

JUDGMENT AT NUREMBERG: FOREWORD TO THE SYMPOSIUM

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The common sense of mankind demands that law shall not stop with the punishment of petty crimes by little people. It must also reach men who possess themselves of great power and make deliberate and concerted use of it to set in motion evils which leave no home in the world untouched. It is a cause of this magnitude that the United Nations will lay before Your Honors.¹

On October 1, 1946, the International Military Tribunal at Nuremberg (IMT) issued its judgment and proclaimed the sentences for the twenty-two defendants who had appeared before it. Nineteen were condemned either to death or imprisonment; three were acquitted. The judgment was sixty pages in length, short by modern war crimes tribunal standards, but weighty by the standards of the day. Sixty years later, world leaders, distinguished scholars from the disciplines of law and philosophy, international criminal law practitioners and experts, and three former Nuremberg prosecutors convened at Washington University School of Law to commemorate the IMT's judgment and discuss its meaning and contemporary relevance. The three-day, interdisciplinary event involved a symposium on international criminal law, addresses from practitioners in the field, and a commemorative banquet and documentary look back at what had transpired sixty years prior.² Panels addressed the three crimes within the IMT's jurisdiction—crimes against peace, crimes against humanity and war crimes—crimes that continue to form the basis of much of modern international criminal law. Distinguished experts discussed Nuremberg's progeny, the International Criminal Tribunals for the Former Yugoslavia and Rwanda (ICTY and ICTR, respectively), the Special Court for Sierra Leone and the International Criminal Court; philosophers, as

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1. Opening Statement for the United States of America by Robert H. Jackson, Chief of Counsel for the United States, *in* THE NÜRNBERG CASE 31 (1971).

2. The conference was held under the auspices of the Whitney R. Harris Institute for Global Legal Studies at the School of Law, and co-sponsored by the Washington University Department of Philosophy, in collaboration with the Robert H. Jackson Center and the American Society of International Law (ASIL Regional Centennial Conference).

well as lawyers, offered their perspectives on the successes and failures of these experiments.

The Nuremberg Judgment, and the trial that preceded it, have been the subject of many academic conferences over the years, and yet it is difficult to overstate their importance. As an historical matter, Nuremberg represented the first modern, successful international war crimes trial. The IMT was created by international treaty, and although it suffered from the stigma that the victors sat in judgment of the vanquished, the precedent it established was subsequently internationalized and embraced by the fledgling United Nations. The law of the UN Charter, as enshrined in the IMT's judgment and later codified by the International Law Commission, laid the foundation for the now-burgeoning discipline of international criminal law, and human rights law as well. In holding that "crimes are committed by men, not by abstract entities," the IMT broke new ground, finding that individuals, not just States, could be subjects of international law and acquire duties thereunder. The corollary was that individuals are endowed with rights, as well.

From the vantage of 2006, Nuremberg's importance seems obvious. There are now several functioning ad hoc international war crimes tribunals, including the International Criminal Tribunals for Rwanda and the Former Yugoslavia and the Special Court for Sierra Leone.³ The permanent International Criminal Court treaty entered into force in July 2002, and the Court presently has four situations on its docket. A court for Cambodia was recently launched, and even the rough justice Saddam Hussein received in his Iraqi trial could not escape the influence of international law.⁴

At the same time, the survival of the Nuremberg precedent was not a foregone conclusion. Writing in 1979, Claude Lombois, the famous French scholar, likened Nuremberg to a dormant volcano—incredibly powerful, yet quiescent. The Cold War had squelched efforts to establish a

3. Professor David Crane, Former Chief Prosecutor for the SCSL, presented a fascinating and sober look at the work of that Court on the second day of the conference. David Crane, Professor, Syracuse Univ. Coll. of Law, Nuremberg to West Africa—The Jackson Legacy in Jeopardy—International Criminal Justice at a Crossroads, Panel of the Washington University School of Law Symposium: Judgment at Nuremberg (Sept. 30, 2006) *available at* <http://law.wustl.edu/HIGLS/Videos/Nurembergrecut/cranepanel.html>.

4. Professor Michael P. Scharf treated the audience to a lively presentation on this subject on the second day of the conference. Michael Scharf, Professor, Case Western Reserve Univ., Order in the Courtroom: From Goering to Saddam, the Challenges of Trying a Tyrant, Panel at the Washington University School of Law Symposium: Judgment at Nuremberg (Sept. 30, 2006), *available at* <http://law.wustl.edu/HIGLS/Videos/Nurembergrecut/Scharfpanel.html>.

permanent international criminal court based upon the Nuremberg precedent, and the idea lay fallow for decades.

Why did the Nuremberg volcano erupt in the late 1980s to once again command the world's attention? Two principle reasons: individual leadership and political opportunity. In the hearts of those who had witnessed the trial firsthand, and the minds of scholars and policy makers who understood its central lesson, Nuremberg was never forgotten. Indeed, they worked assiduously to chronicle their experiences and keep the Nuremberg legacy alive. Several of those individuals attended our symposium, and some have articles in this volume. All of humanity remains in their debt. Indeed, we were fortunate to reassemble three former Nuremberg prosecutors at our symposium—Whitney R. Harris, Benjamin Ferencz, and Henry King—each of whom spoke eloquently of their experiences of the past and their participation in what they perceived to be the Trial of the Century. We were also graced by an extraordinary address from Senator Christopher Dodd (D, Connecticut), whose father, Thomas, was on the prosecutorial team at Nuremberg. Senator Dodd read aloud several passages from his father's letters, and upon hearing them, no one remained unmoved. Who could not imagine themselves in the shoes of this upstanding young lawyer who was tasked to prosecute—for the first time in history—crimes against humanity, including the horror of the Nazi final solution? Also present were Greg Peterson⁵ and Professor John Barrett, who brought to the conversation not only the participation of the Robert H. Jackson Center, but directly evoked the memory of Justice Robert Jackson, whose eloquent addresses to the Tribunal as the Chief Prosecutor for the United States shaped the judgment in so many ways. As Professor Barrett writes in his paper in this volume, the individuals that served at Nuremberg and have worked to promote and preserve the Nuremberg legacy are “heroes of the law” for what they accomplished sixty years ago, and what they have done ever since. Finally, one would be remiss not to mention the stunning opening address of Professor M. Cherif Bassiouni, who learned of Nuremberg as a law student and worked tirelessly throughout his extraordinary career to make the dream of international criminal justice for the victims of atrocities a reality, inspiring younger generations of scholars and activists to embrace the same vision.

In the 1990s decades of preparation was followed by political opportunity. The promise of “never again” had not been honored in the

5. Mr. Peterson represented the Robert H. Jackson Center, a co-sponsor of the conference.

years following Nuremberg. Wars had been launched around the world and atrocities were committed in the pursuit of hatred, greed and political power. Not until the fall of Communism in 1989, symbolized as it was by the smashing of the Berlin Wall, did a window of opportunity open, permitting States to respond to the war in the Former Yugoslavia and the Rwandan Genocide by establishing the first international criminal tribunals since Nuremberg. If the label “victor’s justice” is sometimes appended to the Nuremberg Tribunal, the ICTY and ICTR are often criticized as palliatives rather than real efforts at ending the commission of human rights atrocities. Yet the work of the Tribunals and their issue have been vital in focusing attention on the commission of atrocities, in preventing revisionism and denial by the perpetrators of those atrocities, and in helping the international community to direct its attention both to the prevention and punishment of crimes against the conscience of humankind. Both Justice Richard Goldstone, former chief prosecutor of the ICTY and ICTR, and Patricia Viseur-Sellers, now with the ICC, bore witness to this in their remarks.

At the same time, constructing an international criminal justice system has been an arduous task, and the successes, as well as the failures, of the ad hoc tribunals have been important in reviving and rethinking the Nuremberg legacy. Several papers in this volume have reflected upon the many interesting jurisprudential issues raised by the work of the ad hoc tribunals, including Steven Ratner’s important essay *Can We Compare Evils*, and Patricia Wald’s discussion of gaps and overlaps between crimes against humanity and genocide in *Genocide and Crimes Against Humanity*. Both contributions underscore the difficult problems that arise from adapting international treaties, which are contracts between States, to the task of prosecuting individuals. These treaties have served as the template for the codification of international criminal law, but using them as the basis for an international criminal code has caused the system to develop erratically.⁶

6. Patricia Viseur-Sellers, former Prosecutor at the ICTY and ICTR, and Justice Richard Goldstone, Former Chief Prosecutor of the ICTY and ICTR and Justice on the South African Constitutional Court, highlighted some important contributions and difficulties of the Tribunals in their remarks at the conference. Patricia Viseur-Sellers, Special Legal Advisor to the UN High Comm’r for Human Rights, Panel discussion on the Offenses Against the Laws and Customs of War, Washington University School of Law Symposium: Judgment at Nuremberg (Sept. 29, 2006), *available at* <http://law.wustl.edu/HIGLS/Videos/Nurembergrecut/viseursellerspanel.html>; Richard Goldstone, Former Justice of the Constitutional Court of S. Afr., *After Impunity*, Address at the Washington University School of Law Symposium: Judgment at Nuremberg (Sept. 30, 2006), *available at* <http://law.wustl.edu/HIGLS/Videos/Nurembergrecut/goldstoneaddress.html>.

It is difficult to discuss the contemporary relevance of the Nuremberg Judgment without examining the ongoing work of the International Criminal Court. Present to do so were Former U.S. Ambassador for War Crimes, David Scheffer; the President of the Court himself, His Excellency Judge Philippe Kirsch; Judge Hans Peter Kaul of the Court; and William (Bill) Pace, Convenor of the Coalition for the International Criminal Court.⁷ As at this writing, the Court has 104 States Parties and four situations on its docket. One accused is in custody, and arrest warrants have been issued for others. Established as a treaty among States, adopted on July 17, 1998, the International Criminal Court is the direct descendant of the International Military Tribunal at Nuremberg, but with several important differences. The ICC is a permanent, not an ad hoc, Court, with truly international participation. Unlike the Nuremberg Tribunal, civil society was critical to its establishment, and the NGO Coalition for the International Criminal Court, presided over for more than a decade by Bill Pace, continues to monitor the Court's work.⁸ The ICC has a more sophisticated charter than the IMT, responding to the sixty years of legal and procedural developments in the field, and more extensive provisions on substantive criminal law and procedure. As President Kirsch emphasized in his remarks, it is a court of last resort, if no State is able or willing to prosecute or investigate,⁹ and unlike the Nuremberg Tribunal, will operate only prospectively, not retroactively. These are positive developments.

On the other hand, as both Judge Kaul and President Kirsch noted, the ICC faces challenges not presented at Nuremberg. It is not an occupation court, nor does it have soldiers at its command. Thus the ICC, unlike the IMT, faces great challenges in obtaining the cooperation of States with regard to the transfer of suspects and the accumulation of evidence. This has become increasingly evident as arrest warrants issued by the Court remain unexecuted.¹⁰ The ICC is also an extraordinarily ambitious endeavor. The Court itself is quite small, composed only of eighteen judges, a Prosecutorial team, and the Registry. Yet it must potentially respond to situations all over the world, often in remote locations with

7. Judge Kaul and President Kirsch's remarks are included in this volume.

8. For a description of the Coalition's work, see LEILA NADYA SADAT, *THE INTERNATIONAL CRIMINAL COURT AND THE TRANSFORMATION OF INTERNATIONAL LAW: JUSTICE FOR THE MILLENNIUM* 5-7 (2002).

9. Rome Statute of the International Criminal Court arts. 1, 17, July 17, 1998, 2187, U.N.T.S. 90, 37 I.L.M. 1002, available at [http://www.un.org/law/icc/english/rome_statute\(e\).pdf](http://www.un.org/law/icc/english/rome_statute(e).pdf).

10. Hans-Peter Kaul, *The International Criminal Court: Current Challenges and Perspectives*, 6 WASH. U. GLOBAL STUD. L. REV. 575 (2007).

under-developed infrastructures, and multiple local and regional languages.¹¹ As Judge Kaul noted in his remarks, considerable obstacles remain in converting the ICC into a functioning and effective institution, particularly as regards the cooperation of States and the United Nations.

One of Nuremberg's revolutionary features was its promotion of individual, as opposed to collective, criminal responsibility for the commission of atrocities. That is, substituted for the idea of interstate reparations as the remedy for breach embodied in the 1907 Hague Convention was the notion that those who had committed, planned, or ordered the atrocities perpetrated during the war (as well as the war itself), should be held personally responsible. Indeed, Jackson alluded to this in his opening address, stating that the Allies had "no purpose to incriminate the whole German people."¹² Certainly, a focus on individual, as opposed to collective punishment, avoids blaming the innocent for the deeds of the guilty and better aligns moral and legal culpability for the commission of atrocities during a war. Yet it may leave an impunity gap, whereby only the leaders are punished, and many of those who carried out heinous acts are never called to account. It may also inadequately address the needs of victims of war for compensation to restore their losses. Professor Thomas Franck forcefully makes this point in his essay, *Individual Criminal Liability and Collective Civil Responsibility*. In it, he argues that when a State deliberately leads, helps, trains, arms, clothes, pays, and inspires those who commit genocide, even if the passive citizenry does not share collective guilt, they do share responsibility, in the civil sense, for the wrongs done. This responsibility, he asserts, carries with it an obligation to make restitution.¹³

If Nuremberg has been relatively successful in establishing a foundation for the prosecution of war crimes, crimes against humanity, and genocide, it has most clearly failed in preventing further wars. Perhaps one of the most famous statements of the Judgment was its pronouncement regarding the crime of aggression. Regarding that charge, the IMT held: "To initiate a war of aggression, therefore is not only an international crime; it is the supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole."¹⁴

11. Remarks of Philippe Kirsch, at 7–8.

12. THE NÜRNBERG CASE, *supra* note 1, at 35.

13. Thomas Franck, *Individual Criminal Liability and Collective Civil Responsibility: Do they Reinforce or Contradict One Another?* 6 WASH. U. GLOBAL STUD. L. REV. 567 (2007).

14. *International Military Tribunal (Nuremberg), Judgment and Sentence*, 41 AM. J. INT'L L. 172, 186 (1947).

Convincing States as to the binding nature of this proposition has not yet been accomplished. The prohibition on the unilateral use of force was enshrined in the UN Charter, article 2(4) of which prohibits recourse to force against the independence or territorial integrity of another State. The only exception the Charter specifically allows is found in article 51, permitting a Member State to act in self-defense if it suffers an armed attack. Unlike war crimes and crimes against humanity, however, which were codified after the Nuremberg judgment in the four Geneva Conventions of 1949 (war crimes) and the genocide, apartheid, and torture conventions with respect to particular crimes against humanity, no successful codification of the crime of aggression ever took place, and the ICC Statute for the International Criminal Court was negotiated without including a specific definition.¹⁵ The Preparatory Commission, established after the adoption of the Statute in 1998, continued to debate the issue, and a Working Group on Aggression continues to do the same. At least some governments hope that the 2009 Review Conference will adopt a definition of aggression as an amendment to the Court's Statute. Meanwhile, as diplomats continue to work on this seemingly intractable difficulty, scholars and philosophers have continued to debate, both normatively and practically, the legality of war, particularly aggressive war.

As Roger Clark notes in his thoughtful essay, *Nuremberg and the Crime Against Peace*, many issues cropping up in the current ICC negotiations are similar to those faced by the drafters of the London Charter in 1945. Picking up this theme, Ben Ferencz proposes a compromise definition for inclusion in the ICC Statute that he suggests would be accepted by a majority of States. His proposals build upon nearly sixty years of work he and others have done on this important concept, but does not really answer whether the ICC will be able to adjudge an individual guilty of having committed the crime if the Security Council has not found an act of aggression to have been committed first, the element most troublesome to the five permanent members of the Council.

Michael Walzer and David Rodin submitted papers on the moral wrong of aggression and the liability of ordinary soldiers for the crime, issues that are of extraordinary modern day importance. Walzer attempts to distinguish morally justifiable wars—which, in his view, include humanitarian intervention and pre-emptive strikes—from unjustifiable

15. Leila Nadya Sadat & S. Richard Carden, *The New International Criminal Court: An Uneasy Revolution*, 88 GEO. L.J. 381, 436–43 (2000).

wars, concluding that “States cannot impose the risks of war on other states, except in cases of humanitarian urgency.”¹⁶ He correctly argues that setting out a moral continuum that distinguishes just from unjust wars is “work that has to be done,”¹⁷ before ICC prosecutions could occur with any real legitimacy.

Two additional themes emerged from the trials that were evoked by many speakers during the symposium. The first was the need for procedural fairness in any international proceedings if they were to have any lasting value. The second was the need for countries to domesticate the norms in order to ensure their effective implementation. Many speakers worried, either explicitly or implicitly, that the U.S. government was not honoring the legacy of Nuremberg in its conduct during the war on terror, and by its rejection of the International Criminal Court treaty. As regards the war on terror, David Luban and Senator Dodd argued that the recent passage of the Military Commissions Act, with its classification of certain prisoners as “unlawful enemy combatants,” bereft of the rights either of ordinary citizens or POWs, was a step in the wrong direction. Nancy Sherman added to this her extraordinary account of her visit to Guantanamo in October 2005, described in her essay *From Nuremberg to Guantanamo: Medical Ethics Then and Now*. She noted that the ethical questions posed to the doctors, lawyers, and psychologists asked to assist either with detention, interrogation, or subjugation of detainees are substantial. With respect to the International Criminal Court, both Judge Kaul and Ambassador Scheffer observed that the United States had formerly led many of the most important international institutions in the world, and had been instrumental during the Nuremberg trial. The U.S. rejection of the International Criminal Court is therefore disappointing from both an historical and practical perspective, and indeed, many were gloomy about the ultimate survival of the IMT’s legacy given the U.S. abandonment of its principles.

The final moments of the conference were given to reflection upon the question whether peace under the rule of law—the Nuremberg dream—was achievable. After all, as Christoph Safferling writes in his essay, *A World of Peace Under the Rule of Law—The View from Europe*, “peace is associated with the kingdom of God, with paradise,” not with life on Earth. Jackson never believed, of course, that the trial would make war

16. Michael Walzer, *The Crime of Aggressive War*, 6 WASH. U. GLOBAL STUD. L. REV. 635, 640 (2007).

17. *Id.* at 642.

impossible, and understood the “weakness of juridical action alone.”¹⁸ Rather, his belief was that holding a trial, and obtaining a judgment, would place international law on the side of peace.

The more relevant question, then, is a narrower one: whether the constitutional principles established by the judgment of the IMT at Nuremberg remain valid *grundnorms* for the ordering of the international legal order today. Our three days together pondering that subject, as partially reflected in the papers collected in this volume, suggest that the answer is a resounding yes. The Nuremberg principles remain as salient today as they ever were, even if their implementation remains unfinished. Indeed, I suspect that they will be celebrated on the 75th anniversary of the Judgment, and the 100th as well. As Whitney Harris himself is fond of reminding us, “the struggle for peace, law and justice in the world is eternal.”¹⁹

18. 6 WASH. U. GLOBAL STUD. L. REV. 675, 676 (2007).

19. Whitney R. Harris, *A World of Peace and Justice Under the Rule of Law: From Nuremberg to the International Criminal Court* (Whitney R. Harris Inst. for Global Legal Studies, Occasional Paper 2002-No.1), reprinted in 6 WASH. U. GLOBAL STUD. L. REV. 698 (2007).