The Legacy of Nuremberg

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Abstract

The Nuremberg trial, later followed by the Tokyo trial, is a milestone in the development of international law. For the first time in modern history, the leaders of a defeated country were indicted for committing serious crimes jeopardizing the bases of peaceful coexistence among individual human beings and peoples: crimes against peace, war crimes and crimes against humanity. German objections criticizing crimes against peace as having no legal basis and, therefore, contradicting the principle nullum crimen sine lege, were justified. To date, the legal position has not changed, since the international community has consistently refrained from including aggression in the lists of offences prosecutable under the statutes of the currently existing international criminal courts. However, no well-founded objections could be raised against the indictment for war crimes and crimes against humanity. Concerning offences of such abhorrent nature, no offender can invoke nullum crimen that protects only legitimate confidence. To hold to account political leaders, directly under international law, for criminal actions organized and ordered by them is a necessity in a world where the basic axioms of the international system have changed: state sovereignty has lost its absolute character and is counterbalanced by the requirements of human rights protection. The emergence of international criminal justice embodies the concept of international community in the most palpable manner. Fortunately, some of the defects of the Nuremberg trial have been remedied today: no arbitrary picking and choosing of the accused by the prosecution is possible before the International Criminal Court; prosecutors as well as the judges of all existing judicial bodies are carefully selected by the international community with a view to avoiding any illegitimate bias.

1. Nuremberg as a Milestone

To indict the leaders of Nazi Germany who had survived Word War II before the International Military Tribunal (IMT) at Nuremberg was truly a revolutionary step. Although according to a long tradition, international law had permitted

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to try members of the armed forces of an enemy state committing war crimes,\(^1\) during the 19th and the 20th centuries no actual cases occurred where the political leadership of a defeated country had been put on trial. The relevant negative practice was predicated on the assumption that wars were a fact of life and that nothing could be gained by instituting criminal proceedings against the responsible office holders after the end of hostilities. To some extent, this Liberalism may have reflected the spirit of a monarchical past, when in Europe almost all of the reigning houses were tied to one another by close family bonds. Under these circumstances, it was felt inappropriate to raise obstacles making it difficult to re-establish peace after war. In fact, criminal trials, if not conducted by the own courts of a defeated country, would almost certainly have led to resentment and even feelings of revenge in an international environment where nationalism in a narrow, chauvinist sense was a characteristic feature of all European countries.

It is true that the indictment contained in the Versailles Treaty against the German Kaiser, Wilhelm II, is referred to again and again by textbooks as giving an account of the slow emergence of international criminal law. But the relevant provision, Article 227,\(^2\) constituted a curious blend of strongly moral and sketchy legal arguments. No real effort was made to show that the German Kaiser had indeed perpetrated an offence punishable under international law. Essentially, the ‘arraignment’ was meant to support the clause in Article 231 according to which Germany and its Allies had to bear responsibility for all the loss and damage caused by the war. Additionally, the clause served to clear the victorious Allied Powers of any contributory responsibility. That the main motivation behind Article 231 was political became manifest very soon after the Allied Powers had requested the Netherlands to extradite the Kaiser, who had found a place of refuge there. When the Dutch Government denied that request,\(^3\) the Allied Powers did not insist on their wish. The matter was tacitly dropped.\(^4\)

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2. ‘The Allied and Associated Powers publicly arraign William II of Hohenzollern, formerly German Emperor, for a supreme offence against international morality and the sanctity of treaties.
A special tribunal will be constituted to try the accused, thereby assuring him the guarantees essential to the right of defence. It will be composed of five judges, one appointed by each of the following Powers: namely, the United States of America, Great Britain, France, Italy and Japan. In its decision, the tribunal will be guided by the highest motives of international policy, with a view to vindicating the solemn obligations of international undertakings and the validity of international morality. It will be its duty to fix the punishment which it considers should be imposed.

The Allied and Associated Powers will address a request to the Government of the Netherlands for the surrender to them of the ex-Emperor in order that he may be put on trial.’
4. More solid was the affirmation that German officers liable of war crimes should be prosecuted and possibly be extradited to the Allied Powers for that purpose (Art. 228). The reluctant
2. German Criticisms of Nuremberg

In Germany, the reaction to the Nuremberg trial was rather ambivalent or even outright negative, as described by Christoph Burchard in his article. First of all, it was felt that the trial had been imposed upon Germany and that the fact alone of justice being dispensed by prosecutors and judges from the four main victorious Powers discredited the proceedings as a ‘diktat’. The critical voices emphasized in particular the lack of impartiality of the bench. Not a single judge from a neutral country had been called to join the judicial body, nor were any German judges selected. No consideration had been given to ensuring a balanced composition that could not be objected to as representing ‘victors’ justice’. A short time later, at Tokyo, this deficiency was to some extent remedied in that a number of judges from countries other than the main victorious Powers were invited to sit on the bench (although all the judges sitting on the Tribunal were ‘nationals of the countries that had suffered from Japanese military activity’).

The list of offences under the jurisdiction of the IMT was also denounced as having no solid foundation in international law. The Statute of the IMT provided, in the first place, for crimes against peace and, in particular, criminalized war of aggression (Article 6(a)). Rightly, the defence at Nuremberg argued that until that time no leading statesman had ever been held accountable for launching a war. It was obvious that the normal ingredients of international customary law, namely practice and opinio juris as originally specified in the Statute of the Permanent Court of International Justice (PCIJ) and later also in the Statute of the International Court of Justice (Article 38), were lacking. To ignore this legal deficiency constituted the principal novelty of the trial. The IMT was not unaware of the weakness of its legal basis. It attempted to overcome the gap by underlining the fact that aggression had been outlawed by the Kellogg-Briand Pact of 1928, an international instrument which counted Germany as one of its parties, stating that wars are conducted not by states as abstract entities, but by human beings; therefore, if war was unlawful,

prosecution of the alleged offenders before the German Reichsgericht in Leipzig suffered from manipulative obstruction, see G. Hankel, Die Leipziger Prozesse (Hamburg: Hamburger Edition, 2003).

5 See article by C. Burchard, supra in this Symposium.
8 Of 27 August 1928, LNTS 94, at 57.
this also had to entail consequences for individuals responsible for preparing war and making the relevant determinations on launching it.\footnote{See \textit{Trial of the War Criminals before the International Military Tribunal, Nuremberg 14 November 1945–1 October 1946}, vol. 1 (Nuremberg: IMT, 1947), at 223.}

This reasoning was far from convincing. It is one thing to declare war unlawful with regard to inter-state relationships, but a totally different thing to acknowledge it as an offence entailing individual criminal responsibility. Most of the rules of international law, which are binding on states produce no direct effects on individual human beings. The IMT made a dramatic leap, deriving the criminality of aggression from its character as an internationally wrongful act according to the classic scheme of international law as a system of rights and obligations among states. To this very date, doubts have been voiced as to the viability of this legal deduction. Without a new understanding of international law as the basis of an international order predicated on the key concept of peace, the reasoning of the IMT could hardly be sustained.

The criticisms did not stop there. From the German side, it was further argued that the trial was flawed by its fundamental discriminatory nature.\footnote{Dahm, \textit{supra} note 6, at 292, speaks of ‘exceptional law for the defeated’ (‘Ausnahmerecht für die Besiegten’).} In fact, the IMT had been established ‘for the trial and punishment of the major war criminals of the European Axis countries’. Crimes committed by members of the Allied Powers did not come within the jurisdiction of the IMT. Attempts by defence counsel to introduce unlawful conduct of the victors’ side were rigorously blocked by the judges. Thus, the deliberate air attacks directed against the civilian population in German cities like Hamburg and Dresden could not be raised. It is true that the horrors of the atrocities committed by the Nazi authorities, many times with the active involvement of the German \textit{Wehrmacht}, surpassed by far the charges that could be levelled against the Allied Powers. However, such charges were by no means marginal or negligible. In any event, the one-sidedness of the prosecution did not contribute to strengthening the legitimacy of the trials. Even many Germans who, as a matter of principle, welcomed the trials felt uncomfortable on account of their unbalanced character.

Another inconsistency was constituted by the measures taken against the German population after the war. Under the Statute of the IMT, ‘deportation’ to the detriment of a civilian population was recognized both as a war crime and a crime against humanity. However, at the same time as the Statute was drafted, the Allied Powers agreed at Potsdam\footnote{Potsdam Agreement of 2 August 1945, reprinted in I. von Münch (ed.), \textit{Dokumente des geteilten Deutschland} (Stuttgart: Kröner, 1968), 32, § XIII.} to expel (‘transfer’) the German populations not only from the countries where they had lived as minorities (Poland, Czechoslovakia, Hungary), but also from the German territories east of the new Oder-Neiße line. Although they stated ‘that any transfers that take place should be effected in an orderly and humane manner’, it was clear from the very outset that their decision amounted in fact to the legitimation of
wild persecutions — that led to the death of millions. Furthermore, this was a clear case of ‘ethnic cleansing’, a crime that is today included in the Rome Statute of the International Criminal Court both as a war crime and a crime against humanity.\textsuperscript{12} It is clear that neither Germany nor the Germans could count on a lot of sympathy after the genocidal bloodshed that the Nazi regime had organized all over Europe. Nonetheless, it is a remarkable fact that morality was openly split. Some of the offences for which the Nazi leadership were held accountable at Nuremberg were at the same time adopted as an official policy vis-à-vis the defeated people. It is above all this fact that casts a long shadow over the Nuremberg trial.

Lastly, there was another inconsistency at Nuremberg, which cannot be brushed aside. Each one of the four Allied Powers appointed a judge (together with an alternate) and a chief prosecutor, including the Soviet Union. The Soviet jurists came from a country that had suffered enormously from the war,\textsuperscript{13} but where, in the twenties and the thirties, under the Stalinist terror regime, millions of political opponents had been murdered. Thus, they lacked any moral legitimacy. Yet, they could not be challenged as accomplices of a regime that had no better moral standing than Nazi Germany itself.

3. In Particular, the Objection that the IMT Applied \textit{ex post facto} Law

A question heatedly debated in connection with the Nuremberg trials was the alleged retroactive application of the rules, upon which the prosecution had based its charges. Three different aspects should be distinguished in this connection.

A. Differences in the Categories of Crimes under the IMT Jurisdiction

First of all, the trilogy of crimes against peace, war crimes and crimes against humanity did not constitute a homogeneous block. While referring previously to the criticisms directed against the Nuremberg judgments, I have already pointed out that crimes against peace was the most controversial class of offences. Regarding war crimes, Nuremberg introduced no real innovation capable of being denounced as violating the proposition \textit{nullum crimen sine lege}. Likewise, crimes against humanity could be conceived of as an amalgamation of the core substance of criminal law to be encountered in the criminal codes of all ‘civilized’ nations. To be sure, crimes against humanity came in new clothes. The alleged offenders were not charged under a national statute, but directly under international law. However, it was easy to demonstrate that the punishable character of crimes against humanity was

\begin{itemize}
\item \textsuperscript{12} Arts 7(1)(d), (2)(d); 8(2)(b)(viii).
\item \textsuperscript{13} Generally, the Soviet losses in human lives are estimated as surpassing 20 million.
\end{itemize}
established in accordance with general principles of international law as set out in Article 38 of the Statute of the PCIJ. Thus, the argument of retroactivity largely missed the point.

**B. The Proper Role of the Nullum Crimen Principle**

Historically, there were also good reasons to reflect on the justification of the *nullum crimen* rule. This rule emerged from the demands of the Liberal movement in Europe that hoped to overcome monarchical arbitrariness by insisting on the necessity of parliamentary approval of any criminal statute. In Germany, it was a common feature in all the constitutions of territorial states adopted after the Napoleonic wars, that interference in property and freedom (‘*Eingriffe in Freiheit und Eigentum*’) was admissible only in accordance with (parliamentary) law. On the one hand, the German author Franz von Liszt, relying on the teachings of one of the founders of modern criminal law, Anselm Feuerbach, called the *nullum crimen* principle the ‘*Magna Carta of the criminal*’14. On the other hand, it was always clear that von Liszt’s dictum could apply only to borderline cases. One of the main bones of contention during the entire 19th century was the question of freedom of the press. To what extent was it permissible criminally to sanction persons for expressing their views, and in particular views critical of governmental policies? However, nobody would ever have doubted that murder and manslaughter were criminal offences, even in the absence of any explicit statute to that effect.

*Nullum crimen* seeks to protect legitimate confidence. Nobody should be prosecuted on account of a conduct, the punishable character of which he was not aware of, and could not be expected to have been aware of, when he practised that conduct. For that logic to apply, the legislative bodies must have established a conduct as punishable that beforehand was considered to be either perfectly acceptable or a conduct that, although morally reprehensible, was not stigmatized as unlawful. However, crimes against humanity have deep roots in the minds of all human beings. The Martens clause that refers to ‘the laws of humanity and the dictates of the public conscience’15 may be referred to in this connection. There cannot be the slightest doubt that all the offences set out under the title ‘crimes against humanity’ are not only morally objectionable, but deserve to be punished and must be punished because of their abhorrent character if peaceful coexistence in human society is to be maintained. Nobody can legitimately claim that he believed that such actions in which he participated and that are to be classified as ‘crimes against humanity’ were perfectly lawful. The scope *ratione materiae* of the *nullum crimen* rule must accordingly be reduced. It should not be extended to conduct that the international community unequivocally condemns.

15 Hague Convention (IV) Respecting the Laws and Customs of War on Land, 1907, Preamble.
C. The Progressive Reduction in the Scope of the Nullum Crimen Principle

In fact, the international community has effected such a reduction. The Universal Declaration of Human Rights still sets forth *nullum crimen* as a principle not subject to any restriction. However, the European Convention on Human Rights (ECHR), basing itself on the *travaux préparatoires* for the International Covenant on Civil and Political Rights (ICCPR), departed from that kind of rigidity by providing ((Article 7(2)):

This Article shall not prejudice the trial and punishment of any person for any act or omission which at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations.

This was the translation of the Nuremberg philosophy into positive law. Lamentably, the German Government had the unfortunate idea of entering a reservation regarding this provision, in the following terms:

In conformity with Article 64 of the Convention [Article 57 since the entry into force of Protocol No. 11], the German Federal Republic makes the reservation that it will only apply the provisions of Article 7 paragraph 2 of the Convention within the limits of Article 103 paragraph 2 of the Basic Law of the German Federal Republic. This provides that any act is only punishable if it was so by law before the offence was committed.

This reservation could be interpreted as the scrupulous adherence to the rule of law in its purest form. However, it could also be seen as an implicit rejection of the Nuremberg principle to the effect that with regard to crimes under international law (i.e. the most serious crimes in a human community) invocation of the ban on retroactivity is inadmissible. In any event, it greatly smacked of resentment, although the West German state had made clear through its early ratification of the European Convention and the acceptance of the remedy of individual application under its new Constitution, the Basic Law (*Grundgesetz*), that it had nothing to hide and that it was willing to submit unrestrictedly to international review of its actions.16

Fortunately, one may note that a similar mistake was not committed when Germany ratified the ICCPR that contains the same clause as Article 7(2) of the ECHR (Article 15(2) ICCPR), due to the fact that the drafters of the latter had copied its text from earlier drafts of the former. Reference should also be made to Article 13(2) of the Draft Code of Crimes against the Peace and Security of Mankind, which contains a slight departure from the two clauses just referred to:

Nothing in this article precludes the trial of anyone for any act which, at the time when it was committed, was criminal in accordance with internal law or national law.17

It seems as if the drafters of this clause had wanted to reject the essence of the corresponding clauses of the two comprehensive human rights

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16 The reservation was withdrawn on 5 October 2001.
instruments at universal and regional level. Indeed, it confines itself to referring to positive law in force. But the commentary shows that very little thought was given to the crucial issue. The International Law Commission (ILC) just explains that it wished to avoid vagueness and excessive flexibility.  

This reasoning, although respectable, does not resolve the question of how to deal with perpetrators engaged in barbaric atrocities without there being an appropriate instrument permitting criminal punishment. The drafters were probably of the view that at the end of the 20th century that question was more or less moot since international customary law now provided for the prosecution of all serious international offences.

4. The Lessons of Nuremberg

It was necessary to recall the negative features of the Nuremberg trial in order to provide a complete picture. Nuremberg is not a tale of glory and shining justice; historic occurrences are never free from at least some objectionable aspects. And yet, Nuremberg opened up a new page of universal history, less than one month after the coming into force of the Charter of the United Nations. By Resolution 95 (I) of 11 December 1946, the General Assembly affirmed unanimously ‘the principles of international law recognized by the Charter of the Nuremberg Tribunal and the judgment of the Tribunal’, but failed to specify which principles had indeed been so recognized.

A. The Demise of Absolute Sovereign Power

Until Nuremberg, State sovereignty had been the fundamental pillar of the international legal order. Even the UN Charter lists the sovereign equality of states as the first of the fundamental principles governing the mutual relationships among states (Article 2(1)). Under the regime of ‘classic’ international law, what happened inside a state was almost entirely removed from the legal impact of international law. The dualist doctrine asserted the existence of a watertight dividing line between domestic and international law. Accordingly, the way a government treated its citizens was considered to be an exclusively domestic matter. Human rights came onto the stage of international law only by virtue of the UN Charter. Similarly, criminal law was dominated by the two guiding principles of territoriality and nationality.

18 Ibid., at 39 § 5.
19 It is logical, though, to subject the jurisdiction of the ICC to the two propositions of *nullum crimen sine lege* and *nulla poena sine lege*, Arts 22 and 23 of the Rome Statute.
States were entitled to prosecute any offences committed in their territories, and they were also authorized to prosecute any offences committed by their nationals inside or outside their territories. However, third states had no say in such matters. No international institutions for the prosecution of grave crimes existed. By way of treaty, states could agree to identify certain offences negatively affecting international society as a whole as crimes susceptible of being prosecuted under the principle of universal jurisdiction. But the list of those offences lacked any specific political dimension or implications since it did not include offences that directly involved members of foreign governments — who could come within the scope of such offences only accidentally, if they associated themselves with common crime.

Nuremberg did away with the protective umbrella that state sovereignty provided perpetrators. The Statute of the IMT did not allow political leaders to shield behind their official functions any longer. Article 7 explicitly provided that the ‘official position of defendants, whether as Heads of State or responsible officials in government departments, shall not be considered as freeing them from responsibility or mitigating punishment’. This proposition has found its way into all the later statutes of international criminal courts and tribunals. If captured at the end of World War II in Berlin, Hitler would also have had to stand trial at Nuremberg. Recently, the arrest and indictment of the Yugoslav ex-President, Slobodan Milošević, and of Charles Taylor from Liberia, has demonstrated that the accountability of political leaders is more than a hollow assertion. Thus, the sovereign state has to some extent been dismantled. It has lost its pivotal position within the international legal order. Whatever status a human community may have or claim, its leaders are placed under the rule of international law. In fact, a state — that in actual terms means, a government — should never be above the law. Neither should one accept the principle: rex legibus solutus, nor the corresponding principle: res publica legibus soluta.

B. The Emergence of the International Community

Essentially, therefore, Nuremberg, together with the UN Charter, marked the inception of the international community as a legal concept that is more than an academic construction. As long as governments were the exclusive masters of all occurrences within their borders, the real impact of international law could be dismissed as being marginal or even insignificant. Much too often, treaties had been ridiculed just as pieces of papers that could not resist the slightest wind of change. All of a sudden, however, it appeared that there was a common moral ground acknowledged by all states that demanded respect and could eventually be enforced through common institutions. It is true that the

22 The relevant subject matters were and still are counterfeiting of foreign currency, slave trade, forced prostitution, drug trade, etc.
international community is a concept lacking absolutely clear-cut contours. But it may become visible and take concrete shape through rules and mechanisms designed to uphold certain common values the integrity of which is essential for the peaceful existence of mankind as a whole.\textsuperscript{23} Nuremberg translated the core values of the leading states into the provisions of a criminal code, supplementing these provisions at the same time with effective enforcement machinery. Since the exercise of criminal jurisdiction belongs to the key functions of governmental power, the nucleus was created of a development which found its culmination point in the two ad hoc tribunals established by the Security Council\textsuperscript{24} and the International Criminal Court (ICC) under the Rome Statute. Although the Rome Statute has not yet been ratified by all states and currently is being actively combated by the United States, the ICC encapsulates the ambition to establish at world level a judicial function that is not dependent on state consent but authorized to discharge judicial functions even without or against the will of states. In fact, Article 13(b) of the Rome Statute authorizes the Security Council, in accordance with Chapter VII of the UN Charter, to refer any ‘situation’ to the Prosecutor of the ICC, irrespective of the ratification of the Statute by the state concerned. Thus, a network of institutions, which belong to an overarching structure that has primacy over state sovereignty, is slowly emerging and expanding. The IMT showed that it is indeed feasible under the real conditions of international life to conduct criminal proceedings under the auspices of an international authority. International criminal prosecution has thus become the hallmark of the emergence of an (or the) international community.

C. **Individual Criminal Responsibility Becomes one of the Cornerstones of the International Community**

Perhaps the most significant lesson to be drawn from the Nuremberg trial is that criminal responsibility does not necessarily depend on national legal statutes. At Nuremberg, the German law of the Nazi period played no role as a basis for prosecution. It was international law on which the IMT relied. The prosecutable crimes were enunciated in the Charter of the IMT, but the Charter, allegedly, did no more than delineate the jurisdiction of the IMT. According to the official interpretation of the IMT, all the offences listed — crimes against peace, war crimes and crimes against humanity — had firm

\textsuperscript{23} See the definition given by the author, ‘International Law: Ensuring the Survival of Mankind on the Eve of a New Century’, 281 Recueil des cours (1999), 88: ‘an ensemble of rules, procedures and mechanisms designed to protect collective interests of humankind, based on a perception of commonly shared values.’

\textsuperscript{24} International Criminal Tribunal for the former Yugoslavia (ICTY), established by Security Council resolution 827, 25 May 1993; International Criminal Tribunal for Rwanda (ICTR), established by Security Council resolution 955, 8 November 1994.
foundations in customary international law. This is a contention which was already discussed. The remarkable fact was that the screen between international law and the individual, normally constituted by state sovereignty, was pierced. According to the traditional dualist view, international and domestic law differed precisely regarding their scope *ratione personae*. International law addressed its commands to states, whereas domestic law dealt with private individuals. Nuremberg brought that traditional conception of the relationship between the different legal levels of the house of law down to its knees.

This was indeed a necessary and desirable quantum leap. In a world where observance and respect for human rights constitute one of the basic axioms of international law, it would be absolutely incongruous to deal with massive violations of human rights solely according to the traditional mechanisms on an inter-state level. The notion that dictators might immunize themselves from any prosecution by enacting laws that legalize crime and injustice pursuant to a formal concept of the rule of law, has become unbearable within the framework of the new human-rights-oriented direction of international law. The rule of law must be understood in a substantive sense, in accordance with the values commonly recognized by the international community. Respect for state sovereignty cannot be boundless. If a dictatorial regime cannot be stopped by its own people, then the international community must step in. In such instances, justice requires that the responsible leaders — and not a whole nation! — be put on trial, irrespective of any orders or commands by national legislation. Criminal sanctions can also have an important deterrent effect — although it must be acknowledged that in many countries the existence of international criminal law and international criminal tribunals is widely unknown and, therefore, can hardly influence the decisions of the leadership.

Today, individual criminal responsibility is the unchallenged cornerstone of the entire edifice of international criminal law. The relevant key propositions are articulated in the ILC’s Draft Code of Crimes against the Peace and Security of Mankind\textsuperscript{25} as follows (Article 2(1)):

\begin{quote}
A crime against the peace and security of mankind entails individual responsibility.
\end{quote}

Article 3 continues:

\begin{quote}
An individual who is responsible for a crime against the peace and security of mankind shall be liable to punishment . . .
\end{quote}

The language chosen in the Rome Statute is very similar (Article 25(2)):

\begin{quote}
A person who commits a crime within the jurisdiction of the Court shall be individually responsible and liable for punishment in accordance with this Statute.
\end{quote}

Wherever international criminal tribunals are established, they rely invariably on the premise that the legal order of the country concerned has

no determinative significance. The individual, thus, becomes directly subject to international law. In legal doctrine, authors rightly qualify this status as ‘passive personality’ under international law.\textsuperscript{26}

The Charter of the IMT also provided for the prosecution of groups or organizations. Thus, six organizations — among them the leadership corps of the Nazi party, the Government (Cabinet) of the German Reich, the General Staff and High Command of the German \textit{Wehrmacht} and the SS — were defendants at the Nuremberg trial. This extension of the scope \textit{ratione personae} of the indictment brought with it considerable difficulties. Only four of them (the Leadership Corps of the Nazi Party, the Gestapo, the SD and the SS) were found to be criminal. None of the texts governing the currently existing international criminal courts or tribunals has followed the Nuremberg example. It would be particularly difficult to accept states as defendants in criminal proceedings as well. Essentially, it would not be the state concerned but its people that would become the target of any punishment — over and beyond the consequences which derive for a state from the commission of an internationally wrongful act. By definition, a trial against a state would be based on the assumption of collective criminal guilt — a notion implicitly rejected by the leaders of the four victorious Powers who opted in favour of a trial against the main war criminals who had not only launched a criminal war, but had also killed millions of their own citizens. On the other hand, to impose on a people sanctions which suffocate it, denying it any opportunity to join the other nations, would not only be politically disastrous, as shown by the aftermath of the unfortunate Treaty of Versailles. It would at the same time amount to a blatant violation of the rights of the members of the succeeding generations who should bear no responsibility for the misdeeds committed by their fathers and forefathers.

5. Developments after Nuremberg

A. Aggression as an International Crime

The criticisms against the Nuremberg convictions that were based on the offence of aggression have been mentioned. One can hardly dismiss those criticisms — although they were largely irrelevant inasmuch as all of the defendants were found guilty on a considerable number of other charges. At the present juncture, it is necessary to reconsider the issue. The fact that in 1945 crimes against peace were not a legally consolidated class of offences does not mean that the same judgment would still be valid today. In order to clarify the legal position, the practice as it has developed since 1946 must be evaluated.

As far as judicial pronouncements are concerned, no one has ever been convicted of aggression since the days of Nuremberg and Tokyo. In fact,

\textsuperscript{26} See, for instance, Tomuschat, \textit{supra} note 23, at 152.
there is no basis for such a conviction in the statutes of the currently existing international criminal courts and tribunals. Although in the former Yugoslavia aggression was something very real, the Security Council preferred not to touch upon this burning question. Aggression does not figure among the heads of jurisdiction assigned to the ICTY. In the case of the ICC, it would have been almost natural to vest it with a corresponding title of jurisdiction in order to continue the line commenced at Nuremberg. At first glance, the Rome Statute seems to mirror the Charter of the IMT in the most perfect manner. The crime of aggression is mentioned in Article 5 as an offence falling within the competence of the ICC. But Article 5(2) makes an important reservation that renders the statement of principle de facto inapplicable.\textsuperscript{27}

It stands to reason that such an amendment to the Rome Statute will hardly ever be approved. Thus, Article 5(2) is a clear indication of the lack not only of practice, but also of \textit{opinio juris}. The statement enunciated both in General Assembly Resolution 2625 (XXV) (on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations) and in Resolution 3314 (XXIX) (on the Definition of Aggression) to the effect that ‘a war of aggression constitutes a crime against the peace, for which there is responsibility under international law’\textsuperscript{28} do not specify the kind of responsibility envisaged. During the drafting process, the issue was deliberately left open.\textsuperscript{29} Many good reasons militate for an understanding that views the two sentences just as reference to state responsibility in the classic sense, albeit in its most drastic form that entails particularly grave consequences as they now can be found in the ILC Articles on responsibility of states for internationally wrongful acts (Article 41).\textsuperscript{30}

The British House of Lords in a recent judgment\textsuperscript{31} endeavoured to rescue the Nuremberg convictions notwithstanding this disclaimer, but did so rather ineptly. The House of Lords could have reasoned more cogently by distinguishing between acts of aggression and wars of aggression. One can hardly believe that broad consensus will ever be attained on the definition of an act of aggression. Is a short-term armed intervention, carried out with a view to

\textsuperscript{27} The Court shall exercise jurisdiction over the crime of aggression once a provision is adopted in accordance with Arts 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime. Such a provision shall be consistent with the relevant provisions of the Charter of the United Nations.

\textsuperscript{28} Particularization of the principle of non-use of force, § 2. Under Resolution 3314 (XXIX), the text was slightly changed (Art. 5(2)): ‘A war of aggression is a crime against international peace. Aggression gives rise to international responsibility’.

\textsuperscript{29} See B. Graf zu Dohna, \textit{Die Grundprinzipien des Völkerrechts über die freundschaftlichen Beziehungen und die Zusammenarbeit zwischen den Staaten} (Berlin: Duncker & Humblot, 1973), 100.

\textsuperscript{30} Taken note of by General Assembly Resolution 56/83, 12 December 2001.

rescuing one's own citizens from a life-threatening situation, an act of aggression? What about NATO's intervention in Kosovo, the objective of which was not to occupy and annex a part of a foreign country, but to save the Kosovar Albanians from genocide and ethnic cleansing? It is a different matter altogether if a state invades a foreign country with the intent to annex parts of that country or to expel and kill the persons living there. In fact, where UN General Assembly Resolutions 2625 (XXV) and 3314 (XXIX) state that aggression constitutes a crime against the peace, they refer both to a 'war of aggression' and not to individual acts of aggression. To be sure, the difference is one of degree only, but this difference has a qualitative character. When charges were brought at Nuremberg against the major German war criminals, the relevant facts were absolutely clear: Nazi Germany had launched a war first against Poland and thereafter against other European states. One may safely assume that agreement still exists today as to the necessity of prosecuting persons who are responsible for leading their country into a genuine war of aggression, while any understanding of the concept of aggression that goes beyond a narrow core would probably end up in acrimonious debate. Nonetheless, an objective assessment of the legal position warrants the conclusion that on this issue we are still in the field of *lex ferenda*.

**B. The Establishment of International Criminal Courts and Tribunals**

It would be naive to believe that international mechanisms for the prosecution of perpetrators of international crimes can be run like domestic legal systems. Because of the political character of all the relevant offences, international institutions cannot rely on any kind of bureaucratic automaticity. Without strong political backing, they will not be able to achieve their aims. The difficulties encountered by the ICC are very telling. Four years after it came into existence in July 2002, the ICC has yet to deliver just one judgment. Becoming aware of certain feelings of frustration spreading in the international community that is at the same time a community of taxpayers who have to defray its costs, the ICC has embarked on informing in great detail about the measures it has taken in the three situations it has been seized with. Of course, it finds itself in a delicate situation. Although the United States as a permanent member of the Security Council did not oppose the referral of the situation in Darfur to the ICC, the ICC remains debilitated by the irrational campaign conducted against it by that state. Moreover, the ICC receives no real support from the Security Council in dealing with the delaying tactics of the Sudanese government. Nuremberg was an exceptional situation since Germany had surrendered unconditionally, and no sympathy.


33 It abstained together with Algeria, Brazil and China.
supported a state whose responsibility for the holocaust became all too visible after 8 May 1945.

However, some of the inherent weaknesses of the Nuremberg trials have been remedied. First of all, consideration has been given to excluding a pick-and-choose approach to international criminal prosecution. According to Articles 13 and 14 of the Rome Statute, only ‘situations’ may be referred to the ICC. Hence, it is not open to states or to the Security Council to put on trial just one or a few alleged offenders identified by name. Nor is it admissible to distinguish between the two sides in a conflict. The ‘situation’ comprises an ensemble of facts with all of its actors and occurrences. It is this basic feature of the Rome Statute that prompted the United States to demand a resolution of the Security Council excluding from ICC jurisdiction all members of an operation established or authorized by the UN, provided that their national state was not a party to the Rome Statute. This demand was accepted in the Security Council twice34 but failed after the scandalous treatment of prisoners in the Abu Ghraib prison had come to light.

As far as the composition of the bench is concerned, not only the Rome Statute, but also the statutes of the ICTY and the ICTR contain carefully drafted provisions according to which all contracting parties — in the case of the ICC — or the entire international community — in the case of the ICTY and the ICTR — participate in the selection of the judges. Accordingly, nobody can claim any longer that victors’ justice is imposed on a defeated nation.

Still, those states that have to date declined to ratify the Rome Statute — among them three of the permanent members of the Security Council as well as the five great ‘I’s — India, Indonesia, Iran, Iraq, Israel — remain in a privileged position since their nationals are not subject to the jurisdiction of the ICC *ratione personae*. However, if their nationals commit an international crime in the territory of a State Party to the Rome Statute they too cannot escape criminal accountability. Lastly, the Security Council may at any time refer a situation to the ICC. Under this provision, however, there exists a basic inequality in that a permanent member of the Security Council can at any time block such a planned referral.

6. Brief Concluding Remarks

Nuremberg has left a tangible legacy in the contemporary world order. The legal tool kit shows no lack of instruments. More and more, however, implementing the system becomes a political power struggle. It is in particular the Darfur situation, which will serve as a litmus test for the viability of the system of international criminal justice launched at Nuremberg.

34 Resolutions 1422, 12 July 2002 and 1487, 12 June 2003.