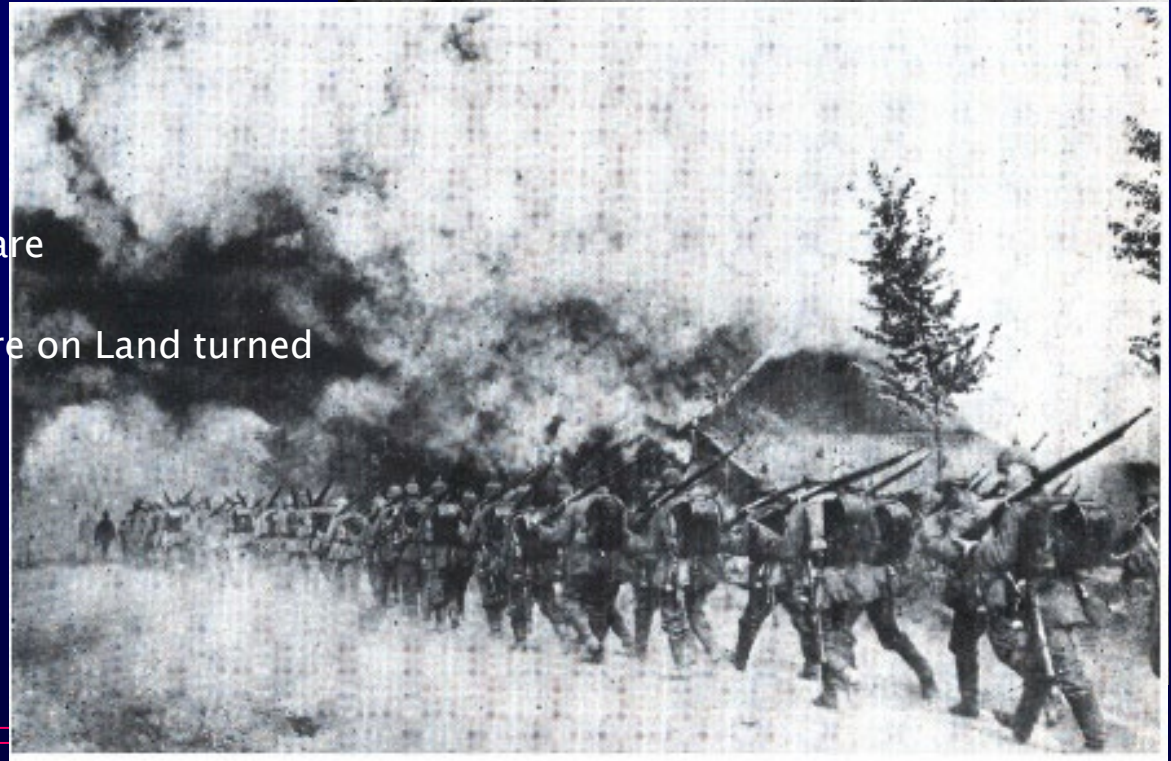
Threat of war and armed conflict are multiplying

- War between Russia and Japan;
- Japan starts without a declaration of war
- Sudden attack on Port Arthur
- A battle of artilleries without having visual contact with the soldiers themselves
- Crisis in Morocco
- Construction of the German fleet
- Annexation Bosnia–Herzegovina by Austria–Hungary



Armageddon in August 1914

- Invasion by Germany of Belgium, the neutrality of which had been guaranteed by the invader
- Massive reprisals against civilians
- Use of gasses in Ypres
- Mass deportations
- Unlimited submarine warfare
- Rules of the Law on Warfare on Land turned out to be a paper tiger



Woodrow Wilson

president of the United States

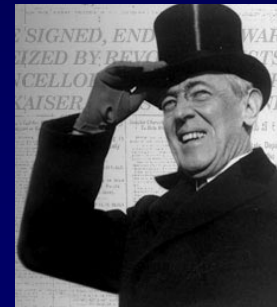
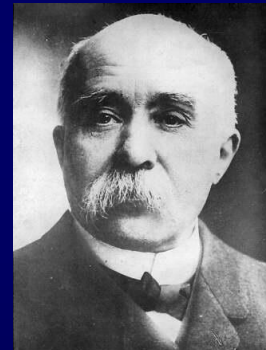


- The world needs an overarching legal community
- There must be an universal law making authority
- There must be a rank of priorities of sources of international law
- The right of selfdetermination of the peoples should be an axiom
- Similarly the assumption of the equality of states
- There should be an authority at the international level having penal enforcement power of its own
- To launch a war of aggression is a crime under international law
- **THERE SHOULD BE A LEAGUE OF NATIONS**
(8 january1918)

Towards a World Peace 1918?

- Wilson:
Statute of the League of Nations
as annex to the Peace Treaty
should be integral part of the
final texts
- Clemenceau (France)
Le Boche payera
- Lloyd George (UK)
Hang the Kaiser

Wilson's ideas are rejected

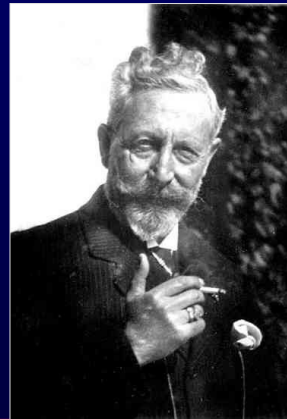


German Emperor

At the collapse of the German “Kaiser Reich”, Wilhelm II asked for asylum in the Netherlands and lived until his death (1941) in Doorn, The Netherlands

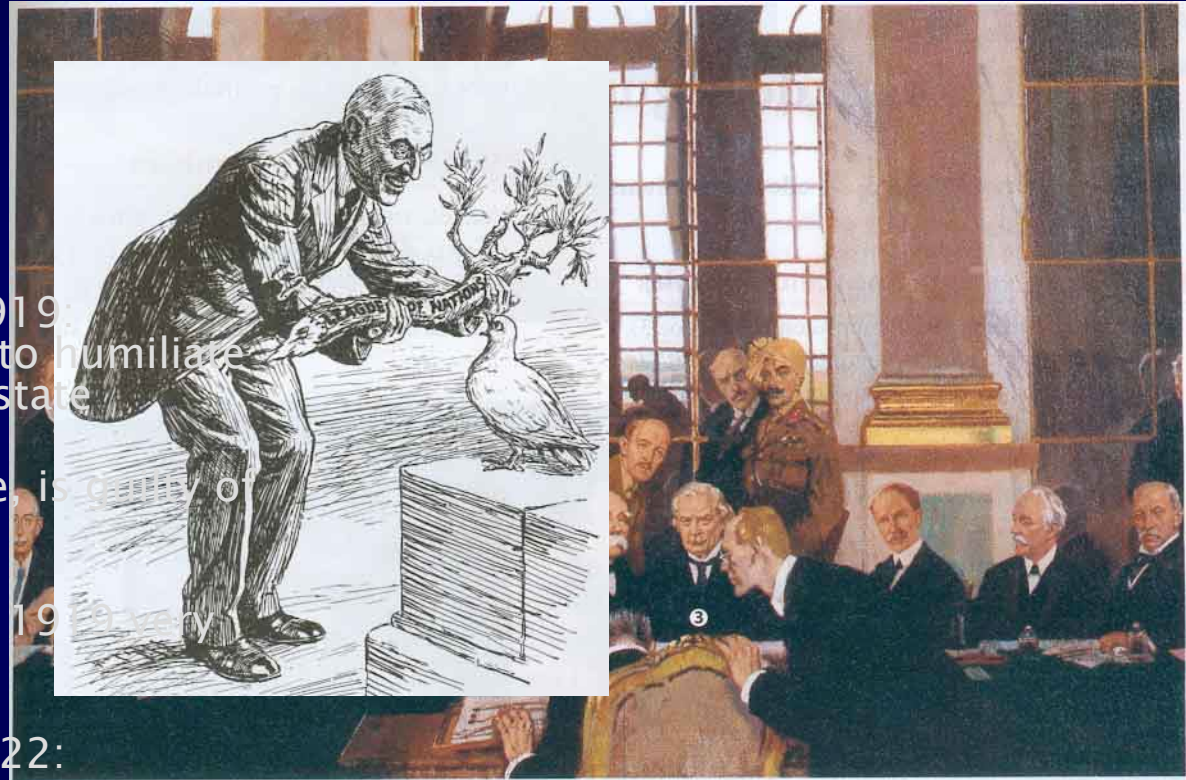


Queen Wilhelmina, (parented to the German Emperor) was thought to have facilitated the Emperor's coming. The Dutch Government and Parliament were not amused.



Reconstruction of the Peace after 1918

- Versailles Treaty 1919: deliberate attempt to humiliate Germany as rogue state
- Germany, as a state, is guilty of the war
- Treaty of Lausanne 1923: mild to Austria
- Treaty of Sevres 1922: humiliation of Turkey as accomplice of Germany



Main characteristics of the Versailles Treaty:

- New criminalisations and definitions of international crimes
- Unilateral application
- No universal international criminal court
- No mondial penal enforcement power to be bestowed on the League of Nations
- League is deemed to be a paper tiger
 - USA does not join
 - Germany and Russia are excluded from membership

Only the war criminals of the Central Powers have to stand trial



The central war criminals
to be assigned by the allies
have to stand trial

- Hindenburg
- Ludendorff
- Von Hötzendorff
- Von Kluck

The German Reichsgericht has to
hand down their verdicts as
trustee of the Versailles Treaty
Organisation

Fate of the League of Nations: in the 30-ies

- Germany leaves in 1933 after having been admitted in 1925
- So do Italy and Japan in 1936 after having been condemned by the League for their policy of aggression
- USA never took up membership
- Hitler invades Poland in 1939



Hitler and Stalin

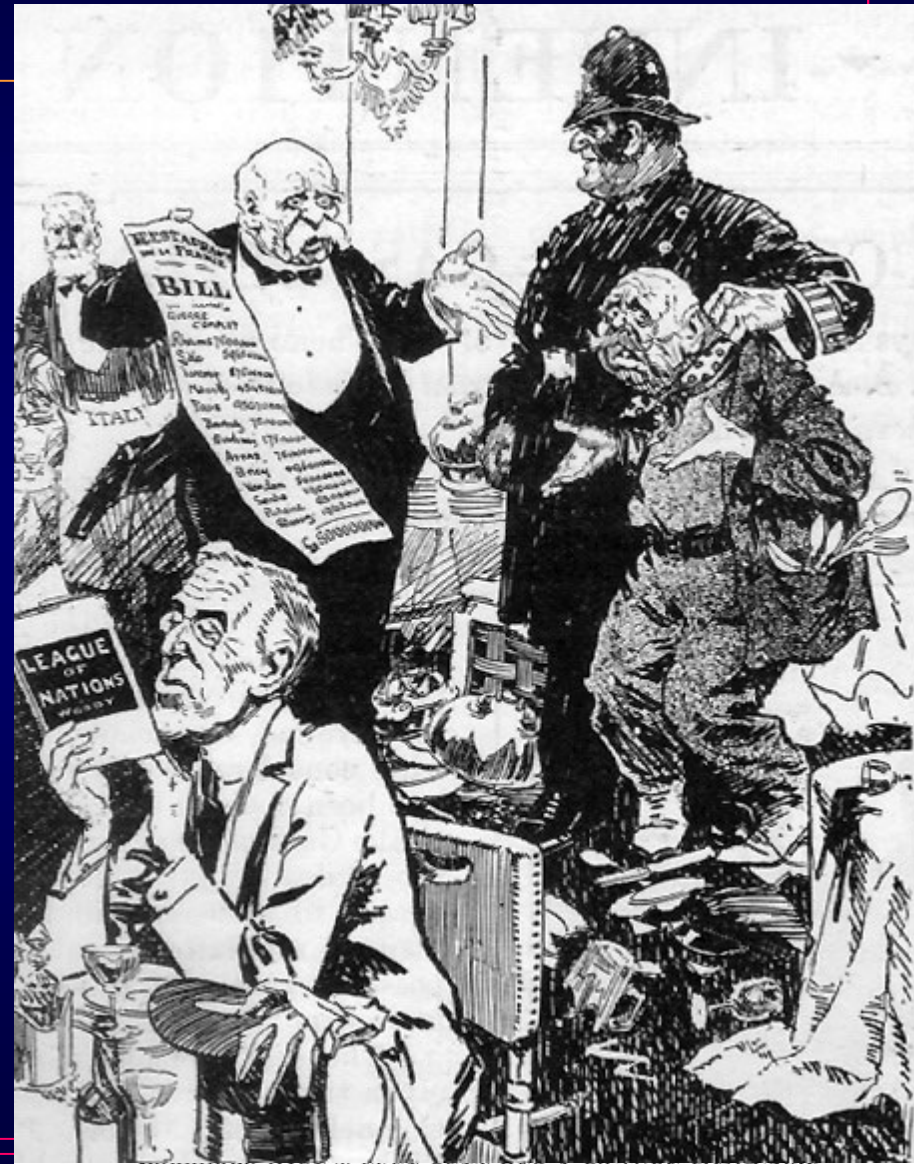
- Non-aggression pact 1939
- Chamberlain
 - Munich TS
 - Polen next
- Again: Armageddon
 - Heavy atrocities on each side belligerent parties
 - Holocaust of the Jews
 - Civil reprisals
 - Battle of the Atlantic
 - Deportations
 - Bombings of civil popula
- League is nowhere



The LEAGUE ridiculised



REAR VIEW. —Orr in the Chicago Tribune.



WOODROW HASN'T EVEN SENT HER A PICTURE POST CARD. —Darling in the New York Tribune.

Evolutions in international criminal law after 1940

- Atlantic Charter 1942
 - recodifying elements of crimes: inchoate acts, acts of participation, aiding and abetting, mens rea
 - Assumption: the individual criminal responsibility of Heads of States, Leaders of Governments, Ministers and commanders with a military rank. Churchill – Roosevelt
- 1945
 - Declaration of Saint Jame's Palace
 - Nuremberg Charter
 - Tokyo Charter



Characteristics of this “new” international criminal law (Nuremberg)

No real recodification in a consolidated text

- Mainly oriented towards the Anglo Saxon Tradition
 - Jackson, the main prosecutor applying USA Law
 - Geoffrey Lawrence as president, applying English common law
 - Donnedieu de Vabres, judge (F) , nowhere



• Concepts as

- conspiracy
- Waging war
- command responsibility
- criminal organisation (Waffen SS)

unknown in the continental European law tradition.
The French judge Henri Donnedieu de Vabres opposes to the introduction of those concepts, being antithetical to the rule of legality as understood until then
Procedural law: rule of orality, disclosure of evidence, cross examination, adversarial system



- Adversarial system

- Opposing attorneys leading the trial
- Direct examination
- Cross examination
- No procedures in absentia
- Rule of orality
- No full appeal

The establishment of the United Nations

Declaration of San Francisco 1945

- United Nations should be a law making organisation
- With its own penal enforcement power
- And an own Permanent Criminal Court
- With an own Criminal Code
- MANDATE TO the International Law Commission



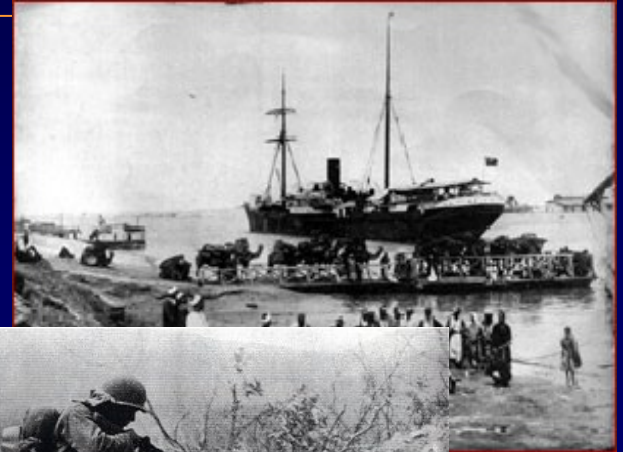
Results of WW II

- As from 1946
the United Nations
International Law Commission
came forward with several
proposals in line with
Wilson's ideas.



International Law Commission

- Work International Law Commission steadily frustrated by the P5-ers in the Security Council
 - Suez crisis 1956
 - Korea crisis 1950–1953
 - Invasion of Hungary 1956
 - Vietnam war 1963 – 1973



Developments within the UN

- Evolution of the legal order of mankind after 1946
- The International Law Commission achieves to establish a consolidated draft text of the Code of Crimes
- Implementation frustrated by the p-5ers of the Security Council: USA, UK France, Soviet Union, China
- 1989 COLLAPSE OF THE IRON CURTAIN



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.”)



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



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



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 a 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?*



Fiction of extritoriality

- Did Milosevic die in the Netherlands ?
- Responsibility of the Host Country
- Who was in charge of the autopsy?



Lockerbie Court 2000

A Scottish Court, applying Scots law, seated in the Netherlands on Dutch soil.

- NO Exterritoriality
- NOT a UN affiliated judiciary
- An emanation of the Scottish judiciary
- Access to leave for appeal to the Scottish Supreme Court



UN ICC–accelerated

- 1993 Draft of the International Law Commission to the UN General Assembly, on the initiative of Trinidad Tobago
- Appointment of Ad Hoc Committee of Drafters 1993
- For the Netherlands as expert:
Prof Dr G.A.M. Strijards

ICC developments (1)

- 1996 Italy offers to host the diplomatic summit in Rome (an offer which can not be refused)
- Negotiations in Rome 1998
- USA opposes ICC with NATO as a threat
- USA has to yield
- ICC–USA relations completely distorted
- More than 100 states are willing to guarantee the immunity of USA military personnel

FAO building Rome



ICC developments (2)

- Autonomous Treaty Organisation
- Rule of complementarity
- National legality has the primacy
- Willingness to cooperate decisive
- No rule of legality
- UN Security Council has the monopoly

- Anglo Saxon Rules of Procedure Adversarial
 - Orality
 - Corroboration of evidence
 - No referral to the *lex loci*
 - Rules of procedure and evidence may be changed *ad libitum*

- Installation of judges in 2002



ICC development (3)

- Statute of Rome signed by an overwhelming majority on 17 July 1998
- 1 July 2002: ICC can wield its jurisdictional powers

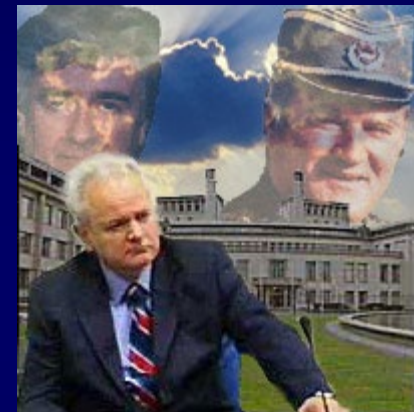


Assembly of State parties

Features

International Criminal Court

- National rule of legality remains the basic assumption
- There are no mandatory obligations to render assistance
- ICC shall be a complementary jurisdiction
- No principal UN organ
- UN Security Council has the power to block the ICC jurisdiction
- AD HOC tribunals remain the most appreciated solution
- Authority of ICC sentences depends on willingness of ICC States Parties



ICC functioning since 2002

- Kirsch
- Adrian Fulford
- Ocampo

- Suspects in pre-trial detention
 - Thomas Lubanga
 - Germain Katanga
 - Allegation: racketeering of child soldiers

- Pre trial investigation
 - Sudan
 - ...



Important:

ICC is NOT a subsidiary UN-organ like ICT and ICTR established in 1993

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 then see whether The Hague will be acting as the real LEGAL capital of this world.



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

Triangular relation between

- ICC
- Host Country
- Assembly of States Parties

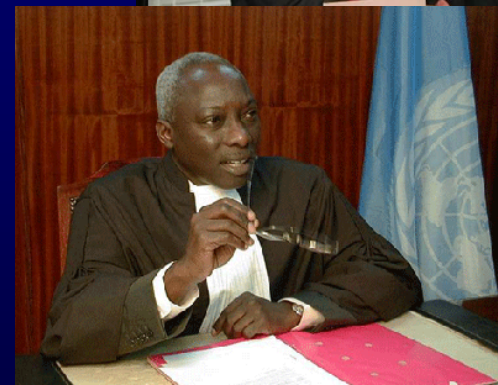


- Host Agreements
- Additional Host Arrangements



Execution Authority:

- Execution Authority: mostly the Registrar
 - ICTY: Mr. Hans Holthuis
 - ICC: Mr. Bruno Cathala
 - ICTR: Mr. Adama Dieng



In the mean time two new Ad Hoc Tribunals

- Sierra Leone
- Hariri
 - Unlike ICTY and ICTR
NOT UN-established
 - Own Statutes,
 - own substantive law



Karadzic



31 July 2008: ICTY



Penitentiary law

- Mixed responsibility
- Dutch law applicable
- BUT
 - not enforceable without consent of the registry
 - European Convention on Human Rights and European Prison Rules are applicable
 - The Netherlands is responsible as ratifier
- As a Host Country, it might be summoned



Transit problems

Transit to and from:

- On the premises:
responsibility of the registrar
- Outside the UN–premises:
responsibility of the Host Country
 - Dutch Law applicable



Safe housing

- ICTY-example: Blascic
- Always under the responsibility of the Host Country



This presentation is made by

EULEC
The European Institute for
Freedom, Security and Justice

www.eulec.org

The presentation can be downloaded from the web site

IHL Treaties

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

Common Art. 49/50/129/146

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

IHL Treaties - continued

- 1977
Additional Protocol I (art. 11, 85)
2005

- Additional Protocol 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 Torture Convention (art.4–9)
- 2000 Optional Protocol to
1989 Convention on the Rights of the 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 a Permanent Tribunal

- 1998 Rome Statute >
International Criminal Court

Importance of 2000
„Elements of Crimes” and
„Rules of Procedure and Evidence”