

THE NUREMBERG TRIAL, SEVENTY YEARS LATER

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Seventy years ago, my fellow countryman, Justice Robert H. Jackson stood in this courtroom and gave the opening statement for the Prosecution at the trial of the major German defendants before the International Military Tribunal at Nuremberg. According to Telford Taylor, a member of his team, Jackson had been nervous and irritable for weeks prior to the opening of the trial, which had almost been delayed, over his objections, several times. But once he walked to the podium and began to speak, his voice was clear, and his commitment was unshakeable—no one listening that day or reading his statement afterwards could doubt his passion, eloquence and firm conviction that his role was to bring the rule of law to bear on the question of what to do with the twenty-two captured Germans in the dock that day. Jackson understood that this was no ordinary trial and knew that the world was watching and would judge him harshly if he failed. He did not. Jackson, like the other prosecutors that presented evidence to the Tribunal over the next ten months, rose to the occasion. His Opening Statement, in particular, and its impact over the decades, has been forever etched in the hearts and minds of scholars, activists and students of Nuremberg.

Jackson noted that he had the “privilege” to open the first trial in history for crimes against the peace of the world, a privilege that imposed upon him a grave responsibility. Ladies and gentlemen, your Excellencies, distinguished academics and dear friends and colleagues, I feel similarly privileged to stand before you today at the opening of this important meeting of the International Nuremberg Principles Academy—on the occasion of the 70th anniversary of that famous trial—and address you regarding a subject that has been close to my heart and academic work for the better part of two decades. While these remarks are in no way as consequential as Jackson’s Opening Statement was seventy years ago, I

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feel a similar responsibility. What is there to be said about an event and its consequences that has not already been the subject of distinguished books, films, articles and conferences? What can I, as an American observer and commentator, bring to your important discussions today on the Nuremberg legacy?

Having been charged with the task, I, too, hope to rise to the occasion. I will address only briefly the Nuremberg trials themselves, and then quickly turn to their legacy—how the extraordinary events of 1945 and 1946 have shaped the world since that time. I would then like to turn our attention to aspects of the Nuremberg legacy that remain either unfinished or have tarnished, rather than brightened, with the passage of time, and conclude with some final reflections on what can be done to reinforce the legacy so that we do not find ourselves, seventy years hence, “breathless and ashamed” as they were in 1945,¹ at the devastation wrought by a world at war, but enjoying the benefits and prosperity that have resulted from our efforts to promote the gradual and unceasing construction of a world at peace.

I. THE NUREMBERG TRIAL

The difficulties that Jackson faced in 1945 remain with us, to some extent, today. Indeed, rereading the biographies from that period,² I am struck by how many of the same problems have been present at the ad hoc tribunals and the International Criminal Court. *Plus ça change, plus ça reste pareil*. Jackson, of course, was keenly aware of the deficiencies, both legal and practical, that faced the prosecution team at Nuremberg. A country lawyer without formal legal training, he had risen to the highest judicial office in the United States as a result of his keen mind and extraordinary rhetorical skill.³ He knew that the case was a novel one, that the precedent for indicting and trying the accused was virtually non-existent, and that there were legitimacy questions raised by the specter of having German accused tried to a bench of Allied jurists by a team of Allied prosecutors. Rather than hide from the weaknesses of his case, however, he met them head on.

1. WILLIAM I. HULL, *THE TWO HAGUE CONFERENCES AND THEIR CONTRIBUTIONS TO INTERNATIONAL LAW* 1 (1908) (describing the first quarter century of the nineteenth century).

2. *See, e.g.*, WHITNEY R. HARRIS, *TYRANNY ON TRIAL* (2d ed. 1999); FRANÇOIS DE MENTHON, *LE PROCÈS DE NUREMBERG: SON IMPORTANCE JURIDIQUE ET POLITIQUE* (1946); HARTLEY SHAWCROSS, *LIFE SENTENCE: THE MEMOIRS OF LORD SHAWCROSS* (1995); TELFORD TAYLOR, *THE ANATOMY OF THE NUREMBERG TRIALS: A PERSONAL MEMOIR* (1st ed. 1992).

3. GAIL JARROW, ROBERT H. JACKSON 42, 57–58 (2008).

As Jackson observed in his Opening Statement, the case was complex, involving “the developments of a decade, covering a whole continent, and involving a score of nations, countless individuals, and innumerable events.”⁴ Eight months earlier, the courtroom had been an enemy fortress and the accused and the documents were in enemy hands. There was no codification of the relevant law, no procedures had been established, no tribunal was in existence, and no prosecuting staff had been assembled. Further, nearly all the accused were at large and the four prosecuting powers had not yet joined in common cause to try them. What Jackson did *not* reveal publicly was that the four prosecutorial teams did not work well together. It was an arduous and difficult diplomatic, as well as legal, process. The negotiators and prosecutors wrangled over the differences between common law and civil law procedure and struggled with questions of substantive law and procedure: with the Anglo-American concept of conspiracy; with the impossibility of getting documents translated in time for all the judges and defense counsel to receive copies; with the particularity requirement of the indictment. Jackson had trouble with his staff, many of whom departed either due to conflict with him or for personal reasons. Telford Taylor described the staff as being plagued by tensions and petty jealousies, living in an expatriate bubble, with little interaction between occupiers and occupied.⁵ The Russians were not permitted to fraternize with the other teams,⁶ and although François de Menthon opened the French case with a stirring and oft-quoted statement, he returned to France shortly thereafter, leaving Champetier de Ribes in charge for the remainder of the trial.⁷ Finally, many of Jackson’s American compatriots were scornful about the utility and enforceability of international law, arguing that the trials would either make matters worse or, at best, be a useless act.

The international political environment was challenging for the Tribunal as well. Just two days prior to the signing of the London Agreement and Charter, the Enola Gay was winging its way through the sky en route to dropping an atomic bomb on Hiroshima, and one day after

4. TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL, 14 November 1945—1 October 1946, vol. II, *Opening Statement for the United States of America by Robert H. Jackson, Chief of Counsel for the United States*, 100 (Nov. 21, 1945) [hereinafter Jackson, *Opening Statement*], available at www.loc.gov/tr/frd/Military_Law/pdf/NT_Vol-II.pdf.

5. TAYLOR, *supra* note 2, at 232.

6. *Id.* at 209.

7. *Id.* at 212, 294–95.

the Charter was signed, a second bomb was dropped on Nagasaki,⁸ killing tens of thousands of civilians. Because the four Allied powers had a vested interest in not pursuing charges that would show them in a bad light, they had not included any charges relating to aerial bombardment,⁹ and the Russians insisted on accusing the Germans of the Katyn Forest massacre (which had actually been perpetrated by Russian forces).¹⁰ The press covered the trials, but found the documentary evidence boring.¹¹ Jackson bemoaned the fact that no real arrangements had been made so Germans could attend and learn about the trial.¹² On March 5, 1946, as the Russians were presenting their evidence at Nuremberg, Winston Churchill was in Fulton, Missouri giving his famous Iron Curtain Speech ushering in the Cold War era.¹³

Jackson understood these difficult political realities, but he defended the trials, writing later “[w]hat we should have done with these men is a question always evaded by those who find fault with what we did do.”¹⁴ He and Roosevelt shared the view that the thirst for vengeance, which had been amply demonstrated in the French purge of thousands of former collaborators, could, if applied to the Germans, lead to doubt about and denial of the crimes and a myth of martyrdom. Instead, they argued, there must be public proof of Nazi crimes, and the accused must be given the chance to defend themselves.¹⁵

After ten months of proceedings, the trial was over and the judges retired to deliberate. The judgment they rendered on October 1, 1946 was impressive.¹⁶ Indeed, many of its pronouncements form part of the modern canon of international law: that crimes are “committed by men, not by abstract entities”;¹⁷ that the law of the Charter was both an “expression of international law existing at the time of its creation; and to that extent is itself a contribution to international law”;¹⁸ that the establishment of the

8. *Id.* at 74; Luc Reydam & Jan Wouters, *The Politics of Establishing International Criminal Tribunals* in INTERNATIONAL PROSECUTORS 6, 13 (Luc Reydam et al eds., 2012).

9. TAYLOR, *supra* note 2, at 325–26.

10. *Id.* at 117; HARRIS, *supra* note 2, at 31–32, 252.

11. TAYLOR, *supra* note 2, at 197.

12. *Id.* at 235.

13. *Id.* at 316–17.

14. Robert H. Jackson, *Introduction*, in HARRIS, *supra* note 2, at XXXI.

15. *Id.* at XXXIV (discussing Roosevelt’s support of a “speedy but fair trial”); TAYLOR, *supra* note 2, at 44–45 (discussing Justice Jackson’s opposition to show trials).

16. TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL, vol. I, *Judgment* (Oct. 1, 1946), available at www.loc.gov/rr/frd/Military_Law/pdf/NT_Vol-I.pdf.

17. *Id.* at 223.

18. *Id.* at 218.

International Military Tribunal by the Allied powers was lawful because they had only “done together what any one of them might have done singly; for it is not to be doubted that any nation has the right thus to set up special courts to administer law.”¹⁹

In terms of substantive law, the International Military Tribunal articulated its understanding of the law it was asked to apply, famously holding:

War is essentially an evil thing. Its consequences are not confined to the belligerent States alone, but affect the whole world. 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.²⁰

Although this statement arguably conflates war crimes and crimes against peace, its essence—a juridical condemnation of the evils of war—is undeniably powerful. In other respects, the judgment was perhaps less progressive, particularly regarding the crimes against humanity counts, which were limited to acts committed against civilians after the onset of the war, in spite of language to the contrary in the Charter.²¹

Yet even with these arguable deficiencies, seventy years later we still study, discuss, and even revere the Nuremberg trial.²² For separated from its all too human flaws, the decision to hold a trial, and the accomplishment of the task to a high level of professionalism and distinction, represented an extraordinary achievement. It may have been an American “show”²³ in terms of the material support and size of the various participating prosecutorial teams; but it built upon decades of European thought which, following the failed experience of the Leipzig trials held after World War I, endeavored to fortify the emerging structure of international criminal law.²⁴

Building upon this legacy, Nuremberg taught us to re-conceptualize the notion of war and its worst consequences, as well as to reframe our

19. *Id.*

20. *Id.* at 186.

21. Leila Nadya Sadat, *The Interpretation of the Nuremberg Principles by the French Court of Cassation: From Touvier to Barbie and Back Again*, 32 COLUM. J. TRANSNAT'L L. 289, 308–09 (1994) (formerly Wexler).

22. A search of the major legal databases reveals that well over two hundred journal and law review articles have discussed the topic in the past three years alone.

23. ELIZABETH BORGWARDT, *A NEW DEAL FOR THE WORLD: AMERICA'S VISION FOR HUMAN RIGHTS* 233 (2005).

24. Leila Nadya Sadat, *The Nuremberg Paradox*, 58 AM. J. COMP. L. 151, 159–60 (2010).

response to it. But the question remained whether Nuremberg would simply be a “one off” historic event, or whether it would have enduring salience in the post-war era. It is to this question I now turn.

II. THE NUREMBERG LEGACY IN INTERNATIONAL AND MUNICIPAL LAW

The decision to hold war crimes trials was made contemporaneously with the San Francisco Conference establishing the United Nations. The principles of Nuremberg are thus deeply intertwined “with the organization of the United Nations as the twin foundations of an international society ordered by law.”²⁵ We see this in Article 2(4) of the UN Charter prohibiting the use of force against the territorial integrity and political independence of Member States,²⁶ and in the limited exceptions to that prohibition enshrined in Article 51 (on self-defense) and the powers of the Security Council under Chapter VII.²⁷

Likewise, the Charter incorporates provisions—albeit limited ones—on the importance of human rights.²⁸ Indeed, modern human rights law—like modern international criminal law—rests upon the Nuremberg foundation. The corollary of the notion that individuals have duties under international law is that they may also acquire rights thereunder.

The Nuremberg principles were prepared by the International Law Commission and presented to the General Assembly after the war,²⁹ and at least some of the “law” enshrined in the Charter and judgment found its way into new international instruments on apartheid, genocide, the laws of war, and torture,³⁰ although aggression and crimes against humanity were

25. TAYLOR, *supra* note 2, at 42 (quoting Justice Jackson’s son, William E. Jackson).

26. U.N. Charter art. 2, ¶ 4.

27. *Id.* art. 51.

28. *Id.* arts. 55 & 56; see also MARY ANN GLENDON, *A WORLD MADE NEW: ELEANOR ROOSEVELT AND THE UNIVERSAL DECLARATION OF HUMAN RIGHTS* (2001).

29. Int’l Law Comm’n, Rep. on the Work of Its First Session, U.N. Doc. A/CN.4/13, at 279 (1949).

30. International Convention on the Suppression and Punishment of the Crime of Apartheid, Nov. 30, 1973, 1015 U.N.T.S. 243; Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277; Convention for the Amelioration of the Condition of the Wounded in Armies in the Field, Aug. 22, 1864, 22 Stat. 940 129 Consol. T.S. 361; Hague Convention (II) With Respect to the Laws and Customs of War on Land, July 29, 1899, 32 Stat. 1803; Hague Convention (IV) Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, 1 Bevans 631; Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3144, 75 U.N.T.S. 31; Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Geneva Convention (III) Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75

never the subject of specialized conventions. Understood broadly, the “Nuremberg principles” eschew collective responsibility in favor of individual criminal responsibility; provide that no human being (even a head of state or other responsible government official) is above the law with respect to the most serious crimes of concern to humanity as a whole: war crimes, crimes against humanity, and the crime of aggressive war; and that reliance upon internal law is no defense to crime for which an individual may have responsibility under international law.³¹

Thus at the international level, the Nuremberg principles became an essential part of the new world order. But their implementation soon ran aground on the shoals of state politics. The permanent members of the Security Council were often divided, which meant that the International Law Commission’s work preparing a draft code of crimes and a statute for an international criminal court were largely unsuccessful.³² The Nuremberg principles were also often honored in the breach. The United States invaded Vietnam; the Soviet Union invaded Afghanistan. Neither state’s government appeared to understand—or perhaps to care—that the Nuremberg principles applied to these wars.³³

It was only in the 1990s, as war broke out in the former Yugoslavia and the Rwandan genocide sickened and shocked the world, that the international community, freed from Cold War politics, reached for the Nuremberg precedent, and established, for the first time since 1945, new international criminal tribunals. The Yugoslavia and Rwanda Tribunals had similar, but not identical jurisdictions to their forbearer, though neither Tribunal included crimes against peace in its statute.³⁴ Although both Tribunals suffered the same human difficulties experienced at Nuremberg, both were ultimately able to establish themselves as credible and

U.N.T.S. 287; Convention Against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment, Dec. 10, 1984, S. Treaty Doc. No. 100-20, 1465 U.N.T.S. 85.

31. Leila Nadya Sadat, *Shattering the Nuremberg Consensus: U.S. Rendition Policy and International Law*, 3 YALE J. INT’L AFF. 65, 66 (2008).

32. Leila Nadya Sadat, *The Proposed Permanent International Criminal Court: An Appraisal*, 29 CORNELL INT’L L.J. 665, 667 (1996) (formerly Wexler).

33. See TAYLOR, *supra* note 2, at 636 (outlining the U.S. position on both invasions and their relation to the Nuremberg principles); Jean Allain, *The Continued Evolution of International Adjudication*, in LOOKING AHEAD: INTERNATIONAL LAW IN THE 21ST CENTURY 50, 55 (Can. Council of Int’l Law ed., 2012) (discussing popular opposition to the conflicts in Vietnam and Afghanistan based on the Nuremberg Principles); Benjamin B. Ferencz, *The Nuremberg Principles and the Gulf War*, 66 ST. JOHN’S L. REV. 711, 719–20 (1992) (discussing the willingness of heads of state to ignore the Nuremberg Principles).

34. Statute of the International Criminal Tribunal for the former Yugoslavia, S.C. Res. 827, Annex, U.N. Doc. S/RES/827 (May 25, 1993); Statute of the International Criminal Tribunal for Rwanda, S.C. Res. 955, Annex, U.N. Doc. S/RES/955 (Nov. 6, 1994).

successful international institutions, trying scores of defendants and creating important precedents which have added depth to our conceptual and practical understanding of international criminal justice and the substantive law of war crimes, crimes against humanity and genocide as well as international criminal procedure.³⁵ Building upon this foundation, in 1998, a statute for a permanent International Criminal Court was adopted after years of difficult negotiations. The International Criminal Court now has 124 States Parties, and the substantive law of the Court is widely cited by national and international courts and tribunals, even including, interestingly, the courts of non-States Parties, like the United States.³⁶

Returning to the question of Nuremberg's impact on national jurisdictions, prior to the establishment of the International Criminal Court in 1998, the Nuremberg principles were, to paraphrase the great French jurist Claude Lombois, "like a volcano" that was dormant, but not extinct.³⁷ And indeed, after the post-war trials, of which there were thousands all over the world—in France, Germany, Holland, Hungary, Poland, and the Soviet Union—Nuremberg and its teachings seemed to be forgotten as nations recovered from the pain and suffering of the war. That changed in 1961 when Israel abducted Adolf Eichmann from Argentina and charged him with crimes under Israeli law, including crimes against humanity. His trial was widely covered by the press, and many credit the *Eichmann* trial with forcing Germany to confront its Nazi past as it did in the Frankfurt Auschwitz trials, held from 1963–1965.³⁸ Likewise, in the

35. The International Criminal Tribunal for the former Yugoslavia has indicted 161 persons of whom 81 have been convicted (with an additional eight cases currently on appeal): *Key Figures of the Cases*, International Criminal Tribunal for the former Yugoslavia, <http://www.icty.org/sid/24> (last updated May 23, 2016). The International Criminal Tribunal for Rwanda has indicted 93 individuals with 59 convictions: *Key Figures of the Cases*, Mechanism for International Criminal Tribunals, <http://unictr.unmict.org/en/cases/key-figures-cases> (last visited May 26, 2016); see also Leila Nadya Sadat, *The Contribution of the ICTR to the Rule of Law*, in PROMOTING ACCOUNTABILITY UNDER INTERNATIONAL LAW FOR GROSS HUMAN RIGHTS VIOLATIONS IN AFRICA 118 (Charles Chernor Jalloh & Alhagi B. M. Marong eds., 2015); Yaël Ronen, *The Impact of the ICTY on Atrocity-Related Prosecutions in the Courts of Bosnia and Herzegovina*, 3 PENN. ST. J.L. & INT'L AFF. 113 (2014) (discussing the importance of ICTY jurisprudence in the national courts of Bosnia and Herzegovina).

36. See, e.g., *Prosecutor v. Kaing*, Case No. 001/18-07-2007/ECCC/TC, Judgement (July 26, 2010) (Cambodia) (drawing repeatedly on the ICC Statute and Elements of the Crimes in finding Duch guilty of crimes against humanity); *Prosecutor v. Taylor*, Case No. SCSL-03-01-T, Judgement (May 18, 2012) (Sierra Leone) (also relying on the ICC Statute and Elements of the Crimes in its conviction of Taylor); *Sexual Minorities Uganda v. Lively*, 960 F. Supp. 2d 304 (D. Mass. 2013) (holding that a Massachusetts minister, by aiding and abetting the persecution of LGBTI individuals in Uganda, had committed a crime against humanity).

37. Sadat, *supra* note 21, at 313 n.93.

38. Lecture, Henrike Claussen, International Humanitarian Law Dialogs, Chautauqua, Aug. 31, 2015 (author's notes).

1970s and 1980s, France began the process of bringing French and German World War II defendants to trial using the Nuremberg Charter as incorporated into French law in the cases brought against Klaus Barbie and Paul Touvier. Although *Barbie*, like *Eichmann*, was a case in which a state was more comfortable proceeding because the accused was not of the same nationality as the victim, the *Touvier* case, begun in 1973 and ultimately decided in the 1990s, involved a *French* WWII collaborator who was indicted and convicted of crimes against humanity for acts carried out against *French* victims.³⁹ The *Priebke* case brought by Italy in 1997⁴⁰ and the *Finta* case brought by Canada in 1994⁴¹ were also related to the war.

In Latin America, many prosecutions and truth commissions have been undertaken in Argentina, Brazil, Chile, Mexico, Peru, and Uruguay, relating to crimes committed not during World War II but by former officials of those countries, especially during the “Dirty War” in the 1970s. The *Pinochet* case is perhaps the most famous example arising out of the Latin American experience. The case involved not only the exercise of universal jurisdiction over the crime of torture in European states in which the cases were brought, but ultimately prosecutions in the Chilean courts themselves.⁴² More recently Guatemala’s Attorney General brought a case against President Rios Montt for genocide against the Mayan people.⁴³

The Nuremberg principles have also found their way into international human rights law. Both the European and Inter-American Courts of Human Rights (and the Inter-American Commission) have developed a broad jurisprudence on many international crimes, both in terms of elements, modalities, and potential amnesties for such crimes. This case

39. Sadat, *supra* note 21, at 316–17, 330, 333.

40. Rome Military Tribunal, *Hass and Priebke*, Judgment of July 22, 1997.

41. *R. v. Finta*, [1994] 1 S.C.R. 701 (Can.).

42. *R. v. Bartle and the Commissioner of Police for the Metropolis and Others, Ex Parte Pinochet*, [2000] 1 A.C. 147 (HL) (appeal taken from Eng.); Sebastian Brett, *The Pinochet Prosecution*, Human Rights Watch, available at <https://www.hrw.org/legacy/campaigns/chile98/dispatches.html> (last visited May 27, 2016).

43. *Efraín Rios Montt & Mauricio Rodríguez Sánchez*, International Justice Monitor, available at <http://www.ijmonitor.org/efrain-rios-montt-and-mauricio-rodriguez-sanchez-background/> (last visited May 27, 2016). The Open Society Foundation has English translations of portions of Montt’s conviction by the First Criminal Court of First Instance for Criminal Justice, Drug Trafficking and Environmental Crimes and its subsequent reversal by the Guatemalan Constitutional Court available online, available at https://www.opensocietyfoundations.org/sites/default/files/rios-montt-judgment-full-version-11072013_2.pdf and <https://www.opensocietyfoundations.org/sites/default/files/rios-montt-constitutional-court-judgment-plus-dissents-11072013.pdf> respectively. A new trial began in January of 2015.

law has become so extensive that my colleague Alexandra Huneus refers to them as “quasi-criminal jurisdictions” that are in fact enforcing international criminal law.⁴⁴

In Africa, the *Hissène Habré* trial, which followed *Belgium v. Senegal* and the International Court of Justice’s decision that Senegal had an obligation to either try or extradite Habré under the Torture Convention, has set an important precedent.⁴⁵ Likewise, the establishment of the Special Court for Sierra Leone as a mixed jurisdiction has “domesticated” the Nuremberg principles,⁴⁶ as has the widespread ratification of the ICC Statute on the continent and, to a lesser extent, incorporation of ICC crimes into national legislation.⁴⁷ We have also witnessed the development of mechanisms to bring perpetrators to justice such as the Gacaca trials in Rwanda,⁴⁸ mobile courts in the Democratic Republic of Congo⁴⁹ and special war crimes chambers in Uganda.⁵⁰ Indeed, to the extent that Nuremberg was as much about *accountability* as *prosecution*, and about creating a record so victims can know the truth and perpetrators cannot engage in denial, all these different modalities are part of the Nuremberg legacy.

In Asia, although ICC ratification rates are relatively low, a new volume by Kirsten Sellars, entitled *Trials for International Crimes in Asia*, observes that although Asian states may be more likely to view international trials with skepticism, they have often conducted national trials. She points to the *in absentia* trial of Pol Pot in Cambodia as one example, suggesting that if it was “the unsound sequel to the *Eichmann*

44. Alexandra Huneus, *International Criminal Law by Other Means: The Quasi-Criminal Jurisdiction of the Human Rights Bodies*, 107 AM. J. INT’L L. 1 (2013).

45. Questions Relating to the Obligation to Prosecute or Extradite (*Belg. v. Sen.*), Judgment, 2012 I.C.J. 422 (July 20).

46. Statute of the Special Court for Sierra Leone, S.C. Res. 1315 (Aug. 14, 2000).

47. Canada, for example, adopted the Crimes Against Humanity and War Crimes Act, S.C. 2000, c. 24, to implement the ICC Statute, and France amended its legislation dealing with crimes against humanity (Loi 64-1326 du 26 Décembre 1964 tendant à constater l’imprescriptibilité des crimes contre l’humanité [Law 64-1326 of December 26, 1964 on Crimes Against Humanity], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [Official Gazette of France], Dec. 29, 1964, p. 11788, originally passed based on the Nuremberg Principles after ratification of the Rome Statute.).

48. See William A. Schabas, *Genocide Trials and the Gacaca Courts*, 3 J. INT’L CRIM. JUST. 879, 891–94 (2005) (discussing the history and importance of the Gacaca trials).

49. Compare William E. Davis & Helga Turku, *Access to Justice and Alternative Dispute Resolution*, 2011 J. DISP. RESOL. 47, 57–58 (2012) (discussing the effectiveness of the mobile courts) with Jacob N. Foster, *A Situational Approach to Prosecutorial Strategy at the International Criminal Court*, 47 GEO. J. INT’L L. 439, 470–71 (2016) (discussing the practical deficiencies of the mobile courts).

50. See HUMAN RIGHTS WATCH, JUSTICE FOR SERIOUS CRIMES BEFORE NATIONAL COURTS: UGANDA’S INTERNATIONAL CRIMES DIVISION (2012) (giving an overview of the International Crimes Division and providing recommendations for improvement).

trial, it was also the overlooked prequel to the Extraordinary Chambers in the Courts of Cambodia.”⁵¹ The book includes chapters on the influence of the Tokyo trials in modern international criminal law, the Bangladesh experience, Indian and Indonesian proceedings, and the Special Panels for East Timor.

III. CHALLENGES TO THE NUREMBERG LEGACY

So with all this ferment of activity at both the national and international levels, is the Nuremberg legacy under threat today? There are two sets of concerns in this regard. The first is the “unfinished” business of Nuremberg itself; the second is challenges to the legacy by States.

A. The Unfinished Work of Nuremberg

In spite of the considerable achievements listed above, which are just a sample of the Nuremberg Charter’s influence upon our modern world, there is work remaining to be done. The first task is to truly universalize the legacy and the message of Nuremberg, so it is no longer an “American” or a “Western” show. This conference is a wonderful example of that.⁵²

The second task is to complete the normative framework of the Charter and enhance the effectiveness of the institutions charged with its application. This means continuing to press for universal ratification of the Rome Statute of the International Criminal Court. Three permanent members of the UN Security Council still have not ratified the Statute—China, Russia and the United States—and dozens of small and large States still remain outside the Rome Statute system. This undermines the Court’s legitimacy, and makes its work more difficult.

In terms of the substantive law of the Charter, the laws of war are widely codified, but there remain gaps, and there is a continuing need for vigilance. Many States are developing restrictive definitions of proportionality to justify attacks that kill large numbers of civilians or target civilian objects, broadening the notion of “combatants” to expand the range of permitted lethal targeting and developing dangerous new

51. Kirsten Sellars, *Introduction*, in TRIALS FOR INTERNATIONAL CRIMES IN ASIA 1, 18 (Kirsten Sellars ed., 2015).

52. Workshops and panels at this conference include *Promotion of Human Rights and International Criminal Law by International and Regional Courts* and *Complementarity and Cooperation*, as well as sessions examining the universality of the Nuremberg Principles from both an Islamic and African perspective.

weapons systems. Nuclear weapons, in particular, remain a constant threat not only to our safety, but to humanity's survival. The rules relating to non-international armed conflict are less well developed than the rules on international armed conflict, and the so-called "global war on terror" has undermined the consistent meaning and application of international humanitarian law, a point to which I will return presently.

Regarding the crime of aggression, progress has been made but many questions remain. There are now a sufficient number of ratifications of the Kampala amendments to activate the ICC's jurisdiction over the crime of aggression in 2017, meaning that the Assembly of States Parties may vote upon the amendments' entry into force. Hopefully States already party to the Rome Statute will not try to opt out of the aggression amendments at that time *en masse*. It is troubling that when the Kampala amendments were adopted, "understandings" were attached that were regressive, providing, among other things, that there is no duty or right of States to exercise their domestic jurisdiction with respect to acts of aggression committed by other States.⁵³ Although the understandings are presumably non-binding as a formal matter of international law, their clear intent is to ensure that aggression, unlike other *jus cogens* crimes, will not be governed by the same regime that governs other universal jurisdiction crimes. Thus, avoiding the possibility of there one day being a "*Pinochet* moment" for the crime of aggression.

Finally, with respect to crimes against humanity, it is stunning that in a world with more than 300 international criminal law conventions, covering everything from the cutting of submarine cables to terrorist bombings and genocide, one of the three "core" crimes of the Nuremberg trials does not yet have its own treaty.⁵⁴ *Belgium v. Senegal* and the *Pinochet* case clearly demonstrated how important a treaty basis for jurisdiction can be in international law.⁵⁵ Likewise, the absence of a crimes against humanity convention created difficulties for the International Court of Justice in *Bosnia v. Serbia*.⁵⁶ It is thus good news that the International Law Commission has taken up the *Initiative* of the Whitney

53. Review Conference of the Rome Statute, Res RC/RES.6, Annex III (June 11, 2010).

54. M. Cherif Bassiouni, *Crimes Against Humanity: The Need for a Specialized Convention*, 31 COLUM. J. TRANSNAT'L L. 457 (1994).

55. See Questions Relating to the Obligation to Prosecute or Extradite (Belg. v. Sen.) Judgment, *supra* note 45, ¶¶ 42–63; R. v. Bartle and the Commissioner of Police for the Metropolis and Others, Ex Parte Pinochet, [2000] 1 A.C. 147 (HL) (appeal taken from Eng.);

56. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), Judgment, 2007 I.C.J. Rep. 43, ¶ 277 (Feb. 26).

R. Harris World Law Institute⁵⁷ and begun the drafting of a new international convention on crimes against humanity under the able leadership of Special Rapporteur Sean Murphy who has been elected by the Commission to lead this project.⁵⁸

B. The Noncompliance of States

As Antonio Cassese wrote more than a decade ago, international terrorism is disrupting some important legal categories.⁵⁹ Recall that when the ICC project was reintroduced to the General Assembly's agenda in 1989, it was by Trinidad and Tobago, leading a group of Caribbean States, which argued that the future international criminal court should address the crimes of terrorism and narcotics trafficking.⁶⁰ Terrorism was the subject of an international court convention in 1937 that never entered into force.⁶¹ Terrorism not only harms victims of terrorist acts, but provokes States to launch terrible wars in response to terrorist violence. It is increasingly difficult to understand how terrorism is not one of "the most serious crimes of concern to the international community as a whole" like other ICC crimes. When the Rome Statute was adopted without the crime of terrorism included, a Resolution was appended to the Conference's Final Act promising to take up the issue in the future.⁶² Each year at the annual meeting of the ICC's Assembly of States Parties, some States have tried to convince ICC States Parties to take terrorism seriously.⁶³ It is, it seems, the scourge of our time, as the recent tragedies of Paris, Beirut,

57. The Initiative has proposed a model convention on crimes against humanity. See FORGING A CONVENTION FOR CRIMES AGAINST HUMANITY (Leila Nadya Sadat ed., 2011).

58. See Special Rapporteur on Crimes Against Humanity, *First Rep. on Crimes Against Humanity*, Int'l Law Comm'n, U.N. Doc. A/CN.4/680 (Feb. 17, 2015) (by Sean D. Murphy); Special Rapporteur on Crimes Against Humanity, *Second Rep. on Crimes Against Humanity*, International Law Commission, U.N. Doc. A/CN.4/690 (Jan. 21, 2016) (by Sean D. Murphy).

59. Antonio Cassese, *Terrorism is Also Disrupting Some Crucial Legal Categories of International Law*, 12 EUR. J. INT'L L. 993 (2001).

60. Sadat, *supra* note 32, at 683 n.112.

61. The draft Convention for the Creation of an International Criminal Court is reproduced at U.N. Secretary-General, Historical Survey of the Question of International Criminal Jurisdiction (Memorandum Submitted by the Secretary-General), Int'l Law Comm'n, U.N. Doc. A/CN.4/7Rev.1, Appendix 8 (1949).

62. United Nations Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome, Italy, June 15–July 17, 1998, *Official Records*, U.N. Doc. A/CONF.183/13 (Vol. I), Annex 1, Resolution E (Aug. 2002).

63. See, e.g., Assembly of States Parties to the Rome Statute of the International Criminal Court: Eighth Session, The Hague, November 18–26, 2009, U.N. Doc. ICC-ASP/8/20, Appendix III at 65-6 (2009) (formal proposal of the Netherlands to include terrorism within the ICC's jurisdiction at the Kampala Review Conference).

Baghdad, Istanbul, and Brussels demonstrate. Perhaps those States arguing for the inclusion of this crime in the ICC Statute—or for the creation of other international mechanisms to try terrorists—are correct. Certainly, the gaps in the current legal regime are unsatisfactory.

Particularly since the attacks of September 11, 2001, the Nuremberg principles have been undermined by the policies of the very nations that gave them birth, including my own country. Recall Jackson’s exultation in his opening address: “[t]hat four great nations, flushed with victory and stung with injury stay the hand of vengeance and voluntarily submit their captive enemies to the judgment of the law is one of the most significant tributes that Power has ever paid to Reason.”⁶⁴

When the United States was stung by the terrible attacks of September 11, 2001, reason was jettisoned as vengeance and even cruelty took its place. Lawyers in the U.S. Department of Justice argued that the United States should abandon the provisions of the Geneva Conventions of 1949 in favor of a new legal regime for the detention, treatment and trial of enemy prisoners, whether captured in the United States or abroad.⁶⁵ Then Counsel to the President, Alberto Gonzales, famously opined that portions of the Conventions were “quaint” and “obsolete,”⁶⁶ ultimately persuading the President to deny the applicability of Geneva law to either al-Qaeda or Taliban detainees in U.S. custody. A diplomatic and legal furor ensued, particularly after the transfer of prisoners from Afghanistan to Guantanamo Bay, Cuba, where they were kept in deplorable conditions.⁶⁷

The Afghanistan war was at least buttressed, if not authorized, by the Security Council; important Resolutions were adopted, including Resolution 1373,⁶⁸ that reinforce the Nuremberg paradigm by emphasizing

64. Jackson, *Opening Statement*, *supra* note 4, at 99.

65. Memorandum from John Yoo & Robert J. Delahunty, Office of Legal Counsel, U.S. Dep’t of Justice, to William R. Haynes II, General Counsel of U.S. Dep’t of Defense on the Application of Treaties and Laws to Al Qaeda and Taliban Detainees (Jan. 9, 2002), *available at* <http://nsarchive.gwu.edu/torturingdemocracy/documents/20020109.pdf> (arguing that the Geneva Conventions do not apply to the detention and trial by military commission of al-Qaeda and Taliban prisoners); Memorandum from Jay Bybee, Assistant Attorney General, Office of Legal Counsel, to Alberto R. Gonzales, Counsel to the President & William R. Haynes II, General Counsel of the Dep’t of Defense (Jan. 22, 2002), *available at* <https://www.justice.gov/sites/default/files/olc/legacy/2009/08/24/memo-laws-taliban-detainees.pdf> (signing off on Yoo’s memo of January 9th and sending it on to the Pentagon). These memos, along with others, are colloquially referred to as “the Torture Memos.”

66. Memorandum from Alberto R. Gonzales, Counsel to the President, to President George W. Bush (Jan. 25, 2002), *available at* <http://nsarchive.gwu.edu/NSAEBB/NSAEBB127/02.01.25.pdf>.

67. In a 2005 report, for example, Amnesty International declared that Guantanamo Bay “has become the gulag of our times.” Irene Khan, *Foreword to Amnesty International Report 2005* i (2005). See also Leila Nadya Sadat, *Ghost Prisoners and Black Sites: Extraordinary Rendition under International Law*, 37 CASE W. RES. J. INT’L L. 309, 311–12 (2006); Sadat, *supra* note 31, at 67.

68. S.C. Res. 1373, U.N. Doc. S/RES/1373 (Sept. 28, 2001).

the duty of States to try or extradite suspected international criminals. But it was followed by the 2003 invasion of Iraq in which two of the five permanent members of the Security Council appeared to contravene the prohibition of Article 2(4).⁶⁹ Moreover, the Iraq invasion and war in Afghanistan were accompanied by high levels of civilian casualties⁷⁰ and, as reported by the press and in Congressional hearings, the apparent adoption of torture and cruel treatment as official U.S. policy, in violation of international conventional and customary law.⁷¹ More recently, the United States has engaged in targeted killing by remotely piloted unmanned vehicles in Afghanistan, Pakistan, Yemen, Libya, Iraq, and Somalia, campaigns which often involve high civilian casualties, mistakes, and the terrorization of civilians in the areas in which the drones are operating.⁷²

To be sure, the United States is not the only member of the Security Council using its power to avoid being contained by the international legal system. Moreover, the above mentioned actions are not of the same magnitude as the crimes committed during World War II. But they are nevertheless shocking, *precisely because they have been undertaken by the United States*, a country that endeavors to distinguish itself by its high moral standards, sees itself as a champion of the rule of law, and leans its considerable strength to ensuring the success of the Nuremberg trials and building the post-war system of international peace and security. The United Kingdom joined the 2003 invasion of Iraq, and Russia and China have vetoed important resolutions on Syria that would have come closer to imposing real consequences for the violence as well as referring the situation to the International Criminal Court.⁷³ There is a movement to impose a “responsibility not to veto” on the five permanent members of

69. See Sean D. Murphy, *Assessing the Legality of Invading Iraq*, 92 GEO L.J. 173 (2004); Ewan MacAskill & Julian Borger, *Iraq War was Illegal and Breached UN Charter, Says Annan*, GUARDIAN (D.C.), Sept. 15, 2004, available at <http://www.theguardian.com/world/2004/sep/16/iraq.iraq>.

70. The Iraq Body Count estimates that more than 6,000 civilians died in the first phase of the U.S.-led invasion of Iraq alone, and that more than 160,000 civilian deaths have been documented following the 2003 invasion of Iraq. See <https://www.iraqbodycount.org/>; see also JOHN HAGAN ET AL., *IRAQ AND THE CRIMES OF AGGRESSIVE WAR I* (2015).

71. U.S. Senate, Select Committee on Intelligence, *Committee Study of the Central Intelligence Agency's Detention and Interrogation Program*, S. Rep. No. 113-288 (2014), available at <http://www.intelligence.senate.gov/sites/default/files/documents/CRPT-113srpt288.pdf>.

72. See generally Leila Nadya Sadat, *America's Drone Wars*, 45 CASE W. RES. J. INT'L L. 215 (2012).

73. Leila Nadya Sadat, *Genocide in Syria: International Legal Options, International Legal Limits, and the Serious Problem of Political Will*, 5 IMPUNITY WATCH L.J. 1, 9 (2015), available at <http://impunitywatch.com/wp-content/uploads/2015/04/Sadat-IW-FINAL.pdf>.

the Security Council;⁷⁴ but it is not clear whether that initiative will bear fruit. Meanwhile, more than 400,000 Syrians have lost their lives, millions have been displaced, and Russia has apparently annexed parts of Ukraine. The Paris attacks of November 2015 were discussed in the Security Council,⁷⁵ but there has not been a concerted effort to make a *legal* as opposed to a policy argument for military action in Syria in response.⁷⁶

Given this record of noncompliance and disrespect for the Nuremberg principles by the great powers, it is perhaps unsurprising that we find other States following suit. The African Union proposal two years ago to create a new African Court of Justice and Human Rights that would provide heads of state with immunity from prosecution is just one example,⁷⁷ as is the recently announced withdrawal of two African States from the Court. Other countries are retreating from the exercise of universal jurisdiction, even in *Pinochet*-type cases.⁷⁸ These are worrisome trends.

IV. CONCLUSION

Let me conclude by restating the obvious: The record of compliance with the Nuremberg principles is mixed. At the same time, the Nuremberg legacy itself is extraordinary, and its importance is hard to overstate. On the occasion of the 70th anniversary of the trials, I want to conclude on a cautiously optimistic note. We come to meetings like this neither to unthinkingly engage in self-adulation nor to wallow in destructive self-criticism. Rather, our job is to help make international criminal justice stronger, fairer, more effective, and more respected. This brings me to three final points.

74. See, e.g., Letter dated Dec. 14, 2015 from the Permanent Representative of Liechtenstein to the United Nations addressed to the President of the Secretary-General, U.N. Doc. A/70/621 (Dec. 14, 2015).

75. See S.C. Res. 2249, U.N. Doc. S/RES/2249 (Nov. 20, 2015); S.C. Press Release, *Security Council Press Statement on Terrorist Attacks in Paris*, U.N. Doc. SC/12121 (Nov. 13, 2015).

76. Although the United States has communicated its position to the United Nations Security Council stating “in accordance with the UN Charter and its recognition of the inherent right of individual and collective self-defense,” the US would use “*necessary and proportionate military action*” in Syria. S.C. Res. 2249, U.N. Doc. S/RES/2249 (Nov. 20, 2015), this legal position has not been forthcoming in debates at the Council, and has been criticized as overly vague.

77. Executive Council of the African Union, *The Report, The Draft Legal Instruments and Recommendations of the Specialized Technical Committee on Justice and Legal Affairs*, ¶¶ 24–27, Doc. EX.CL/846(XXV) (June 2014).

78. See LUC REYDAMS, EUROPEAN PARLIAMENT, *THE APPLICATION OF UNIVERSAL JURISDICTION IN THE FIGHT AGAINST IMPUNITY* (Trans European Policy Studies Ass’n ed., 2016), available at <http://statewatch.org/news/2016/apr/ep-study-universal-jurisdiction-fight-against-impunity-4-16.pdf> (examining the reasons behind this retreat and highlighting overreaches of the principle in several European countries).

First, Nuremberg and the international community's experience with the ad hoc international criminal tribunals demonstrate that international justice doesn't have to be perfect to be good. Holding up Nuremberg to an impossible, imagined standard is neither fair nor productive. The same is true for the International Criminal Court. Jackson himself argued that he was not asking the Tribunal to make the commission of war impossible, but to put international law and its precepts squarely "on the side of peace."⁷⁹

Second, as aforementioned, international criminal trials are not the only way to ensure accountability for the commission of international crimes—they are not the only tools available. There are many ways to enforce international humanitarian law and the Nuremberg principles. These include human rights courts, national courts, truth commissions, the International Criminal Court, the International Court of Justice, fact finding commissions of inquiry, UN human rights bodies, national civil lawsuits, and ad hoc and mixed model international criminal tribunals. I am sure there are others which I have not mentioned, or do not exist yet but are to be established. To enhance the effectiveness of the Nuremberg principles, we need to broaden our thinking, get creative and draw from the rich talent present all over the globe to improve the international criminal justice system. And we will, I daresay, do even better than they did in 1945 because we can tap into an additional fifty percent of this international talent that is *female*, something that was apparently overlooked at Nuremberg.

Finally, we cannot forget that the Nuremberg trials and, fifty years later, the establishment of the International Criminal Court, were nothing short of miracles, neither of which was expected or foreseen by many knowledgeable observers at the time. Today is a day to celebrate those extraordinary events and honor the memories of the trailblazing individuals who came before us. It seems only proper to remember our dear friend and colleague, the late Judge Hans-Peter Kaul, who was firmly committed to the Nuremberg principles and felt that the trials were "an historic must." In his lecture to this Academy in 2012, he wrote that he felt that "dramatic encounters here in Nuremberg, this shocking look into the mirror of the Nazi crimes—it was necessary for the German people, as some kind of catharsis."⁸⁰

79. Jackson Opening Statement, *supra* note 4, at 155.

80. Hans-Peter Kaul, *The Nuremberg Legacy and the International Criminal Court—Lecture in Honor of Whitney R. Harris, Former Nuremberg Prosecutor*, 12 WASH. U. GLOBAL STUD. L. REV. 637, 646 (2013).

Likewise, I would also like to evoke the memory of former Nuremberg Prosecutor Whitney Harris, who wrote in 1999:

Nuremberg in 1946, and Rome in 1998, stood fast against the pressures of the precedents of the past. Nuremberg refused to apply executive punishment against its vanquished enemies, according them the rights of accused persons under the law. Rome rules that every person is subject to the law.

.....

Nuremberg and Rome stand against the resignation of humankind to its self-debasement and its self-destruction. The achievements of that great trial and historic conference in elevating justice and law over inhumanity and war give promise for a better tomorrow.⁸¹

Friends and colleagues, your Excellencies, ladies and gentlemen, it has been an extraordinary opportunity for me to make the pilgrimage to this place, to engage in this conversation, to participate in your debates. I am sure that our meetings and exchanges over the next two days will be rich and fruitful, and I remain deeply honored to have been invited to address such a distinguished and accomplished group.

Thank you so much for your kind attention.

81. HARRIS, *supra* note 2, at 593.