Kooijmans Lecture 2024: International Criminal Law in Times of Turmoil
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Introduction

Good afternoon everyone. I would like to thank the organizers and the Kooijmans family for their invitation to address you today. When I studied law here in Amsterdam, I quickly learned that Peter Kooijmans was not only an academic authority in international law but also an international expert with an unwavering dedication to the international rule of law, as an international judge, a Special Rapporteur for the United Nations, and in various other capacities. It is an honor to lecture here today in his name.

Peter Kooijmans' work is more relevant today than ever. Kooijmans was one of the judges on the International Court of Justice's Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories. He wrote a thoughtful Separate Opinion in 2004, some twenty years ago, addressing not only the legal implications of the situation but also the human perspectives on both sides. Re-reading it today reminds us that both unconditional condemnation of deliberate attacks against civilians, regardless of motive, and respect for the norms and rules of international law are essential under all circumstances. Re-reading it should also make us realize that we will keep going from tragedy to tragedy, to the detriment of all involved, if we do not find a way to make better use of the legal instruments we have on the international stage.

Enforcement deficit

We live in times of turmoil. It seems our news is dominated by reports of armed conflicts and grave international crimes more often than not: ISIS, Syria, Ukraine, Gaza. And this list is far from complete.

In one such conflict, the UN reports that since mid-April 2023 more than 8.8 million people have fled their homes; more than 15,000 people have died, and more than 1,400 attacks on civilians have occurred.

These numbers are not from Gaza or Ukraine, but from Sudan, one of the world's brutal conflicts that does not often make global headlines. The NGO Human Rights Watch concluded earlier this month that in Sudan the crimes against humanity of murder, torture, persecution, and forcible transfer of the civilian population are being committed, and possibly also genocide.

This is a Deutsche Welle news clip on that Human Rights Watch report:

This is a clip of Jamal Abdullah Khamis, a human rights lawyer from El Geneina in Darfur, site of some of the worst atrocities of the conflict in Sudan, expressing his hope for a return home, peace and the importance of justice to make it possible.

The scale and gravity of the crimes that continue to be committed in different places around the world today are not matched by commensurate international criminal law enforcement. It is both a cliche and an understatement to say that international criminal law suffers from a serious enforcement deficit. So much so, in fact, that for some time now, we see growing cynicism and despair or, on the contrary, a denial of reality about the effectiveness of international criminal law.

Neither despair nor denial of the present unsatisfactory state of international criminal law enforcement are warranted or helpful. I believe we are better served with positive realism, acknowledging what needs to be improved but also what progress has been made in the last three decades. I will offer some thoughts on both today.

What progress has been made?

Let me start with describing where I believe tangible progress has been made. To do that, I would like to take you back to more than 20 years ago. At that time, many people were talking and writing about the 1998 arrest of Chilean General Pinochet in London. Some called it the Pinochet precedent and predicted a new era of accountability. It was also the time of the International Criminal Tribunal for the former Yugoslavia and International Criminal Tribunal for Rwanda, and the enactment of the International Criminal Court. The glass of international criminal law enforcement then certainly seemed half full.

What received far less attention was the visit General Pinochet had made to The Netherlands just a few years earlier. A criminal complaint was filed against him on the basis of the Torture Convention. When the Dutch Department of Prosecutions declined to act on the complaint, that decision was appealed. A Dutch Court of Appeal agreed in 1995 with the Dutch Department of Prosecutions that a Dutch investigation into torture in Chile in the junta years, based on universal jurisdiction, would be not only practically impossible but also “disproportionate and presumptuous”.

Just several years later, Pinochet was arrested in London and a few years after that, the Dutch Department of Prosecutions started making serious work of the investigation and prosecution of international crimes, also on the basis of universal jurisdiction and against former state officials.

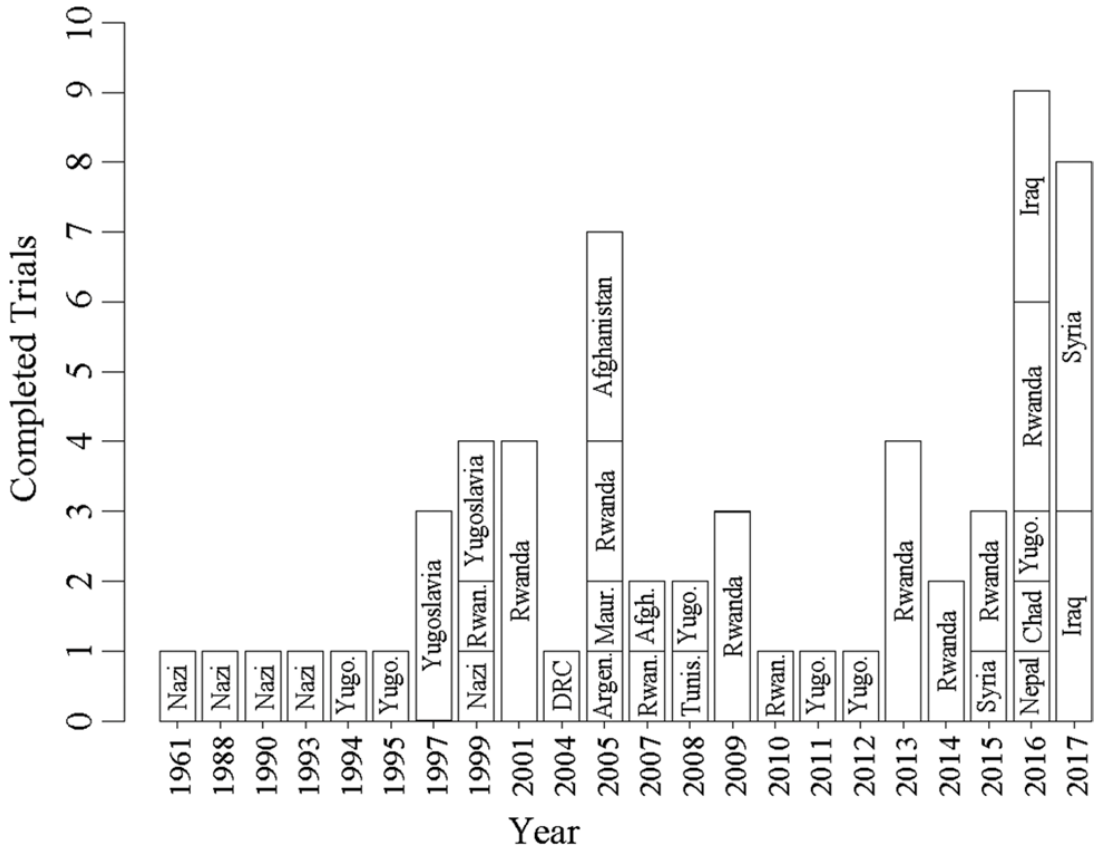
Today, I have a hard time imagining a national prosecutor or judge calling an investigation into torture in another country “disproportionate and presumptuous”. Our perception of international criminal law enforcement has radically changed over the last decades. We have gone relatively quickly from an environment where calls for enforcement of international criminal law were

seen by authoritative groups as ‘activist’ or ‘presumptuous’, to today’s world, where there are far higher expectations of international criminal law enforcement.

I believe that the work of the International Criminal Tribunal for the former Yugoslavia and International Criminal Tribunal for Rwanda has been a key driver of that change. These tribunals have shown that such investigations and prosecutions can be done successfully and are legitimate and important. They have also generated case-law and evidence that helped national authorities conduct their own trials.

Until relatively recently, the great majority of prosecutions based on universal jurisdiction conducted by national authorities targeted Nazis from the Second World War and defendants from Rwanda and the former Yugoslavia:

Completed universal jurisdiction trials by year and defendant nationality



(source: Langer and Eason 2019)

In recent years, such universal jurisdiction investigations and prosecutions have significantly grown in number and diversified, focusing on a wider set of countries, including Syria and Iraq.

Just last week, a French court sentenced three high-ranking former Syrian intelligence officials in absentia to life in prison for complicity in imprisonment, torture, enforced disappearance and murder constituting crimes against humanity.

It is important to recognize that such universal jurisdiction cases are only one category of prosecutions, limited in number and taking place mostly in Europe. Important national prosecutions of international crimes are taking place in other parts of the world, including in Africa and South-America.

Still, asking ourselves why European states are prosecuting more international crimes than ever before in their national jurisdictions may help identify what can strengthen international law enforcement more broadly.

What is working?

Several factors have contributed to this growth.

Given the overrepresentation of crimes in Rwanda and the former Yugoslavia, this line of prosecutions clearly started as a spin-off from the ICTY and ICTR. This shows how ad hoc solutions in response to specific situations can have broader systemic effects.

Specialization made up the next step. Many European states now have specialized units of investigators and prosecutors for international crimes.

A further factor is strengthened international cooperation.

In 2002, the Genocide Network was established at Eurojust in The Hague. It acquired a secretariat in 2011, and serves as an effective forum for facilitating ongoing cooperation among EU member states in investigating and prosecuting international crimes. Each EU member state has its own national Contact Point, comprising specialized and dedicated prosecutors, investigators and officers for mutual legal assistance, providing operational support to colleagues at national and EU levels.

The Genocide Network also includes associate members, including the Kosovo Specialist Chambers, as well as international NGOs, such as Human Rights Watch and Amnesty International. And it includes observers, including countries such as Norway, Switzerland and the United States, and the International Criminal Court.

The availability of such a network for international cooperation makes all the difference for the investigation and prosecution of international crimes. These are more often than not complex cases where the places of the crime, victims, witnesses and evidence span multiple, if not numerous, countries. Fast and efficient cooperation by experts in the subject matter is key to getting the work done.

The next step in international cooperation is not only the exchange of information and evidence, but fully joint investigations. This allows countries to share resources, information and evidence most efficiently. This is happening more and more. Such joint investigations by multiple countries have been conducted in recent years regarding systematic torture in Syria, international crimes committed in Ukraine, and crimes against Yezidis in Syria and Iraq. There is now also a Joint Team made up of several European countries as well as the ICC, investigating crimes against migrants and refugees on the Central Mediterranean Route to Europe and, especially, in Libya. Multiple national prosecutions concerning the crimes investigated by these teams have been and are being conducted.

A last factor I want to mention is the role of NGOs. NGOs have made enormous contributions to the investigation and prosecution of international crimes. They have empowered victims, generated critical support and important evidence, and pushed authorities to act.

Groups like Human Rights Watch and, even earlier, Amnesty International, were pioneers and their work remains critical to this day.

But, encouragingly, the number of non-governmental organisations, both international and national, working in this field and their influence is growing every year, driven, in part, by the technology that has transformed the world in recent years.

Bellingcat, for example, which is based here in the Netherlands, uses crowdsourcing to identify locations and reconstruct situations with the capability of obtaining detailed evidence in minutes. I have seen its work up close in the MH17 case, where I was one of the prosecutors, and was highly impressed. It is expanding its work to cover more contemporary conflicts in real time.

Other examples include the EyeWitness Project, using technology to document mass atrocity crimes in real time, and the Commission for International Justice and Accountability, conducting on-the-ground investigations in conflict zones – including in Syria and Myanmar – collecting and preserving evidence.

All these and other NGOs are succeeding in uncovering and preserving evidence in real time with a view to assisting and contributing to prosecutions and advancing international criminal law enforcement in various other ways.

All of this – increased universal jurisdictions prosecutions, better international cooperation, more joint investigations, increased NGO capabilities – is progress. Most importantly, the paradigm shift that effective enforcement of international criminal law, including when crimes have been committed in far-away countries, is not “disproportionate and presumptuous” but mandatory, is considerable progress.

That is in no way meant to detract from current shortcomings. We cannot be satisfied with the current state of international criminal law enforcement. We must do better, and we can do better. There is much to work on. Topical subjects include the need for greater universality, drawing in

states who currently are on the sidelines, and a more unified and consistent international response to threats and interference in international criminal law enforcement, whether these are addressed against victims, witnesses, prosecutors, attorneys, or judges.

Today, I will focus on case selection and international cooperation.

International cooperation: the Ljubljana-The Hague Convention

To start with the latter, further strengthening international cooperation – between countries, international institutions and NGOs – is one way international criminal law enforcement can be improved.

Indeed, exactly that is about to take place with the Ljubljana-The Hague Convention on international cooperation in the investigation and prosecution of the crime of genocide, crimes against humanity, war crimes and other international crimes, signed earlier this year in The Hague. It should now be ratified by as many states as possible to become an effective instrument.

The Convention provides a multilateral treaty basis for global international cooperation that can make a real difference. It provides a menu of tools and procedures for the investigation and prosecution of international crimes, including video conferencing; examination of objects and sites; exchange of information and evidence; execution of searches, seizures and confiscations; service of judicial documents; use of special investigative techniques; conducting cross border observations; witness protection; the extradition of suspects; and the transfer of sentenced persons.

This treaty has been a long time coming. In 1951 Professor Robert G. Neumann noted in the *American Journal of International Law* that the lack of relevant treaty provisions made the extradition of war criminals "extremely difficult, if not impossible." He concluded that "under present legal conditions it is almost impossible to obtain the extradition of a fugitive war criminal from a neutral state, even if the neutral wishes to co-operate" and that "the remedy obviously lies in better international extradition treaties and agreements concerning the future treatment of war criminals and international terrorists."

Since 1951, the international community has concluded more than ten treaties regulating international cooperation against international terrorism. Yet, for war criminals and genocidaires, the situation today is not much better than in 1951. Since then, great efforts have been made towards improving cooperation of states with international courts and tribunals, but no significant progress had been made to improve cooperation between the states whose primary task it is to prosecute these crimes, until the Ljubljana-The Hague Convention this year.

Lack of a treaty basis for cooperation has hindered and slowed down many national investigations of international crimes. An effective use of the Ljubljana-The Hague Convention

can significantly aid international criminal law enforcement if it is widely ratified and effectively used.

Which cases?

Another potential area of improvement is, more substantially, a rethinking of the nature and goals of international criminal law enforcement. Especially for international courts, there has long been a perception that the greatest, if not only, utility of international criminal law is to prosecute the big fish, those at the very top, who are most responsible for the international crimes of genocide, crimes against humanity, and war crimes.

Often, such cases are the most difficult to make, requiring complex analysis and extensive evidence, and their investigations take the longest. In addition, the biggest fish are often better at evading justice than smaller ones. Thus, indicting them does often not lead to an actual trial. This can lead to a systemic problem for courts involved: criminal courts need to generate actual trials at a serious pace to garner credibility. Thus, there is real tension between focusing on those most responsible, on the one hand, and reacting to ongoing atrocities with pace and actual results, on the other. And for the deterrent effect of international criminal law, certainty and speed of investigations and prosecutions matter.

Take the situation in Ukraine. The ICC commenced a preliminary examination of the situation in Ukraine in April 2014, subsequent to the Russian invasion and annexation of Crimea. As you may know, a preliminary examination is a first step to determine whether the ICC should fully investigate specific crimes and individuals, considering such matters as sufficient evidence, jurisdiction, gravity of the crimes, and the interests of justice.

The ICC did not progress the Ukraine situation to a full investigation until February 2022, when Russian President Vladimir Putin announced a ‘Special Military Operation’ in Ukraine. Four days after that announcement, the ICC Prosecutor announced he would seek authorisation to open an investigation into the Situation in Ukraine.

We do not know what the ICC did in the preliminary examination of the situation in Ukraine between 2014 and 2022, and it is well known that there were numerous problems inhibiting the work of the Court in this period. But this timing is remarkable.

It is not difficult to see that a prosecution policy focusing on ‘big fish’ could explain why Ukraine was not a top priority for the ICC until Putin’s speech in 2022. Up until 2022, those committing crimes in Ukraine were shady unknowns, described in the media as ‘separatists’ or ‘Russian backed rebels’. They were not big fish.

I learned a lot about them and the crimes they were committing through my role in the MH17 case. Our investigation focused not only on the shootdown of flight MH17 itself, but to some extent also on the armed conflict and the parties involved in that broader context.

I was struck by the abundance of evidence for grave crimes committed by the so called 'separatists', including torture and murders of civilians. Numerous NGO and IGO reports were issued detailing a range of atrocity crimes being perpetrated in Ukraine from 2014 onwards. On the website of the International Committee of the Red Cross, atrocity crimes against prisoners and civilians in Eastern-Ukraine were listed as a case study years before 2022. In the media, concrete evidence of torture and murder of prisoners and civilians could be found at one's fingertip. This included videotaped crimes and confessions of perpetrators and signed execution orders.

There was also ample material to determine who was committing these crimes from 2014 onwards and where they were coming from. Intercepted communications, open source information and other evidence made clear that active Russian military personnel were playing key roles in the so called 'separatist' groups, that they were receiving orders and instructions from Moscow on a range of issues, and that there was extensive evidence for their involvement in grave crimes such as murders and torture. This was the conclusion of the European Court of Human Rights in 2022.

Thus, there was no shortage of evidence for the ICC to bring cases for the crimes in Ukraine between 2014 and February 2022. We should ask ourselves whether in some situations bringing smaller cases against lower-level defendants, swiftly resulting in actual prosecutions rather than outstanding arrest warrants, is preferable to longer investigations focusing on the top of the hierarchy with uncertain results. In so doing, we should take into account that successful prosecutions of lower-level perpetrators can also contribute to the eventual prosecution of their leaders in various ways, including by generating evidence and insider witnesses, and by raising public expectations of trials for those most responsible.

'Old' crimes and their victims

While I believe prioritizing swiftness and actuality in some situations can help improve enforcement of international criminal law, even if it means prosecuting lower-level defendants, I do not mean to suggest that only swift prosecutions have value.

On the contrary, my work at the Kosovo Specialist Chambers and Specialist Prosecutor's Office shows me every day how important prosecutions of international crimes can be for victims' lives even decades after the crimes were committed. The Specialist Chambers is a Kosovo court relocated to the Netherlands under a law adopted by the Kosovo Assembly. We are prosecuting war crimes and crimes against humanity committed in Kosovo in 1998 and 1999.

These crimes are roughly a quarter of a century old. But there is no statute of limitation on war crimes. And the wounds caused by those crimes continue to fester.

During the conflict in Kosovo, many thousands of victims disappeared and more than 1500 of them have not been found to this day. Such disappearances have enormous impact on remaining family members, who are left behind struggling between hope and grief and have no body or funeral to help them accept the passing of their loved ones.

One such victim testified last year before the Kosovo Specialist Chambers how her husband and son were abducted in July 1998. She never saw them again. This is how she described the impact this had on her:

> "When they took my son away from me. It's as if you lost one half of your heart, and the other half I still have left for the other part of my family. And this is how I live on, and I shall die with this. And I will take these thoughts with me to my last breath, I will be thinking about my son and my husband. And as I said, I would go to the end of the world, just to reach the truth."

Ms. Bozanic also expressed to the court what it meant for her to be heard by the judges, even after all those years, in a judicial process trying to establish the facts. It is a reminder of the impact international criminal justice can have for victims and perhaps the most eloquent argument for effective enforcement of the rules and norms of international criminal law for which Peter Kooijmans worked so hard. I leave the final word today to Ms Bozanic, addressing the court as she completed her testimony:

> "Thank you, too. I did want to come here. And as long as I can, I will not give up until I learn the truth and just the truth. And I will continue to go wherever I'm invited to come. I won't stop. I will die with my pain and with my wound on my heart. And I thank you very much for having me here, because this was really important to me. It's almost as if I have seen my son and my husband again. I'm very, very grateful that I had the opportunity to come here. I really wanted to come here. Thank you to heaven."