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Towards a Truly Universal Invisible College of International Criminal Lawyers

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In 1977, the eminent American public international law scholar *Oscar Schachter* published a short essay titled 'The Invisible College of International Lawyers'.[1] I thought that the invitation to deliver a 'Special Lecture' at the occasion of the opening of an academic conference of major importance was a good opportunity to take *Schachter*'s memorable article as a source of inspiration to offer a couple of reflections on the scholarship of international criminal law. I shall begin with a brief tribute to the pioneers (*sub* 1.), I shall then demonstrate that we are currently witnessing the emergence of a full-fledged scholarly discipline of international criminal law (*sub* 2.), and I shall conclude with a call for continuing to work towards the establishment of a fully universal college of international criminal lawyers (*sub* 3.).

1. The Pioneers: A Brief Tribute

1.1. The Inter-War Period

We shall probably know more about the history of international criminal law scholarship as a result of the major research project on the 'Historic Origins of International Criminal Law'. But for the time being, it is con-

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[1] Oscar Schachter, "The Invisible College of International Lawyers", in *Northwestern University Law Review*, 1977, vol. 72, no. 2, p. 217.

venient to begin the story about the emergence of an international criminal law scholarship in the inter-War period when a progressive group of lawyers started to give systematic thought to the idea of criminal responsibility directly under international law and to the establishment of an international forum to adjudicate crimes under international law. The names that come to mind are those of *Édouard Descamps*,[2] *Hugh Bellot*,[3] *Henri Donnedieu de Vabres*,[4] *Quintiliano Saldana*[5] and, most importantly, *Vespasian Pella*.[6] Entrusted with a mandate of the International Law Association (ILA) and the Association de Droit International Pénal (AIDP), the Romanian criminal lawyer *Pella*, in 1935, presented a "plan d'un code répressif mondial".[7] This draft was not taken up by States which, as *Pella* observed, "did almost nothing between the two wars to bring about an international system of justice".[8] The few scholars that devoted their attention to the idea of international criminal law proved far ahead of the political establishment of the time.

1.2. The Aftermath of the Nuremberg and Tokyo Trials

The Nuremberg trial had been prepared with some scholarly involvement including, in particular, contributions made by *Sheldon Glueck*[9] and

[2] The Belgian international lawyer Édouard Descamps was the head of the League of Nations Advisory Committee of Jurists which in 1920 submitted a series of draft resolutions on the subject-matter; UN Secretary-General, "Historical Survey of the Question of International Criminal Jurisdiction", UN Doc. A/CN.4/7/Rev.1 (1949).

[3] At the 1922 Buenos Aires conference of the International Law Association, the British international lawyer Hugh Bellot submitted a draft resolution on the subject-matter building on the prior work of the Advisory Committee of Jurists.

[4] For the main contribution of the French criminal lawyer Henri Donnedieu de Vabres, see "La Cour Permanente de Justice Internationale et sa vocation en matière criminelle", in *Revue Internationale de Droit Pénal*, 1924, vol. 1, p. 175.

[5] For the main contribution of the Spanish criminal lawyer Quintiliano Saldana, see "La justice pénale internationale", in *Recueil des Cours de l'Académie de droit international de La Haye*, 1925, vol. 10, p. 227.

[6] For Pella's ground breaking contribution, see *La criminalité collective des états et le droit pénal de l'avenir*, Imprimerie de l'état, Bucharest, 1925, *passim*.

[7] Vespasian Pella, "Plan d'un code répressif mondial", in *Revue Internationale de Droit Pénal*, 1935, vol. 12, p. 348.

[8] Vespasian Pella, "Towards an International Criminal Court", in *American Journal of International Law*, 1950, vol. 44, no. 1, p. 38.

[9] See Robert Jackson's acknowledgment in his foreword to Sheldon Glueck, *The Nuremberg Trial and Aggressive War*, A.A. Knopf, New York, 1946, p. vii.

Hersch Lauterpacht.[10] And with *Henri Donnedieu de Vabres* in Nuremberg and *Bert Röling* in Tokyo, two scholars served as judges. The judicial recognition of individual criminal responsibility directly under international law in Nuremberg and Tokyo and the United Nations General Assembly's (UNGA) Affirmation of the Principles of International Law Recognized by the Charter of the Nuremberg Tribunal[11] triggered some scholarly debate about the significance of these trials and about the question of their compatibility with the principle *nullum crimen sine lege*.[12] The 'creative precedents' of Nuremberg and Tokyo and their reception by the UNGA also led to the initial work of the International Law Commission (ILC) on the subject matter during the years 1949 to 1954.[13] But all in all, the scholarly debate in the aftermath of the Second World War did not give rise to the emergence of an elaborate international criminal law scholarship. Rather to the contrary, the limited debate that took place displayed a considerable amount of uncertainty about the precedential value of Nuremberg and Tokyo. The German criminal lawyer, *Hans-Heinrich Jescheck*, for example, who in 1952 devoted a ground-breaking monograph to the law of Nuremberg and who was supportive of the idea of an international criminal law, located the Nuremberg principles still more in the realm of Utopia than in the reality of international relations.[14] And the British international lawyer, *Georg Schwarzenberger*, stated dryly that "to

[10] Elihu Lauterpacht, *The Life of Hersch Lauterpacht*, Cambridge University Press, Cambridge, 2012, p. 270.

[11] UNGA Resolution 95 (I), UN Doc. A/Res/1/95, 11 December 1946.

[12] Some participants of the trials took part in that debate; see, for example, Francis Biddle, "Le procès de Nuremberg", in *Revue Internationale de Droit Pénal*, 1948, vol. 19, p. 1; Henri Donnedieu de Vabres, "Le procès de Nuremberg devant les principes modernes du droit pénal international", in *Recueil des Cours de l'Académie de Droit International de La Haye*, 1947, vol. 70, p. 481; for some other scholarly contributions, see Hans Kelsen, "Will the Judgment in the Nuremberg Trial Constitute a Precedent in International Law?", in *International Law Quarterly*, 1947, vol. 1, no. 2, p. 153; Georg Schwarzenberger, "The Problem of an International Criminal Law", in *Current Legal Problems*, 1950, vol. 3, no. 1, p. 263; and, most thoroughly, Hans-Heinrich Jescheck, *Die Verantwortlichkeit der Staatsorgane nach Völkerstrafrecht*, Röhrscheid, Bonn, 1952, *passim*.

[13] D.H.N. Johnson, "The Draft Code of Offences against the Peace and Security of Mankind", in *International and Comparative Law Quarterly*, 1955, vol. 4, no. 3, p. 445.

[14] Jescheck, 1952, p. 420, see *supra* note 12.

regard war crimes [...] as evidence of the existence of an international criminal law, requires a remarkable gift of abstraction from reality".[15]

1.3 The Cold War

The picture did not change decisively until the end of the Cold War. While the Polish scholar *Raphael Lemkin* had made a tremendous contribution[16] to the formulation and adoption of the Convention on the Prevention and Punishment of the Crime of Genocide in 1948,[17] the lack of political will to significantly advance the codification of international criminal law in any other respect negatively impacted on the development of international criminal law scholarship. While the ILA and AIDP never abandoned the idea of an international criminal law,[18] only a few scholars, such as the former Dutch judge at the Tokyo Tribunal *Bert Röling*,[19] the former American Prosecutor at Nuremberg *Benjamin Ferencz*,[20] the Belgian professor *Stefan Glaser*,[21] and the German professor *Otto Triffterer*,[22] invested much of their intellectual energy in the consolidation and development of international criminal law. The Egyptian-American professor *M. Cherif Bassiouni* took a leading role by presenting Draft Codes

[15] Schwarzenberger, 1950, p. 270, see *supra* note 12.

[16] For his major work, see Raphael Lemkin, *Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress*, Carnegie Endowment for International Peace, Washington, 1944, *passim*.

[17] Convention on the Prevention and Punishment of the Crime of Genocide, UN Treaty Series, vol. 78, p. 277.

[18] For the activity of these two scholarly bodies during the Cold War, see Heiko Ahlbrecht, *Geschichte der völkerrechtlichen Strafgerichtsbarkeit im 20. Jahrhundert*, Nomos, Baden-Baden, 1999, pp. 215–222.

[19] See, for example, Bert Röling, "The Law of War and the International Jurisdiction since 1945", in *Recueil des Cours de l'Académie de Droit International de La Haye*, 1960, vol. 100, p. 355. In 1957, Röling had criticised the States for a betrayal of the Nuremberg and Tokyo judges and the principles of these trials because of their abandonment of the international criminal law project.

[20] See, for example, Benjamin Ferencz, *An International Criminal Court. A Step towards World Peace – A Documentary History and Analysis*, Oceana, New York, 1980, *passim*.

[21] See, for example, Stefan Glaser, *Introduction à l'Étude du Droit International Pénal*, Bruylant, Brussels, 1954, *passim*.

[22] See, for example, Otto Triffterer, *Dogmatische Untersuchungen zur Entwicklung des materiellen Völkerrechts seit Nürnberg*, Albert, Freiburg, 1966, *passim*.

on international criminal law and the establishment of an international criminal court.[23] In light of the prevailing political climate, the work of this small group of lawyers remained without much immediate impact in practice and it was belittled by a realist critic as "glass bead games by an international sect of lawyers".[24] *Hans-Heinrich Jescheck*, who had coined the German term 'Völkerstrafrecht' to denote international criminal *stricto sensu* in 1952,[25] was probably not the only one whose hope in the future of such a body of law had been fading. In 1965 he wrote on the work done by the ILC in the aftermath of the Second World War that "it appears to mark the end of a promising, but failed attempt to build a true international community".[26] And as recently as 1994, *Bassiouni* sent out the following warning:

> Almost half a century after the horrors of World War II, the legal precedents of Nuremberg, Tokyo, and the subsequent Proceedings risk sinking into *désuétude*. The prolonged inactivity reinforces the argument made by some that 'Crimes Against Humanity', as this category of international crimes emerged from Post-World War II experience, were of an exceptional nature, representing no more than "victor's vengeance".[27]

1.4 The Renaissance of International Criminal Law

But from 1993 onwards the development took a different turn. In this year, the UN Security Council established the International Criminal Tri-

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[23] In 1981, M. Cherif Bassiouni submitted a first draft code on the subject-matter: "Le projet de code pénal international", in *Revue Internationale de Droit Pénal*, 1981, vol. 52, p. 119; in 1987, Bassiouni presented *A Draft International Criminal Code and Draft Statute for an International Criminal Tribunal*, Martinus Nijhoff Publishers, Dordrecht.

[24] Helmut Quaritsch (ed.), *Carl Schmitt. Das internationalrechtliche Verbrechen des Angriffskrieges und der Grundsatz 'nullum crimen, nulla poena sine lege*', Duncker & Humblot, Berlin, 1994, p. 219.

[25] Jescheck, 1952, p. 11, see *supra* note 12.

[26] Hans-Heinrich Jescheck, "Gegenwärtiger Stand und Zukunftsaussichten der Entwurfsarbeiten auf dem Gebiet des Völkerstrafrechts", in Hilde Kaufmann, Erich Schwinge, Hans Welzel (eds.), *Erinnerungsgabe für Max Grünhut*, Elwert, Marburg, 1965, p. 47.

[27] M. Cherif Bassiouni, "Crimes Against Humanity: The Need for a Specialized Convention", in *Columbia Journal of Transnational Law*, 1994, vol. 31, no. 3, pp. 458, 474.

bunal for the former Yugoslavia (ICTY).[28] After an initial phase of uncertainty, the seminal 1995 *Tadić* Decision[29] made it plain that the political choice made in 1993 paved the way for reawakening the idea of international criminal justice which had lain dormant during the Cold War decades. The *Tadić* Decision was also my personal awakening moment. I clearly remember finishing reading the decision and being struck with the feeling that something truly ground-breaking had happened here – a landmark moment for the international legal order and a major challenge for international legal scholarship. I wrote an article on the *Tadić* Decision,[30] my first scholarly piece on international criminal law, and since that moment in time my interest in the subject matter has never wavered.

Unsurprisingly, the beginning of the ICTY's judicial activity sparked a wider renewal of scholarly interest in the topic of international criminal law. While *Bassiouni* with all of his distinguished criminal law expertise played an important role in the lead-up to the establishment of the ICTY,[31] it is probably fair to say that, at this early point of the renaissance of international criminal law, public international lawyers rather than criminal lawyers dominated the scholarly discourse.[32] This was due to the fact that the most burning legal issues including, most importantly, the ascertainment of the state of customary international law, required a strong public international law expertise that criminal lawyers at the time only exceptionally possessed. The first President of the ICTY, the late *Antonio ('Nino') Cassese*, more than anybody else, personified the leading role of public international lawyers at this moment in time. In judge's robes, the eminent Italian professor of public international law was the

[28] UN Security Council Resolution 827, UN Doc. S/RES/827, 25 May 1993.

[29] International Criminal Tribunal for the former Yugoslavia (ICTY), *The Prosecutor v. Duško Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, IT-94-1-AR72, 2 October 1995.

[30] Claus Kreß, "Friedenssicherungs- und Konfliktvölkerrecht auf der Schwelle zur Postmoderne. Das Urteil des Internationalen Straftribunals für das ehemalige Jugoslawien (Appeals Chamber) im Fall Tadic vom 2. Oktober 1995", in *Europäische Grundrechte Zeitschrift*, 1996, vol. 23, p. 638.

[31] Bassiouni was a member of the Commission of Experts established by the UN Secretary-General pursuant to UN Security Council Resolution 780 (UN Doc. S/RES/780, 6 October 1992) in order to examine the allegations of violations of international humanitarian law committed in the territory of the former Yugoslavia.

[32] In this context, it is fitting to note that the Commission of Experts mentioned in note 31 was headed by the Dutch public international lawyer Frits Kalshoven.

main actor in revitalising the Nuremberg and Tokyo precedents and progressively developing them towards the crystallisation of war crimes committed in non-international armed conflict[33] and the emancipation of crimes against humanity from the Nuremberg connection with crimes against peace or war crimes. During the '*Cassese*-years' at the ICTY, the practice and the theory of international criminal law formed a remarkable alliance. It was the time when important judgments of the ICTY were characterised by a distinct 'scholarly spirit and style', ripe with learned and sometimes far reaching *obiter dicta*.[34] And it was the time when the ICTY, emboldened by its scholarly self-confidence, challenged the International Court of Justice (ICJ) on a legal issue as central as the attribution of conduct to States under public international law.[35]

2. The Emergence of a Full-Fledged Scholarly Discipline of International Criminal Law

Despite the heavy scholarly touch of the early practice of the ICTY and despite the fact that a number of scholars – most importantly *Bassiouni* as the head of the Drafting Committee – were involved in the formulation of the Statute of the International Criminal Court (ICC Statute) in 1998, it is difficult to deny that large parts of the ICC's founding treaty were formulated without thorough scholarly preparation. For example, this was true regarding the general principles of criminal law and criminal procedure. Due to the ILC's work leading to the adoption of the Draft Code of Crimes against the Peace and Security of Mankind in 1996,[36] the situation was somewhat different regarding the codification of crimes in the ICC

[33] For a powerful scholarly contribution pointing in this direction, see Theodor Meron, "International Criminalization of Internal Atrocities", in *American Journal of International Law*, 1995, vol. 89, no. 3, p. 554.

[34] For a comparative note on the style of the ICTY and the ICC, see Claus Kreß, "The International Court of Justice and the Law of Armed Conflicts", in Christian J. Tams/James Sloan (eds.), *The Development of International Law by the International Court of Justice*, Oxford University Press, Oxford, 2013, p. 296.

[35] The story of the rise and partial fall of the ICTY's 'overall control theory' is too well known to be rehearsed here. Suffice it to refer to Antonio Cassese's last scholarly word on the matter in "The Nicaragua and Tadic Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia", in *European Journal of International Law*, 2007, vol. 18, no. 4 , p. 649.

[36] Draft Code of Crimes against the Peace and Security of Mankind, UN Doc. A/51/10 (1996).

Statute. However limited its scholarly preparation, the establishment of the first permanent international criminal court in legal history finally opened the door for the emergence of a system of international criminal justice "in which newly established international criminal tribunals, treaty obligations and national courts all have their part to play" to implement the "international consensus that the perpetrators of international crimes should not go unpunished".[37] It was this new legal landscape that has finally provided a sufficiently fertile ground for the ongoing and rapid development towards a full-fledged scholarly discipline of international criminal law.

2.1. A New Generation of International Criminal Lawyers and their Building of a Scholarly Infrastructure

The present-day college of international criminal law scholars is represented by an increasing number of specialised international criminal lawyers occupying specialised chairs or working in specialised research institutes. Increasingly, these lawyers do justice to the distinctive 'hybrid' character of international criminal law through a combination of a criminal law background with a marked interest in public international law and at times you find scholars with full expertise in both 'parent disciplines'. The methods and the spirit of those two 'parent disciplines' are hereby more fully appreciated and, where appropriate, usefully integrated, as is exemplified by the recent work of Indo-Canadian scholar *Leena Grover* on the interpretation of the definitions of crimes as contained in the ICC Statute.[38] This increasing sensitivity for international criminal law's belonging to two 'parent disciplines' helps to avoid an unhealthy compartmentalisation within the college of international criminal law.[39]

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[37] International Court of Justice, *Arrest Warrant of 11 April 2000* (Democratic Republic of the Congo v. Belgium), Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal, 14 February 2002, I.C.J. Reports 2002, p. 78 (para. 51).

[38] Leena Grover, *Interpreting Crimes in the Rome Statute of the International Criminal Court*, Cambridge University Press, Cambridge, 2014, *passim*.

[39] Long before the debate about fragmentation, Schachter, 1977, pp. 221–222, see *supra* note 1, had cautioned against 'compartmentalization' within international law as 'unified discipline'; the 'hybrid' character of international criminal law had already been stressed by Florian Jeßberger, "Zu Nutzen und Notwendigkeit einer Völkerstrafrechtswissenschaft", in Martin Büscher, Sascha Rolf Lüder, Uwe Tittmann (eds.), *Rule of Law – Herrschaft des Rechts in den internationalen Beziehungen. Ein Jahr in-*

Over the past few years, international criminal law has also become the subject matter of various kinds of scholarly work including treatises,[40] textbooks and handbooks,[41] commentaries,[42] companions[43] as well as monographs,[44] essay collections in honour of distinguished authorities in international criminal law,[45] and articles published in specialised academic journals.[46] Finally, questions of international criminal law occupy a place on the agendas of important bodies of international legal scholarship, such as the *Institut de Droit International* (IDI),[47] the ILA[48] and the AIDP.[49]

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ternationaler Strafgerichtshof, Institut für Kirche und Gesellschaft, Iserlohn, 2004, pp. 84–85.

40 Kai Ambos, *Treatise on International Criminal Law, Vol. I: Foundations and General Part*, *Vol. II: The Crimes and Sentencing*, Oxford University Press, Oxford, 2013–2014, *passim*.

41 For example, Hervé Ascensio, Emmanuel Décaux, Alain Pellet, *Droit International Pénal*, Pedone, Paris, 2012, *passim*; Robert Cryer, Hakan Friman, Darryl Robinson, Elisabeth Wilmshurst (eds.), *An Introduction to International Criminal Law and Procedure*, Cambridge University Press, Cambridge, 2014, *passim*; Enrico Amati, Valentina Caccamo, Matteo Costi, Emanuela Fronza, Antonio Vallini, *Introduzione Al Diritto Penale Internazionale*, Giuffrè, Milan, 2010, *passim*; Gerhard Werle, *Völkerstrafrecht*, Mohr Siebeck, Tübingen, 2012, *passim*.

42 For example, Antonio Cassese, Paola Gaeta, John R.W.D. Jones (eds.), *The Rome Statute of the International Court: A Commentary*, Oxford University Press, Oxford, 2002, *passim*; Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court*, Hart Publishing, Oxford, 2008, *passim*.; Christian Tams, Lars Berster, Björn Schiffbauer, *Convention on the Prevention and Punishment of the Crime of Genocide: A Commentary*, Beck/Hart/Nomos, 2014, *passim*.

43 Antonio Cassese (ed.), *The Oxford Companion to International Criminal Justice*, Oxford University Press, Oxford, 2009, *passim*.

44 For a particularly influential example, see William A. Schabas, *Genocide in International Law*. *The Crime of Crimes*, Cambridge University Press, Cambridge, 2009, *passim*.

45 For an example, see Lal Chand Vohrah, Fausto Pocar, Yvonne Featherstone, Olivier Fourmy, Christine Graham, John Hocking, Nicholas Robson (eds.), *Man's Inhumanity to Man: Essays in Honour of Antonio Cassese*, Brill, Leiden, 2003, *passim*.

46 The two most clearly specialised journals are the *Journal of International Criminal Justice* and the *International Criminal Law Review*.

47 See, for example, the 2005 IDI-Resolution on Universal criminal jurisdiction with regard to the crime of genocide, crimes against humanity and war crimes; available at http://www.idi-iil.org/idiE/resolutionsE/2005_kra_03_en.pdf, last accessed on 22 November 2014.

2.2. The Broadening of the Scholarly Activity so as to Cover the Whole Territory of International Criminal Law

The scope of international criminal law scholarship has extended from an early focus on substantive criminal law into the realms of international criminal procedure and the enforcement of international sentences of imprisonment. The former is highlighted by the monumental 2013 publication of *International Criminal Procedure – Principles and Rules*, as edited by *Göran Sluiter*, *Håkan Friman*, *Suzannah Linton*, *Sergey Vasiliev*, and *Salvatore Zappalà*. The latter is demonstrated by *Róisín Mulgrew*'s 2013 monograph *Towards the Development of the International Penal System*. As one would expect, this broadening of the scope of scholarly activity as well as the rapidly increasing level of detail and refinement of the scholarly studies goes hand in hand with indications of 'internal scholarly specialisation', such as the sub-fields of substantive criminal law and international criminal procedure. This trend is not unlike that discerned in the scholarship on national criminal laws and justice systems.

2.3. From Ceremonial Affirmation to Constructive Criticism

> The world will never be the same after the establishment of the International Criminal Court. Yesterday's adoption of the Final Act of the United Nation's Diplomatic Conference and today's opening of the convention for signature marks both the end of a historical process that started after World War I as well as the beginning of a new phase in the history of international criminal justice. [50]

It was most appropriate that *Bassiouni* chose this ceremonial and even somewhat euphoric tone on 18 July 1998, the day that the ICC Statute was opened for signature on 'Il Campidoglio' in Rome. And it was understandable that this tone should resonate in many scholarly contributions in the years to come. With the stunningly early entry into force of the ICC Statute, with the by now rapidly unfolding case-law of the ICTY and the ICTR, with the establishment of internationalised criminal tribunals, with

[48] The ILA has, for example, recently established the committee 'Complementarity in International Criminal Law'.

[49] See, for example, the 2009 AIDP-Resolution on Universal Jurisdiction; in *Revue Internationale de Droit Pénal*, 2009, vol. 80, p. 553.

[50] The passage is reprinted in Triffterer, 2008, p. xxx, see *supra* note 42.

signals pointing to an enhanced indirect enforcement of international criminal law at the domestic level, and with all this having been backed by a broader 'post-Westphalian' move within the international legal order,[51] the emergence of a global system of international criminal justice seemed a bit like an irresistible success story. These happy days perhaps reached a climax when the Security Council, in 2005, and unexpectedly at the time, decided to refer the situation of Sudan (Darfur) to the ICC.[52]

But, somewhat ironically, this referral also decisively contributed to the end of the honeymoon.[53] The ICC instituted proceedings against the President of Sudan. What was clear on paper suddenly became a reality: the judicial intervention by the Court could entail no less than the change of a criminal regime. The recognition of this fact led to a change of attitude among many African leaders towards the ICC and the ensuing controversies swept away any illusion that the establishment of the ICC as an actor on the international plane could somehow be achieved in unmitigated joy and harmony.[54] But the conflict with African leaders was not the only challenge. The ICC had to put into practice a new procedural law, fraught with ambiguities and complexities, and it was at times called upon to do so during ongoing conflicts and without the required State cooperation. These difficulties, compounded by some disturbingly unprofessional rivalries within the young institution, explain why the Court needed 10 years to render its first judgment. This created further disillusionment with the international criminal law project. The latter also became the subject of broader 'neo-Westphalian hestitations' regarding the exercise of universal jurisdiction by States[55] and even regarding the international

[51] Claus Kreß, "Major Post-Westphalian Shifts and Some Post-Westphalian Hesitations in the State Practice on the International Law on the Use of Force", in *Journal on the Use of Force and International Law*, 2014, vol. 1, no. 1, pp. 11, 12–13 and 20.

[52] UN Security Council Resolution 1593, UN Doc. S/RES/1593, 31 March 2005.

[53] The term is borrowed from David Luban, "After the Honeymoon. Reflections on the Current State of International Criminal Justice", in *Journal of International Criminal Justice*, 2013, vol. 11, no. 3, p. 505.

[54] Gerhard Werle, Lovell Fernandez, Moritz Vormbaum (eds.), *Africa and the International Criminal Court*, Springer, Berlin, 2014 (see, in particular, the contributions by Tim Murithi, Juliet Okoth and Sosteness Francis Materu in that volume).

[55] On the case of Belgium, see Tom Ongena, Ignace Van Daele, "Universal Jurisdiction for International Core Crimes: Recent Developments in Belgium", in *Leiden Journal of International Law*, 2002, vol. 15, no. 3, p. 687; on the case of Spain, see Ley Or-

criminal law exception from the international law State immunity *ratione materiae*.[56] As if this was not enough, more recent scholarly studies have placed question marks behind the international criminal law project as a whole or at least behind the manner in which key components of the current system operate. *Martti Koskenniemi*, for example, wondered whether international criminal trials could attain their goal to convey the historical truth without ending up as 'show trials',[57] and in a somewhat similar vein, *Markus D. Dubber* protrayed the operation of international criminal 'law' as the 'alegal administrative elimination of wrongdoers'.[58]

By and large, international criminal lawyers do not seem to have abandoned their support for the international criminal justice project 'after the honeymoon'. They remain committed to the cosmopolitan concern of international criminal law for human beings beyond State borders and its major aspiration to have law speak to power more forcefully than in past international relations. But they may no longer hold an uncritical belief in the project's success. *David Luban* is likely to speak for quite a few international criminal lawyers when he writes: "It's too soon to tell".[59] In light of the "grim realities, the constraints and the complexities of international criminal justice",[60] the tone among international criminal lawyers has generally become more prosaic. Exceedingly high hopes or even "exag-

gánica 1/2014, de 13 de marzo, de modificación de la Ley Orgánica 6/1985, de 1 julio, dl Poder judicial, relativa a la justicia universal, BOE Nr 63 of 14 March 2014.

56 For the three reports of Special Rapporteur of the ILC on the topic of the immunity of State officials from foreign criminal jurisdiction, see Roman Anatolevich Kolodkin, see Third Report on immunity of State officials from foreign criminal jurisdiction, UN Doc A/CN.4/646 (24 May 2011); Second Report on immunity of State officials from foreign criminal jurisdiction, UN Doc A/CN.4/631 (10 June 2010); Preliminary Report on immunity of State officials from foreign criminal jurisdiction, UN Doc A/CN.4/601, 29 May 2008.

57 Martti Koskenniemi, "Between Impunity and Show Trials", in *Max Planck Yearbook of the United Nations*, 2002, vol. 6, no. 1 , pp. 1, 35.

58 Mark D. Dubber, "Common Civility: The Culture of Alegality in International Criminal Law", in *Leiden Journal of International Law*, 2011, vol. 24, no. 4, pp. 923, 935–936; Dubber's formulation was first used in the Dissenting Opinion by Judge Robertson in Special Court for Sierra Leone, *Prosecutor v. Norman*, Child Recruitment Decision, SCSL-2004-14-AR72(E), 31 May 2004, para. 14, in order to guard against an unacceptable weakening of the principle of legality in international criminal law.

59 Luban, 2013, p. 515, see *supra* note 53.

60 Payam Akhavan, "The Rise, and Fall, and Rise, of International Criminal Justice", in *Journal of International Criminal Justice*, 2013, vol. 11, no. 3, p. 527.

gerated normative fantasies" [61] tend to be replaced by a much more modest and realistic assessment of the potential of international criminal law. Much inspired by *Darryl Robinson's* 2008 diagnosis of an "Identity Crisis of International Criminal Law",[62] this goes hand in hand with an increasing tendency to keep a healthy distance from the initially widespread self-congratulatory rethoric that international criminal courts unvariably adhere to the "highest international legal standards".[63] All in all, the predominant approach of the international criminal law scholarship remains constructive. However, it has become more cognisant and critical of the shortcomings in the day-to-day practice of international criminal law, of the limited effect of the infliction of punishment and of the fact that the criminal sanction does not lose its deeply problematic features because it is imposed "in the name of humanity" at the international level.

2.4. Some Thoughts on the Functions of International Criminal Law Scholarship

It is not pretended here to come up with a comprehensive list of the functions international criminal lawyers can fulfill in order to help the new international criminal justice system sucessfully face its challenges. What follows are therefore no more than a few necessarily selective observations, and the order of the considerations is not to suggest a hierarchy of importance.

2.4.1. The Theoretical Function: Clarifying the Concept, the Purpose(s) and the Nature of International Criminal Law

The theoretical function of international criminal law scholarship requires work on the fundamentals underpinning the subject matter. The challenge begins with the clarification of the concept 'International Criminal Law' which continues to suffer from considerable ambiguity. This is partly due to the fact that this concept, especially in the Anglo-American tradition, is

61 *Ibid*., p. 529.

62 Darryl Robinson, "The Identity Crisis of International Criminal Law", in *Leiden Journal of International Law* 2008, vol. 21, no. 4, p. 925.

63 See, however, the slogan on the ICTY's website: "The judges apply the highest international legal standards (...)", available at http://www.icty.org/sections/AbouttheICTY/Chambers, last accessed on 25 November 2014.

variously used in quite different contexts.[64] But even if the concept is, as in this lecture, used within the strict meaning of a body of law imposing individual criminal responsibility directly under international law, important uncertainties remain. The ICTY, for example, has taken the view as early as in the 2005 *Tadić* Decision that international treaties may, in themselves, be a sufficient basis for its adjudication of war crimes.[65] But how does such a concept of international criminal law *stricto sensu* relate to the idea that crimes under international law are "of concern to the international community as a whole"?[66] This question is inextricably linked with that of the theoretical explanation for the jurisdiction of international criminal courts. Is the latter's jurisdiction (exclusively) based on the delegation of State powers or does it (ultimately) rest on the *ius puniendi* of the international community as a whole? These are theoretical questions with far-reaching practical consequences. The fundamentally important immunity decision by ICC Pre-Trial Chamber I of 12 December 2011 in the case of *Al Bashir*[67] may serve as one example to illustrate the point.[68]

Clarification of the purpose(s) of international criminal law constitutes a second fundamental challenge that requires further theoretical work. While it does not pose a major difficulty to come up with a list of possible candidates in that context,[69] the question remains whether they are all equally relevant and how to resolve possible conflicts. Is it the primary function of international criminal law to contribute to the resolu-

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64 Claus Kreß, "International Criminal Law", in Rüdiger Wolfrum (ed.), *The Max Planck Encyclopedia of Public International Law*, Vol. V, Oxford University Press, Oxford, 2012, p. 717.

65 *The Prosecutor v. Duško Tadić*, para 143, see *supra* note 29.

66 For a prominent example of a reference to the term 'international community as a whole', see the fourth preambular paragraph of the ICC Statute.

67 International Criminal Court (ICC), *The Prosecutor v. Omar Hassan Ahmad Al Bashir*, Decision Pursuant to Article 87 (7) of the Rome Statute on the Failure by the Republic of Malawi to Comply with the Cooperation Requests Issued by the Court with Respect to the Arrest and Surrender of Omar Hassan Ahmad Al Bashir, ICC-02/05-01/09-139, 12 December 2011.

68 For a full exposition of the point, see Claus Kreß, "The International Criminal Court and Immunities under International Law for States Not Party to the Court's Statute", in Morten Bergsmo/LING Yan (eds.), *State Sovereignty and International Criminal Law*, Torkel Opsahl Academic EPublisher, Beijing, 2012, p. 223.

69 See, for example, the fairly long list in: Cryer, Friman, Robinson, Wilmshurst, 2014, pp. 22–36, see *supra* note 41.

tion of the concrete violent conflict that gave rise to a situation of macro-criminality, or is this body of law primarily concerned with furthering the international community's interest in the maintenance and strengthening of a *noyeau dur* of the international legal order as such? A fascinating scholarly discussion on this and related questions has begun[70] and it is encouraging to see that eminent (legal) philosophers, such as *David Luban*[71] and *Larry May*[72], take an active part in this debate.

A third (and of course closely interrelated) theoretical challenge is related to the nature of international criminal law. Is that body of criminal law, due to its cosmopolitan reach and/or due to the essentially collective character of the conduct it is to capture, fundamentally different from national criminal law? Or does international criminal law have a character distinct from national criminal law which would perhaps require us to articulate certain fundamental criminal law principles in a somewhat different manner? Here again, a stimulating debate, inspired by thinkers such as *Mark Drumbl*,[73] *Mark Osiel*[74] and, most recently, *Darryl Robinson*[75] is underway.

2.4.2. The Doctrinal Function: Refining the Law

While the doctrinal work of international criminal law should of course be connected and inspired by the insights gained at the fundamental theoretical level, a host of middle- and lower range doctrinal legal problems can be addressed by international criminal law scholars irrespective of the theoretical answers underpinning them. The elaboration of doctrines and

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70 For a detailed account of the state of the discussion and with detailed references, see, for example, Ambos, 2013, pp. 60–73, *supra* note 40.

71 See, recently, Luban, 2013, p. 509, see *supra* note 53 (with references to prior writings in note 12).

72 Larry May, *Crimes Against Humanity*, Cambridge University Press, Cambridge, 2005, pp. 3–23, 63–95 and 201–253; see also Larry May, Zachary Hoskins (eds.), *International Criminal Law and Philosophy*, Cambridge University Press, Cambridge, 2010, *passim*.

73 Mark Drumbl, *Atrocity, Punishment, and International Law*, Cambridge University Press, Cambridge, 2007, *passim*.

74 Mark Osiel, *Making Sense of Mass Atrocity*, Cambridge University Press, Cambridge, 2009, *passim*.

75 Darryl Robinson, "A Cosmopolitan Liberal Account of International Criminal Law", in *Leiden Journal of International Law*, 2013, vol. 26, no. 1, p. 127.

their coherent arrangement within a doctrinal system is what is called *Dogmatik* in German[76] and what is referred to here as the doctrinal function of international criminal law scholarship. I shall illustrate this function by way of three examples stemming from different legal contexts and situated at different levels of generality.

In the wake of the renaissance of international criminal law in the 1990s, crimes against humanity soon acquired the most important place in practice.[77] But despite the enormous growth of the practical relevance of this crime under international law, important uncertainties about its proper scope of application persisted. This came to light when the judges of ICC Pre-Trial Chamber II split on the legal construction of the concept of 'organisation' within the policy requirement of Article 7 of the ICC Statute.[78] The judicial controversy relates back to a very important question: to what extent do crimes against humanity (and international criminal law in general) cover the conduct of non-State actors? A convincing answer to this question requires a thorough doctrinal analysis.[79]

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[76] For an explanation of that term by an eminent American criminal lawyer with an intimate acquaintance with the German legal culture, see George P. Fletcher, "New Court, Old *Dogmatik*", in *Journal of International Criminal Justice*, 2011, vol. 9, no. 1, p. 179. Some may intuitively tend to see the highlighting of the doctrinal function as a 'Teutonic obsession' (my German colleague Jeßberger, 2004, p. 84, see *supra* note 39, for example, had stressed the doctrinal function already in 2004). But whether or not the traditional 'teutonic' intellectual style is more open to doctrinal analysis (on that question, see Michael Bohlander, "Language, Culture, Legal Traditions, and International Criminal Justice", in *Journal of International Criminal Justice*, 2014, vol. 12, no. 3, p. 491, and his reminder (*ibid*., p. 504), of John Galtung's seminal essay "Structure, Culture and Intellectual Style: An Essay Comparing Saxonic, Teutonic, Gallic and Nipponic Approaches", in *Social Science Informations*, 1981, vol. 20, no. 6, p. 817), it is a fact that (for example) 'Saxonic' international criminal lawyers have since long been taking an active and hugely enlightening part in the doctrinal debate.

[77] Laila Nadya Sadat, "Crimes Against Humanity in the Modern Age", in *American Journal of International Law*, 2013, vol. 107, no. 2, p. 334.

[78] ICC, *Situation in the Republic of Kenya*, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, ICC-01/09, 31 March 2010, with an Dissenting Opinion of Judge Hans-Peter Kaul.

[79] For a particularly enlightening study on crimes against humanity before the outbreak of the Kenya-controversy, see David Luban, "A Theory of Crimes against Humanity", in *Yale Journal of International Law*, 2004, vol. 29, no. 1, p. 86; for the doctrinal debate triggered by that controversy see, for example, Claus Kreß, "On the Outer Limits

The attribution of individual criminal responsibility within a context of macro-criminality constitutes a core challenge in international criminal law. While the ICTY and the ICTR developed the doctrine of joint criminal enterprise,[80] Article 25(3) of the ICC Statute contains an elaborate list of different forms of participation to meet the challenge. Unsurprisingly, the formulation of this provision gives rise to many questions including those of the existence *vel non* of a normative hierarchy between the four groups of individual participation and their delineation. An intensive scholarly debate has begun with a view to assist the Court[81] in refining the new law on individual participation in a convincing and coherent manner.[82]

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of Crimes against Humanity: The Concept of Organization within the Policy Requirement: Some Reflections on the March 2010 ICC *Kenya* Decision", in *Leiden Journal of International Law*, 2010, vol. 23, no. 4, p. 855 *versus* Gerhard Werle, Boris Burghardt, "Do Crimes Against Humanity Require the Participation of a State or a State-like Organization?", in *Journal of International Criminal Justice*, 2012, vol. 10, no. 5, p. 1151.

[80] The case law goes back to ICTY, *Prosecutor v. Duško Tadić,* Judgment, IT-94-1-A, 15 July 1999, paras. 185–229.

[81] On the evolving case law of the Court, see, most importantly, ICC, *Prosecutor v. Lubanga Dyilo*, Decision on the confirmation of charges, ICC/01/04-01/06, 29 January 2007, para. 317; ICC, *The Prosecutor v. Germain Katanga and Mathieu Nagudjolo Chui*, Decision on the confirmation of charges, ICC-01/04-01/07, 30 September 2008, para. 466; ICC, *The Prosecutor v. Callixte Mbarushimana*, Decision on the confirmation of charges, ICC-01/04-01/10, 16 December 2011, para. 268; ICC, *Prosecutor v. Lubanga Dyilo*, Judgment pursuant to Article 74 of the Statute, ICC/01/04-01/06, 14 March 2012, para. 917 (and Separate Opinion of Judge Fulford, *ibid*., para. 1); ICC, *The Prosecutor v. Mathieu Ngudjolo Vhui*, Judgment pursuant to Article 74 of the Statute, Concurring Opinion of Judge Van den Wyngaert, ICC-01/04-02/12, 18 December 2012, para. 22; ICC, *Le Procureur c. Germain Katanga*, Jugement rendu en application de l'article 74 du Statut, ICC-01/04-01/07, 7 March 2014, para. 1366 (and Judge Van den Wyngaert, Minority Opinion, para. 277); ICC, *Le Procureur c. Germain Katanga*, Décision relative à la peine (article 76 du Statut), ICC-01/04-01/07, 23 May 2014, para. 61.

[82] For some recent examples of scholarly contributions, see the Symposium "Individual Liability for Macrocriminality", as organised by Kai Ambos, in *Journal of International Criminal Justice*, 2014, vol. 12, no. 2, p. 219; Jens David Ohlin, Elies van Sliedregt, Thomas Weigend, "Assessing the Control Theory", in *Leiden Journal of International Law*, 2013, vol. 26, no. 3, p. 725; James G. Stewart, "The End of 'Modes of Liability' for International Crimes", in *Leiden Journal of International Law*, 2012, vol. 25, no. 1, p. 165.

The concept of 'case' is of pivotal importance for the ICC's law of international criminal procedure, be it in the contexts of the principle of complementarity (Article 17 of the ICC Statute) and *ne bis in idem* (Article 20 of the ICC Statute), or the subject matter of the trial (Article 74(2), 2nd sentence, of the ICC Statute). But the concept's meaning remains to be fully[83] explored where the prosecution selects a series of incidents forming part of a far broader context of criminal activity.[84]

The doctrinal function of international criminal law scholarship can yield its potentially beneficial results only if this scholarship is met by judicial partners (most importantly in the appellate bodies) who are willing genuinely to consider doctrinal suggestions or criticisms. The ICTY and the ICTR have not always lived up to this ideal. They decided on important legal questions, such as the concept of genocidal intent or the policy requirement of crimes against humanity, with little (apparent) consideration of the relevant scholarly discussion. Further, once a choice was made on a legal issue, the two tribunals generally showed little inclination to revisit it in light of subsequent scholarly criticism whatever the latter's weight.[85] The emerging practice of the ICC, however, gives one reason to hope that this Court may have a more open mind towards the doctrinal contributions of international criminal law scholarship. The recent Ap-

[83] For an initial attempt to clarify the concept, see Rod Rastan, "What is a 'case' for the purpose of the Rome Statute?", in *Criminal Law Forum*, 2008, vol. 19, no. 3–4, p. 435.

[84] In the connection with the principle of complementarity, the introduction of the test of 'the fundamentally same conduct' by the ICC Appeals Chamber in *Situation in the Republic of Kenya, Case of Muthaura and others*, Judgment on the appeal of the Republic of Kenya against the decision of Pre-Trial Chamber II of 30 May 2011 entitled "Decision on the Application by the Government of Kenya Challenging the Admissibility of the Case Pursuant to Article 19(2)(b) of the Statute", ICC-01/09-02/11 OA, 30 August 2011, para. 39, must be seen in the context of that challenge.

[85] On the cursory treatment of the concept of genocidal intent in ICTR, *Prosecutor v. Akayesu*, Judgment, ICTR 96-4-T, 2 September 1998, para. 498, and in ICTY, *Prosecutor v. Krstić*, Judgment, IT-98-33-A, 19 April 2004, para. 134, see Claus Kreß, "The Darfur Report and Genocidal Intent", in *Journal of International Criminal Justice*, 2005, vol. 3, no. 3, pp. 562 and 566; on the 'shocking brevity' of the ICTY's Appeals Chamber's abandonment of the policy requirement in a footnote in *Prosecutor v. Kunarac*, Judgment, IT-96-23, 12 June 2002, para. 98 (note 114), see Matt Halling, "Push the Envelope – Watch it Bend: Removing the Policy Requirement and Extending Crimes against Humanity", in *Leiden Journal of International Law*, 2010, vol. 23, no. 4, pp. 827 and 829–830.

peals Chamber judgment on the power of the Trial Chambers to compel witnesses before it and to request a State Party to compel witnesses to appear before the Court sitting *in situ* in the State Party's territory or by way of video-link constitutes a positive example of a judicial decision that carefully considers the relevant scholarly debate before deciding upon an important legal issue.[86]

2.4.3. The Advisory Function: Engaging in International Criminal Legal Policy

While it is not for scholars to decide on questions of legal policy,[87] they can usefully advise the policymakers by developing, structuring and weighing the relevant considerations, by placing the policy questions at stake within a broader legal context, and by formulating concrete codification or reform proposals.[88] As our brief tribute to the pioneers has reminded us, international criminal law scholarship has initially engaged mainly in this advisory function. While this is no longer the case, the advisory function retains its significance at the present stage of the development of international criminal law. To illustrate this point just on the field of substantive law: A controversial scholarly debate has accompanied the diplomatic process leading to the 2010 Kampala compromise on the crime of aggression by which the ICC Statute's reception of the first generation of international criminal law, that of Nuremberg and Tokyo, was completed.[89] With respect to the second generation of international criminal law, as articulated by the ICTY and ICTR and as confirmed in the ICC Statute, a group of distinguished international criminal law scholars led by *Leila Nadya Sadat* have submitted a proposal to adopt a Convention for Crimes Against Humanity in order to enhance the coherence

[86] ICC, *The Prosecutor v. William Samoei Ruto and Josua Arap Sang*, Judgment on the appeals of William Samoi Ruto and Mr. Joshua Arap Sang against the decision of Trial Chamber V (A) of 17 April 2004 entitled "Decision on Prosecutor's Application for Witness Summonses and resulting Request for State Party Cooperation", ICC-01/09-01/11 OA 7 OA 8, 9 October 2014.

[87] For the more ambitious claims by the liberal international lawyers of the 1860s, see Martti Koskenniemi, *The Gentle Civilizer of Nations. The Rise and Fall of International Law 1870–1960*, Cambridge University Press, Cambridge, 2002, pp. 15–16.

[88] Schachter, 1977, p. 223, see *supra* note 1.

[89] See, for example, the Symposium "The Codification of the Crime of Aggression" organised by Andreas Paulus, in *European Journal of International Law*, 2009, vol. 20, no. 4, p. 1099.

of the international criminal legal system.[90] While international criminal law scholars have in the past more often than not argued in support of the progressive development of the field, this need not be the case in the future. If the question of whether international terrorism should form part of a third generation of international criminal law[91] was to return to the international criminal legal policy agenda, this would likely provoke a scholarly debate as controversial as that on the crime of aggression.

2.4.4. The Primary Control Function: Evaluating, Enhancing and Protecting the System's Legitimacy

As long as international criminal law was enforced by victors only or *ad hoc* and *ex post facto*, its vulnerability to a critique of illegitimacy was high. In that respect the establishment of a permanent international criminal court constitutes a major advance. Yet, in view of the sovereignty of the State concerned and the sovereignty of that State's people, the judicial intervention of a permanent international criminal court by necessity remains a politically sensitive matter. This is especially so where such intervention is made during an ongoing conflict and/or amounts to a regime change. What *David Luban* says of international criminal justice in general, can therefore be usefully applied to the ICC in particular: "(It) will always be an extraordinary institution that perpetually needs to persuade the world of its own legitimacy".[92] I shall here focus on equality before the law as one of the most important principles to which the ICC must aspire in order to be rightly perceived as a legitimate international criminal court. Already *Robert Jackson* felt the power of this equality principle when he famously stated in Nuremberg:

> The ultimate step in avoiding periodic wars, which are inevitable in a system of international lawlessness, is to make

[90] Leila Nadya Sadat, *Forging a Convention for Crimes Against Humanity*, Cambridge University Press, Cambridge, 2011, *passim*.

[91] International terrorism was the subject of a questionable recognition as a crime under international law by the Special Tribunal for Lebanon, Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging, 16 February 2011, STL-11-01/I, paras. 83 *et seq*., 111; for a powerful critique of the decision, see Ben Saul, "Legislating from a Radical Hague: The United Nations Special Tribunal for Lebanon Invents an International Crime of Transnational Terrorism", in *Leiden Journal of International Law*, 2011, vol. 24, no. 3, p. 677.

[92] Luban, 2013, p. 509, see *supra* note 53.

> statesmen responsible to law. And let me make clear that while this is first applied against German aggressors, the law includes, and if it is to serve a useful purpose it must condemn, aggression by other nations, including those which sit here now in judgment.[93]

Unfortunately, and as experience tells us, the equality principle is doomed to be under constant threat of compromise by the politics of international criminal law. First, it is under threat where the applicable law of the ICC appears to be selective. This point is at stake with respect to the crime of aggression. The equality principle is also under threat where application of the law by the ICC appears to be selective. The ICC must therefore not be turned into an 'anti-rebel-court' as a consequence of 'self-referrals' by States.[94] Moreover, the Security Council must be criticised for its practice, beginning as early as 2002, of shielding certain categories of persons from the Court's jurisdiction.[95] Finally, no State can be immune from the criticism that its approach to the ICC is selective. Even the United States of America, whose idealism has been a powerful driving force at major steps of the development of international criminal law, and whose scholars have significantly contributed to the refinement of the emerging international criminal justice system, must therefore be reminded of the fact that it does not live up to the legacy of Nuremberg and Tokyo when it uses the ICC where it accords with their political preference on the one hand, but tries to shield its own officials from the Court's reach as reliably as possible, on the other hand. As States are often reluctant to clearly speak out against unprincipled conduct by other States, scholars should come to the defence of those principles on which the legitimacy of the ICC rests – however soft the persuasive power of their statements may

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93 The statement is reprinted, for example, in International Military Tribunal, *Trial of German Major War Criminals by the International Military Tribunal Sitting at Nuremberg Germany*, William S. Hein & Co., Buffalo, 2001, p. 45.

94 Claus Kreß, "'Self-Referrals' and 'Waivers of Complementarity'", in *Journal of International Criminal Justice*, 2004, vol. 2, no. 4, p. 944.

95 UN Security Council Resolution 1422, UN Doc. S/RES/1422; for useful criticism, see ZHU Dan, "Who Politicizes the International Criminal Court?", in *FICHL Policy Brief Series*, 2014, no. 28, pp. 1–2; for a useful broad analysis of the Security Council practice, see Jennifer Trahan, "The Relationship Between the International Criminal Court and the U.N. Security Council: Parameters and Best Practices", in *Criminal Law Forum*, 2013, vol. 24, no. 4, p. 417.

be.[96] At the same time, where an allegation of the ICC's selectivity takes the form of a barely disguised apologetic rhetoric by those under judicial threat and their friends in power, the scholarship of international criminal law should deconstruct such rhetoric rather than repeating it. Whatever the shortcomings of the ICC Prosecutor's selection of situations and cases may be, the critique of 'judicial neo-colonialism', skilfully orchestrated by some African leaders, falls in that category.

2.4.5. The Secondary Control Function: Questioning Taboos

When international criminal law scholars speak up in order to protect or enhance the legitimacy of the international criminal justice system, they will typically find partners in many non-governmental organisations that have played such a memorable role in support of the international criminal law project in general and in the establishment of the ICC in particular. The situation is quite different, however, where non-governmental organisations, due to their specific and limited agendas, cherish certain convictions as political taboos. Genuine scholarship of international criminal law cannot recognise such taboos, but must subject the respective convictions to critical scrutiny. I shall give two examples. The popular slogan 'no peace without justice' suggests that operation of the criminal justice system can never conflict with the goals of terminating a violent conflict and of rebuilding a conflict-ridden society. But to make this suggestion in support of a rigorous punitivism is too simplistic. There may well be very difficult dilemmas during peace negotiations and in transitional justice situations as is demonstrated, for example, by the ongoing peace process in Colombia.[97] As the South African precedent received much attention before and even in Rome, States were aware of these dilemmas. They avoided, however, to deal with them explicitly. The slogan 'no peace without justice' is utterly insufficient to clarify what *Mireille Delmas-Marty* calls one of the ambiguities haunting the ICC more then ten years after its coming into existence[98] and it cannot be a taboo for in-

[96] For an excellent example of such a scholarly intervention, see ZHU, 2014, *supra* note 95.

[97] For an important recent pronouncement of the Colombian Constitutional Court on the subject-matter, see Sentencia C-579/13, 28 August 2013.

[98] Mireille Delmas-Marty, "Ambiguities and Lacunae. The International Criminal Court Ten Years on", in *Journal of International Criminal Justice*, 2013, vol. 11, no. 3, pp. 556/557.

ternational criminal law scholars, carefully to consider, including by listening to the advice from transitional justice or *ius post bellum* scholars, possible exceptions to the international punitive response.[99] The participation of victims in proceedings before the ICC and the ICC Statute's provision for reparation to victims are my second example. In some quarters, this introduction of restorative justice[100] elements has not only been celebrated as a major advance in international criminal justice, but is now also being treated as a sacred cow – beyond the reach of critical scrutiny. Given the danger of raising expectations that cannot be met, this may well prove to be an unwise position. Certainly, however, it is not a position that is open to the scholarship of international criminal law. Scholars cannot ignore that the early practice on victim's participation and reparation has given rise to difficulties,[101] that they are called upon to analyse these difficulties and, where appropriate, to suggest remedies.

[99] For some recent scholary contributions on that topic, see Payam Akhavan, "Are International Criminal Tribunals a Disincentive to Peace? Reconciling Judicial Romanticism With Political Realism", in *Human Rights Quarterly*, 2009, vol. 31, no. 3, p. 624; Diane Orentlicher, "Settling Accounts' Revisited: Reconciling Global Norms with Local Agency", in *International Journal of Transnational Justice*, 2007, vol. 1, no. 1, p. 10; Kenneth A. Rodman, "Is Peace in the Interests of Justice? The Case for Broad Prosecutorial Discretion at the International Criminal Court", in *Leiden Journal of International Law*, 2009, vol. 22, no. 1, p. 99; on transitional justice, see Ruti G. Teitel, *Transitional Justice*, Oxford University Press, Oxford, 2000, *passim* (and, most recently, Teitel, *Globalizing Transitional Justice. Contemporary Essays*, Oxford University Press, Oxford, 2014, *passim*); on the debate about a *ius post bellum*, see Carsten Stahn, Jennifer S. Easterday, Jens Iverson (eds.), *Jus Post Bellum. Mapping the Normative Foundations*, Oxford University Press, Oxford, 2014, *passim*.

[100] For the broader context of these innovations, see Carolyn Hoyle, Leila Ullrich, "New Court, New Justice? The Evolution of 'Justice for Victims' at Domestic Courts and at the International Criminal Court", in *Journal of International Criminal Justice*, 2014, vol. 12, no. 4, p. 681.

[101] For the scholarly articulation of some of these difficulties by a Judge, see Christine van den Wyngaert, "Victims Before International Criminal Courts: Some Views and Concerns of an ICC Trial Judge", in *Case Western Reserve Journal of International Law*, 2012, vol. 44, no. 1, p. 475.

2.4.6. The Empirical Function: Exploring the Sociological Context and Assessing the Effects

In a recent article, *Gregory Shaffer* and *Tom Ginsburg* proclaimed "(t)he (e)mpirical (t)urn in (i)nternational (l)egal (s)cholarship".[102] While it would probably be an overstatement to say that the scholarship of international criminal law is at the forefront of this move, it can be stated with confidence that the empirical function of this scholarship has become more visible over the last few years. Quite a number of different sets of questions have usefully been made the subject of recent empirical studies. The above-mentioned[103] extension of scholarly research into the area of enforcing international sentences of imprisonment has led to an increased criminological interest in international criminal law.[104] Furthermore, empirical studies of an anthropological nature may help with testing criticisms that certain basic assumptions underlying the international criminal justice system, such as the idea of individual responsibility, are 'Western' constructs.[105] Finally, empirical studies can help to evaluate whether the operation of the international criminal justice system yields intended effects. While the system's overall compliance-pull will be exceedingly difficult to measure,[106] some middle-range questions more readily lend themselves to empirical scrutiny. Just to refer to two recent examples, *Sarah M. H. Nouwen* has claimed on the basis of field studies in the situation countries Uganda and Sudan that the ICC Statute's principle of complementarity has yet to bring about the intended effects in practice,[107] and

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[102] Gregory Shaffer, Tom Ginsburg, "The Empirical Turn in International Legal Scholarship", in *American Journal of International Law*, 2012, vol. 106, no. 1, p. 1.

[103] *Supra sub* 2.2.

[104] See, apart from Róisín Mulgrew (*Towards the Development of the International Penal System*, Cambridge University Press, Cambridge, 2013, *passim*), for example, Barbora Holá, Joris van Wijk, "Life after Conviction at International Criminal Tribunals", in *Journal of International Criminal Justice*, 2014, vol. 12, no. 1, p. 109; Stefan Harrendorf, "How Can Criminology Contribute to an Explanation of International Crimes", in *Journal of International Criminal Justice*, 2014, vol. 12, no. 2, p. 231.

[105] Robinson, 2013, pp. 143–144, see *supra* note 75.

[106] Christopher W. Mullins, Dawn L. Rothe, "The Ability of the International Criminal Court to Deter Violations of International Criminal Law", in *International Criminal Law Review*, 2010, vol. 10, no. 5, p. 771.

[107] Sarah M.H. Nouwen, *Complementarity in the Line of Fire. The Catalysing Effect of the International Criminal Court in Uganda and Sudan*, Cambridge University Press, Cambridge, 2013, pp. 406 and 408.

Elisa Hoven, *Mareike Feiler*, and *Saskia Scheibel* have concluded from their analysis of the procedural practice of the Extraordinary Chambers in the Courts of Cambodia that the civil party participation scheme has not fulfilled victims' expectations "to a satisfying degree".[108] These results may not be the last word on the subject matters, but they do illustrate important applications of the empirical function of international criminal scholarship that should not be ignored but rather deepened and broadened in the future.

2.4.7. The Historical Function: Generating Knowledge about the Hinterland to International Criminal Law

Although the (known) history of international criminal law is still relatively young, it would be a particularly serious omission to ignore the historical function of international criminal law scholarship on the eve of the second seminar convened as part of the major research project 'The Historical Origins of International Criminal Law'. While illuminating the genesis of specific legal doctrines forms part of the doctrinal function, historical reseach can go beyond that and extend to the law's historical and intellectual foundations. Newly generated knowledge of that kind will lead to a deeper understanding of the law and it might contribute to the latter's "vertical consolidation".[109] The politics of international criminal law, including hypocrisies in the political use of that law can also be made the object of historical studies and can form the subject matter for fruitful co-operation between international criminal lawyers and historians including those interested in 'moral history'.[110]

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[108] Elisa Hoven, Mareike Feiler, Saskia Scheibel, *Victims in Trials of Mass Crimes. A Multi-Perspective Study of Civil Participation at the Extraordinary Chambers in the Courts of Cambodia*, Institute for International Peace and Security Law, Cologne, 2013, p. 78.

[109] On the goals of the 'Historical Origins' research project, see http://www.fichl.org/activities/the-historical-origins-of-international-criminal-law/, last accessed on 25 November 2014.

[110] For a fascinating recent historical study, see Kirsten Sellars, *Crimes Against Peace*, Cambridge University Press, Cambridge, 2013, *passim*; for a 'country study', see Claus Kreß, "Versailles–Nuremberg–The Hague: Germany and International Criminal Law", in *The International Lawyer*, 2006, vol. 40, no. 1, p. 15; and more recently Ronen Steinke, *The Politics of International Criminal Justice. German Perspectives from Nuremberg to The Hague*, Hart Publishing, Oxford, 2012, *passim*; the term

3. Towards True Universality

I wish to state three reasons why the existence of a truly universal college of international criminal lawyers is desirable.[111] First, international criminal law *stricto sensu* must reflect a robust consensus within the international community *as a whole* in order to respect the sovereignty of States and their peoples. The participation of scholars from all major world cultures can help ensure that lines are drawn correctly and that, for example, the judicial interpretation of crimes against humanity does not overstretch the *ius puniendi* of the international community and extend it beyond the core of human rights law.[112] Second, while the operation of the international criminal justice system must be anchored in a cosmopolitan *noyau dur*, it should also leave room for the articulation and respect of cultural differences. A truly universal college of international criminal lawyers can facilitate the identification of such differences and the establishment of the right balance between cosmopolitanism and cultural pluralism. Third, a truly universal college of international criminal lawyers will improve the chances that the legal *réservoire* of all legal families will be exhausted in the search for the best solution to a given problem.[113] In so doing, it is, however, important for international criminal law scholars not to neglect their cosmopolitan doctrinal function and succumb to the parochial temptation invariably to transplant to the international level their own domestic legal doctrines.[114]

'moral history' does not yet seem fully established as a clearly defined term of art; for one perspective, see Jonathan Glover, *Humanity. A Moral History of the Twentieth Century*, Yale University Press, New Haven, 2001, *passim*.

111 In a similar vein for international law in general, see Schachter, 1977, pp. 222–223, see *supra* note 1.

112 For an instructive recent article in that context, see Amrita Kapur, "Asian Values v. The Paper Tiger. Dismantling the Threat to Asian Values Posed by the International Criminal Court", in *Journal of International Criminal Justice*, 2013, vol. 11, no. 5, pp. 1059 and 1066–1071.

113 See, for example, Mohamed Elewa Badar, *The Concept of Mens Rea in International Crininal Law. The Case for a Unified Approach*, Hart Publishing, Oxford, 2013, who devotes a substantial chapter (pp. 198–230) to the study of Islamic Law, which is hard to access for outsiders.

114 Schachter, 1977, pp. 128–129, see *supra* note 1; for a model example, see the article written by the eminent German criminal lawyer Thomas Weigend, "Perpetration through an Organization. The Unexpected Career of a German Concept", in *Journal of International Criminal Justice*, 2011, vol. 9, no. 1, p. 91, who does not simply 'cel-

While the inter-War pioneers of international criminal law[115] had mostly written in French, the *lingua franca* of the present-day scholarly discourse in international criminal law is English. Of course this does not exclude the usefulness of regional or even national scholarly sub-discourses in different languages. But it is only realistic to state that non-Anglophone scholars must write in English if they wish to be universally heard. In short, what is needed is a truly universal college of international criminal law that conducts its discourse in English.[116]

Such a college, it is probably fair to say, does not yet exist. Rather, the current scholarly discourse on international criminal law continues to be dominated by participants from North-America, Australia, New Zealand and Europe.[117] But there are signals pointing in a desirable direction, beginning with improvements of the college's infrastructure. As the full universalization of the scholarly discourse requires the widening of the access to international criminal law sources, including publications, the Legal Tools Database of the ICC constitutes a most welcome development. This database provides an online platform through which scholars from around the world can freely access more than 90,000 legal sources in international criminal law, the bread and butter of international criminal law scholars.[118]

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ebrate' the "unexpected career of the German Concept" of (indirect) perpetration through an organization before the ICC, but puts it to a critical scrutiny and ends up suggesting modifications; for another model example, see the recent joint contribution by Ohlin, van Sliedregt, and Weigend, 2013, *supra* note 82, who, though coming from different legal backgrounds, have bundled their intellectual forces to elucidate a doctrinal question.

115 See *supra* 1.1.; they had therefore occasionally (see Hellmuth von Weber, *Internationale Strafgerichtsbarkeit*, Dümmler, Berlin, 1934, p. 14) been referred to as the 'French movement'.

116 Bohlander, 2014, p. 513, see *supra* note 76.

117 These participants do of course not form a legally cultural homogeneous group (on the persisting differences and even tensions arising from the traditions of 'common law' and 'civil law', see Bohlander, *ibid.*, p. 494. Also within this group, the development of scholarship has not been parallel; German scholars, for example, were latecomers, because, during the inter-War period, the prevailing perception within Germany appears to have been to be the main target of the international criminal justice movement; see von Weber, 1934, p. 20, *supra* note 115.

118 For a detailed presentation, see Morten Bergsmo (ed.), *Active Complementarity: Legal Information Transfer*, Torkel Opsahl Academic EPublisher, Oslo, 2011, *passim*. The ICC Legal Tools Database uses persistent URLs which means that hyperlinks to

At the same time, the college itself is not only growing in numbers, but also in representativeness. In this lecture, no more than a couple of necessarily incomplete indications can be given. Perhaps most conspicuously, the Latin-American contribution to international criminal law scholarship has much increased. The inauguration of the *Anuario Iberoamericano de Derecho Internacional Penal* under the direction of the Spanish scholar *Héctor Olásolo* provides recent evidence for this very encouraging tendency. It is to be hoped that Latin-American scholars will, in the future, publish more of their research in English.[119]

While it is a positive sign that the South African international criminal law scholar *Mia Swart* has assumed the position of chair of the current ILA committee 'Complementarity in International Criminal Law', the list of African scholars, who are continuously contributing to the scholarly discourse could be longer. There are of course *Dapo Akande*, *Charles Chernor Jalloh, Daniel David Ntanda Nsereko* and *Swart* who have taken this role on. At this moment in time, Africa is the continent where the ICC is most active. Africa's voice is prominent within the political discourse about international criminal law,[120] and Africa's face is clearly visible within the ICC[121] and within the network of non-governmental organisa-

documents in the Database will not be broken. The ICC has included such hyperlinks in many decisions. The fact that international law literature published by proprietary publishers is often prohibitively expensive may be seen as another obstacle to the universalisation of the scholarly community. The model of open access publishing pioneered by the Torkel Opsahl Academic EPublisher should be carefully considered as a possible response to that problem. For a broad analysis of the problem, placing emphasis on the international human rights context, see Alf Butenschøn Skre, Asbjørn Eide, "The Human Right to Benefit from Advances in Science and Promotion of Openly Acdessible Publications", in *Nordic Journal of Human Rights*, 2013, vol. 31, no. 3, p. 427.

[119] For noteworthy recent contributions, see a number of chapters in Jessica Almquist, Carlos Esposito (eds.), *The Role of Courts in Transnational Justice: Voices from Latin America and Spain*, Routledge, London, 2012, *passim*; and the article by Maximo Langer, "The Diplomacy of Universal Jurisdiction: The Role of Political Branches in the Transnational Prosecution of International Crimes", in *American Journal of International Law*, 2011, vol. 105, no. 1, p. 1.

[120] Tim Murithi, "Between Political Justice and Judicial Politics: Charting a Way Forward for the African Union and the International Criminal Court", in Werle, Fernandez, Vormbaum, 2014, pp. 180–181 and 182–185, see *supra* note 54.

[121] (Judge) Sanji Mmasenono Monageng, "Africa and the International Criminal Court", in Werle, Fernandez, Vormbaum, 2014, p. 19, see *supra* note 54.

tions.[122] But, in comparison, its scholarly contribution appears to be less visible.[123]

Arab scholars could feel encouraged by the leading and lasting contribution made by *Bassiouni* to the development of international criminal law over several decades.[124] *Mohamed El Zeidy* and *Mohamed Elewa Badar* have recently carried the candle further and have enriched the corpus of international criminal law scholarship through the publication of weighty monographs.[125] While these contributions do not amount to an Arab Spring in the development of Arab international criminal law scholarship, they do provide promising examples for future scholars from the Arab world. As far as Persian contributions are concerned, *Payam Akhavan*'s scholarship, on the crime of genocide in particular, has stood out for many years now.[126]

Positive developments can be noted also with respect to Russia. Not only the current Russian Judge at the ICTY/ICTR-Appeals Camber, *Bakhtiyar Tuzmukhamedov*, has occasionally published in the field of international criminal law.[127] *Gleb I. Bogush*, in particular, has developed a disctinct scholarly interest in international criminal law and in 2008, he has established the journal "International Criminal Law and International Justice" (in Russian) which focuses on this field. In a recent article, *Bogush* has given a fascinating insight into the present state of research in Russia, in which he identifies a growing scholarly interest, on the one hand, but a lack of intimate connection with the international discourse, in part to persisting language hurdles, on the other hand.[128] The latter is con-

[122] Murithi, 2014, pp. 190–191, see *supra* note 120.

[123] In that context, it deserves perhaps to be mentioned that the South African-German Centre for Transnational Criminal Justice, which was set up in 2008 within the University of the Western Cape under the direction of the Gerhard Werle, has been quite successful in its support of international criminal law studies in Africa.

[124] See *supra sub* 1.3., 1.4.; 2. *incip*.

[125] Mohamed M. El Zeidy, *The Principle of Complementarity in International Criminal Law*, Brill, Leiden, 2008, *passim*; Badar, 2013, see *supra* note 113, *passim*.

[126] For a recent monograph, see Payam Akhavan, *Reducing Genocide to Law*, Cambridge University Press, Cambridge, 2012, *passim*.

[127] See, for example, Bakhtiyar Tuzmukhamedov, "The ICC and Russian Constitutional Problems", in *Journal of International Criminal Justice*, 2005, vol. 3, no. 3, p. 621.

[128] Gleb Bogush, "Russian Research on International Criminal Law", in *Justitias Welt*, 2014, available at http://justitiaswelt.com/Aufsaetze/AS55_201108_GB_1.html, last accessed on 26 November 2014); note that the concept 'international criminal law' ap-

firmed by the fact that the great majority of the Russian scholarly contributions have been published in Russian[129] and that those younger Russian scholars, such as *Sergey Sayapin* and *Sergey Vasiliev*, who have published noteworthy pieces in English[130], are currently working outside Russia. Here again, the scholarly potential seems far greater than what is currently evident, but a beginning has been made.

Let me finally say a few more words on the situation in Asia as I am delivering this lecture in New Delhi in the presence of many distinguished Asian colleagues and, in particular, of honourable members of the Indian Society of International Law. The inclusion of Asian scholars in the college of international criminal law is of particular importance in light of three aspects that make the overall relationship between Asia and international criminal law a special one. First, at this moment in time, the number of Asian State Parties to the ICC Statute remains a comparatively limited one[131] and there is a question about whether this may have to do with a deeper tension between the normative underpinnings of the international criminal justice system and 'Asian values'.[132] Second, due not least

pears to be used in a broader sense than international criminal law *stricto sensu*. Bogush also pays tribute to the late Igor Blishchenko who had devoted a part of his scholarly activity to international criminal law; for a short biography, see José Doria, Hans-Peter Gasser, M. Cherif Bassiouni (eds.), *The Legal Regime of the International Criminal Court. Essays in Honour of Professor Igir Blishchenko*, Brill, Leiden, 2009, p. xxii.

[129] For three examples, see Gleb Bogush, Elena Trikoz (ed.), *International Criminal Justice: Contemporary Problems*, Institute of Law and Public Policy, Moscow, 2008, *passim*; Lyudmila Inogamova-Khegay, *International Criminal Law*, Prospekt, Moscow, 2015 (but the book has already appeared), *passim*; Vera Rusinova, *Violations of International Humanitarian Law: Individual Criminal Responsibility and Judicial Prosecution*, Yurlitinform, Moscow, 2006, *passim*.

[130] Sergey Sayapin, *The Crime of Aggression in International Criminal Law. Historical Development, Comparative Analysis and Present State*, Springer, Berlin, 2014, *passim*; Sergey Vasiliev, "General Rules and Principles of International Criminal Procedure: Definition, Legal Nature and Identification", in Göran Sluiter, Sergey Vasiliev (eds.), *International Criminal Procedure. Towards a Coherent Body of Law*, CMP, London, 2009, p. 19.

[131] See the Symposium "Justice for All? Ten Years of the International Criminal Court in the Asia-Pacific Region", as organised by Sarah Williams and Andrew Byrnes, in *Journal of International Criminal Justice*, 2013, vol. 11, no. 5, p. 1023.

[132] For a nuanced and empirically validated answer on the question whether such values indeed exist, see So Young Kim, "Do Asian Values Exist? Empirical Tests of the Four Dimensions of Asian Values", in *Journal of East Asian Studies*, 2010, vol. 10,

to the powerful dissenting opinion by the Indian Judge *Radhabinod Pal*, the legacy of International Military Tribunal for the Far East is more ambiguous than that of its European counterpart. In particular, *Pal* had questioned whether the Allies, in creating the Tribunal, had been guided by universal values or rather by their narrow interest to maintain the *status quo* including its colonial component.[133] Third, the Asian experiences with internationalised criminal justice in the cases of East-Timor and Cambodia, for various reasons, including insufficient financial support or political threats to the judicial independence, have not been glaring successes.[134]

Against this background, it is noteworthy that there are signals of both an increased research interest in the Asian encounters with international criminal law and an increase in the Asian contributions to scholarship in this field. The Tokyo Trial has become the subject of two important English monographs in recent years[135] and the trial records have been published for the first time in China in 2013.[136] Futhermore, there is an increased interest in the study of 'Class-B' and 'Classs-C' post World War II trials in Asia.[137] Finally, both the 'Historical Origins' research project and the book on *Trials for International Crimes in Asia*, which is being edited by *Kirsten Sellars* for publication in 2015, will stimulate the Asian debate (or debates within Asia) about international criminal law.

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no. 2 , p. 315; see further, and specifically in the context of international criminal law, Kapur, 2013, *supra* note 112.

133 For an analysis of Pal's opinion, see Sellars, 2013, pp. 236–237, *supra* note 110.

134 Steven Freeland, "International Criminal Justice in the Asia-Pacific Region. The Role of the International Criminal Court Treaty Regime", in *Journal of International Criminal Justice*, 2013, vol. 11, no. 5, pp. 1029 and 1039–1048; for an earlier assessment by a scholar who has devoted much attention to the cases of East Timor and Cambodia, see David Cohen, "'Hybrid' Justice in East Timor, Sierra Leone and Cambodia: 'Lessons Learned' and Prospects for the Future", in *Stanford Journal of International Law*, 2007, vol. 43, no. 1, p. 1.

135 For a more legal perspective, see Neil Boister/Robert Cryer, *The Tokyo International Military Tribunal: A Reappraisal*, Oxford University Press, Oxford, 2008, *passim*; for a more historical perspective, Yuma Totani, *The Tokyo War Crimes Trial*, Harvard University Press, Cambridge, Mass., 2008, *passim*.

136 ZHANG Binxin, "Criminal Justice for World War II Atrocities in China", in *FICHL Policy Brief Series*, 2014, no. 29, pp. 3–4.

137 See Suzannah Linton (ed.), *Hong Kong's War Crimes Trials*, Oxford University Press, Oxford, 2013, *passim*; ZHANG, 2014, see *supra* note 136, *passim*.

The interest of Asian scholars in the study of international criminal law is perhaps most advanced in Japan, although most publications are written in Japanese and only relatively few of them by international criminal lawyers with a criminal law background.[138] This year, I had the privilege to attend the annual Meeting of the Japanese Society of International Law and I was deeply impressed by the sophisticated debate about the intricacies of the Kampala compromise on the crime of aggression that figured prominently on the agenda. In Thailand, *Kriangsak Kittichaisaree* published a textbook on international criminal law as early as in 2001.[139] In South Korea, *KIM Young Sok* has been continously contributing to the scholarly debate and in 2007 he published an English monograph on the subject matter.[140] Also in China, the scholarly debate about international criminal law has recently intensified. While only a few scholars, such as *JIA Bing Bing*, have been regularly publishing in English – meaning that the greater part of the Chinese scholarship is not easily accessible – *LING Yan* (together with *Morten Bergsmo*) has edited a dialogue between Chinese and European international criminal lawyers titled *State Sovereignty and International Criminal Law* in 2012.[141] Perhaps even more importantly, there appears to be not only a rapidly growing interest in international criminal law among younger international criminal lawyers, but also an increasing willingness to contribute to the debate in English.[142]

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[138] For an account of the Japanese scholarly debate about the Tokyo trials since the 1940s, see Philipp Osten, "The Tokyo Trial and the Japanese Debate about 'Crimes Against Peace'", in Universität zu Köln, Japanisches Kulturinstitut (eds.), *Beiträge aus dem Symposium Japan and Germany – 150 Years of Cooperation. Dynamics of Traditional Research Societies in a Rapidly Changing World*, Iudicium, Munich, 2013, p. 102; for one leading current text book, see Shinya Murase/Keiko Ko (eds.), *Kokusai Keiji Saibansho: Mottomo iudai na kokusai hanzai wo sabaku (The International Criminal Court: Trying the Most Serious International Crimes)*, Toshindo Publishing, Tokyo, 2014, *passim*; for a recent English monograph, see Hiromi Sato, *The Execution of Illegal Orders and International Criminal Responsibility*, Springer, Berlin, 2011, *passim*.

[139] Kriangsak Kittichaisaree, *International Criminal Law*, Oxford University Press, Oxford, 2001, *passim*.

[140] KIM Young Sok, *The Law of the International Criminal Court*, William S. Hein, Buffalo, 2007, *passim*.

[141] Morten Bergsmo, LING Yan (eds.), *State Sovereignty and International Criminal Law*, Torkel Opsahl Academic EPublisher, Beijing, 2012, *passim*.

[142] The following quite remarkable papers, all published in the *FICHL Policy Brief Series* in 2014, are evidence of that fact; SONG Tianying, "Conspiracy to Commit Genocide

Let me conclude this brief overview with a look at India. If I am not mistaken, the development of a scholarly interest in international criminal law is a rather recent matter and our co-host tonight, the honourable *Indian Society of International Law*, appears to have played an important stimulating role by publishing a series of articles on various problems of international criminal law in the 2010 and 2011 volumes of its *Yearbook of International Humanitarian and Refugee Law* and its *Indian Journal of International Law*. Recently Indian scholars have also published noteworthy monographs both of a general or more specialised nature. *Manoj Kumar Sinha*'s book *International Criminal Law and Human Rights* is widely known.[143] Just in this year, two more important international criminal law monographs written by Indian scholars or scholars of Indian origin have seen the light of the day. *Neha Jain* has published her work on *Perpetrators and Accessories in International Criminal Law*[144] and I have already made reference to *Leena Grover*'s *Interpreting Crimes in the Rome Statute of the International Criminal Court*.[145] As I happened to be on Dr. *Jain*'s Ph.D.-examination board and to act as Dr. *Grover*'s Ph.D. supervisor, I am familiar with both books. This lecture is a splendid occasion to share my opinion with members of the *Indian Society of International Law* that the two monographs are of truly excellent quality. If we take them as the yardstick, we can expect the finest Indian contributions to the scholarship of international criminal law in the future.

and Its Exclusion from the ICC Statute", 2014, no. 18; ZHONG Yuxiang, "Criminal Immunity of State Officials for Core International Crimes Now and in the Future", 2014, no. 20; LIU Yiqiang, "Exploring Peace Through Justice Should Be An Essential Element of China's Anti-Fascist War Memorialisation", 2014, no. 23; ZHU, 2014, see *supra* note 95; XUE Ru, "China's Policy Towards the ICC Seen Through the Lens of the Security Council", 2014, no. 27; ZHANG, 2014, see *supra* note 136; the *Chinese Initiative on International Criminal Justice* set up by a group of young Chinese professionals and academics in the field of international criminal law, available at http://ciicj.com/ciicj-justice-update/justice-update-q-and-a/, last accessed on 25 November 2014, constitutes another noteworthy development.

143 Manoj Kumar Sinha, *International Criminal Law and Human Rights*, Manak, New Delhi, 2010, *passim*.

144 Neha Jain, *Perpetrators and Accessories in International Criminal Law*, Hart Publishing, Oxford, 2014, *passim*.

145 Leena Grover, 2014, see *supra* note 38.

4. In Conclusion

This brings me to the end of my reflections. If we take the picture as a whole, there is reason to hope that a truly universal invisible college of international criminal lawyers will come into being before long in order to fulfil a series of important functions in support of the emerging international criminal justice system. The true universalisation of the scholarship on international criminal law may even prove to be a necessary step on the long journey towards the truly universal application of this system. The latter, which was the hope already of the inter-War scholarly pioneers, as of yet, remains an aspiration.

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Towards a Truly Universal Invisible College of International Criminal Lawyers

Claus Kreß

Despite the pioneering work of scholars such as Vespasian Pella and M. Cherif Bassiouni, non-existing political will as well as uncertainty or even scepticism about the precedential value of the Nuremberg and Tokyo trials had postponed the emergence of an invisible college of international criminal lawyers until after the Cold War. With the establishment of the International Criminal Court, the legal landscape finally provides a sufficiently fertile ground for the ongoing and rapid development towards a full-fledged scholarly discipline of international criminal law. The present-day generation of specialised scholars of international criminal law may carry out several important functions in support of the emerging international criminal justice system, such as the clarification of major theoretical questions, the arrangement of a coherent set of doctrines, the advice on legal policy issues, the evaluation of the legitimacy of the system's operation, the questioning of taboos, criminological analysis and the deepening of knowledge about the Hinterland of international criminal law through historical studies. The invisible college of international criminal lawyers fulfilling these functions should be of a truly universal composition and the scholarly discourse within this college should be conducted in English. While the need for an even stronger scholarly participation from Asian, African, Arabic and South-American countries persists, the increase in the research carried out by scholars from those countries over the past few years gives reason to hope that such a college will come into being before long. This might prove to be an important complementary step on the long journey towards the full universalisation of the system of international criminal justice which, as of yet, remains an aspiration.

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