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*International Criminal Court*

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# APPLYING THE PRINCIPLES OF NUREMBERG IN THE INTERNATIONAL CRIMINAL COURT

PHILIPPE KIRSCH\*

## I. INTRODUCTION

Mr. Chancellor,  
Sen. Dodd,  
Mr. Mayor,  
Mr. Harris,  
Honoured Guests,  
Ladies and Gentlemen,

I would like to thank the Whitney Harris Institute and Washington University for the opportunity to speak to you this evening.

This weekend we are marking the 60th anniversary of the judgment of the International Military Tribunal at Nuremberg. This Tribunal was followed by a series of trials carried out by the Allied powers in post-war Germany. We are here because the Nuremberg trials constituted a historic moment in the development of international law. They were important in their own right as a response to the atrocities of the Second World War. At the same time, they gave rise to a new system of international criminal justice. This system includes national courts, ad hoc international and mixed tribunals, and now the International Criminal Court (“ICC”). All of these institutions are rooted in Nuremberg.

I would not presume to lecture you tonight on Nuremberg. Many of you are experts on the Nuremberg trials, and several of you—Whitney Harris, Ben Ferencz, and Henry King—were key participants. I will instead offer some thoughts from the perspective of someone who is involved in a similar endeavour at the ICC.

In my remarks this evening, I intend to speak about the meaning of the Nuremberg trials, their legacy, how that legacy has been embodied in the ICC, and what the ICC is doing today.

## II. THE NUREMBERG TRIALS

I will start with a few words on the Nuremberg trials themselves. Previous war crimes trials by national courts focused on minor defendants

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for isolated and well-established violations of the law of war. At Nuremberg, not only military leaders, but also high-level officials and even private citizens faced trial for some of the most serious crimes known to humanity. We all owe a great deal to those who made the Nuremberg trials happen, including Robert Jackson, Thomas Dodd, Whitney Harris, Ben Ferencz and Henry King.

The Nuremberg trials rested on two fundamental principles. First, individuals can and should be held accountable for the most serious international crimes. The judgment of the Nuremberg Tribunal famously declared, “Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.”<sup>1</sup> Ensuring accountability is important in itself, but it is also important because allowing impunity for widespread or systematic atrocities can have serious consequences for international peace.

The second principle is that individuals should only be punished through a fair trial which safeguards the rights of the accused. Here of course, we are reminded of Robert Jackson’s statement to the Tribunal: “We must never forget that the record on which we judge these defendants today is the record on which history will judge us tomorrow. To pass these defendants a poisoned chalice is to put it to our own lips as well.”<sup>2</sup>

Although the Nuremberg trials also declared many other important principles of procedural and substantive law, it is these two fundamental ideas, accountability and fair trials, which were at the core of Nuremberg’s meaning. These two ideas subsequently became the basis for the legacy of Nuremberg trials.

### III. THE LEGACY OF THE NUREMBERG TRIALS

I would like to turn now to the legacy of the Nuremberg trials. If the message of Nuremberg is that those committing international crimes should be punished, then it is logical that a court (or several courts) should exist to punish these crimes. And these courts must rigorously uphold the standards of fairness and due process.

The Nuremberg trials were never intended to be mere historical events. Those who participated in them saw them as the beginning of a new era of

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1. “International Criminal Law,” *Encyclopedia Britannica* (2007), available at <http://www.britannica.com/eb/article-24853>.

2. Robert H. Jackson, *Opening Statement Before the International Military Tribunal*, <http://roberthjackson.org/man/theman2-7-8-1> (last visited Apr. 9, 2007).

accountability. For example, shortly after the Nuremberg Tribunal concluded, John Parker, one of the Tribunal's alternate Judges, said, "It is not too much to hope that what we have done may have laid the foundation for the building of a permanent court with a code defining crimes of an international character and providing for their punishment."<sup>3</sup>

Ideally, all crimes would be prosecuted by domestic courts. Ordinarily, this is what happens. However, in exceptional circumstances, in the face of the worst atrocities, national courts have been either unwilling or unable to act. This may be because agents of the state direct or are complicit in the crimes as was the case in Nazi Germany. Or, as in other situations, conflict can lead to the collapse of government institutions, including the judiciary. In these situations an international court is needed to punish serious crimes.

For nearly fifty years, the Cold War prevented the establishment of any international criminal court. During this time, serious crimes were committed around the world and went unpunished. The Nuremberg legacy was unfulfilled.

The situation changed when the Cold War ended in 1989. International criminal justice once again became a realistic possibility. The United Nations established ad hoc tribunals in response to atrocities, first in the Former Yugoslavia and later in Rwanda. These tribunals are descendants of the Nuremberg trials. They again showed that international criminal justice is possible. However, they only partially fulfilled the legacy of Nuremberg. This is because ad hoc tribunals face several limitations: first, they have only covered a particular country or geographical region. Crimes that occur elsewhere cannot be punished by these tribunals. Second, these tribunals respond primarily to past events. They are by and large not designed to address future crimes. Third, their creation depends on the political will of the international community of the day. As a result, such tribunals have been the exception, not the rule. These limitations also diminish the deterrent effect of ad hoc tribunals.

A permanent, truly international criminal court is necessary for the punishment of international crimes. Equally important, only a permanent and readily available court can most effectively deter future crimes.

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3. John J. Parker, *The Nuremberg Trial*, 30 J. AM. JUD. SOC. 109–15 (1946–47).

#### IV. THE INTERNATIONAL CRIMINAL COURT

I would like to turn now to the International Criminal Court and how it is intended to fill this need. The ICC was established through a treaty negotiated in 1998 by 160 states meeting in Rome. It builds on the two core principles of Nuremberg: the need for accountability for serious crimes and the importance of fair trials.

Like Nuremberg, the ICC is intended to hold individuals accountable for the most serious international crimes. The Nuremberg Tribunal had jurisdiction over both crimes against humanity and war crimes. The ICC also has jurisdiction over these crimes. Additionally, the Nuremberg Tribunal had jurisdiction over crimes against peace, which are referred to as crimes of aggression in the ICC Statute.

The states which negotiated the ICC Statute could not agree on a definition of aggression or conditions for the exercise of the Court's jurisdiction. They considered that the ICC should not exercise jurisdiction over a crime if it could not be precisely defined. In addition, they did not agree on how the ICC's exercise of jurisdiction should relate to the United Nations Security Council's role in finding that a state has committed aggression. Nonetheless, the legacy of Nuremberg was so strong that most states insisted it be included in the Statute. However, the ICC will only exercise jurisdiction over the crime of aggression once it is defined and conditions for the exercise of the Court's jurisdiction are agreed.

The ICC Statute builds considerably on the initial crimes tried at Nuremberg in two ways. First, the definitions in the ICC Statute and in the supplementary Elements of Crimes are far more detailed than those in the Nuremberg Charter and the statutes of recent ad hoc tribunals.

Second, the ICC Statute reflects well-established developments in international law since Nuremberg. I would highlight two such provisions. The most obvious example is that the ICC has jurisdiction over a fourth offense: the crime of genocide. At the time of Nuremberg, the crime of genocide did not exist as such. Since the adoption of the Genocide Convention in 1948, this crime has become established in customary international law. Another example is the specific inclusion of crimes of sexual violence, such as rape, when committed as a war crime or as a crime against humanity.

The ICC's ability to ensure accountability is reflected in a number of other provisions rooted in Nuremberg. I would highlight two such provisions. First, at Nuremberg, an individual's position as a Government official could not absolve him of responsibility. Second, Nuremberg made clear that acting under superior orders was not a defense for the

commission of atrocities. These principles are embodied in the ICC Statute, even more precisely. Those who commit crimes will be held accountable regardless of their status or their orders.

We must remember that Nuremberg came about, in part, because of the German judicial system's failure to provide accountability for serious crimes under the Third Reich. In fact, in one of the Nuremberg trials carried out by the U.S. Military Tribunal, *United States v. Altstoetter*, the court convicted several high officials for using the judicial system to commit Nazi crimes. Nuremberg was a court of last resort.

The ICC is also a court of last resort. In the case of the ICC this is reflected in the principle of complementarity. Under this principle, the Court does not intervene if a domestic system is carrying out its responsibilities. A case is not admissible if it is being or has been investigated or prosecuted by a state with jurisdiction. The ICC will act only if a state is unwilling or unable genuinely to carry out an investigation or prosecution.

I would like to turn now to the other fundamental principle shared by both Nuremberg and the ICC—the importance of fair trials. Both the Nuremberg Tribunal and the ICC incorporated elements taken from different countries' legal systems. This is an inevitable part of establishing an international tribunal that can be agreed to by several states. In evaluating a court like the ICC or the Nuremberg Tribunal, we cannot expect it to exactly mirror our national experience. What we should expect is that it guarantees due process and a fair trial, which can be and is done in different ways in different countries. Understanding this point can be a challenge for lawyers. In the context of setting up the Nuremberg Tribunal, Robert Jackson observed, "Members of the legal profession acquire a rather emotional attachment to forms and customs to which they are accustomed and frequently entertain a passionate conviction that no unfamiliar procedure can be morally right."<sup>4</sup>

I will not, tonight, provide a detailed recitation of the procedural law of the ICC, but many of its features are familiar to Americans. I cannot comment on how well the ICC compares to any one country's system of criminal procedure. However, as you may find it of interest, I would refer you to a memorandum submitted to the U.S. Congress by nine former Presidents of the American Society of International Law. They wrote that the due process protections of the ICC Statute are, "at least as

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4. Robert H. Jackson, U.S. Representative to the International Conference on Military Trials (Dec. 29, 1947), available at <http://www.yale.edu/lawweb/avalon/imt/jackson/preface.htm> (last visited Apr. 9, 2007).

comprehensive as the American Bill of Rights—in certain cases even more detailed and specific.”<sup>5</sup>

The ICC builds upon Nuremberg to ensure the fundamental fairness and impartiality of the Court. Yet, with all the positive comments that have been made about Nuremberg, two related caveats have often been voiced. These have been addressed in the ICC.

The first caveat is that the Tribunal was set up after the fact to deal with crimes that had never before been punished under international law. The ICC cannot act in an *ex post facto* manner. It can only punish crimes committed after the Statute entered into force on July 1, 2002. Moreover, the crimes which the ICC may try are defined in detail in the Statute and the Elements of Crimes. Potential perpetrators are now on notice that their actions may be tried before the ICC.

The second caveat is that the Tribunal was a form of victor’s justice. The Charter establishing the Statute was adopted by the four Allied powers and had jurisdiction over members of the European Axis, specifically Nazi Germany. Those involved in the Tribunal acknowledged the challenges posed by this criticism and did their utmost to mitigate it.

The ICC cannot be seen as victors’ justice. The ICC was freely established by states for themselves through an international treaty. All states could participate in the negotiation of the Statute, and the vast majority did so. A similar approach was applied to the drafting of the ICC’s subsidiary texts, specifically the *Rules of Procedure and Evidence* and the *Elements of Crimes*. In negotiating the Statute and subsidiary texts, states sought wide agreement on establishing a fair and impartial Court. The result has been a Court with broad support. One hundred thirty-nine states signed the Statute before the deadline for signature expired at the end of 2000, expressing their intention to ratify the Statute. Today, 102 countries around the world have ratified the Statute.

Because the ICC Statute is a treaty, states are free to join or not to join the ICC as they see fit. In deciding to join the ICC, states permit the Court to exercise jurisdiction over their nationals or territory. This is an important point. The ICC is not a court of universal jurisdiction. Its jurisdiction is limited to the territories and nationals of States Parties to the Rome Statute or states otherwise accepting its jurisdiction. The ICC is not imposed on states. States must affirmatively accept its jurisdiction. The only exception is when the United Nations Security Council refers a case

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5. Letter from Monroe Leigh, Partner, Steptoe v. Johnson, to Henry Hyde, Chairman of the H. Comm. on Int’l Relations (Feb. 21, 2001).

to the Court in the exercise of its recognized responsibilities to maintain and restore international peace and security. This decision requires the concurrence of all five permanent members of the Security Council.

It was suggested in the course of the conference that these jurisdictional provisions limit the capacity of the Court to act. That is an accurate observation. The reason for these limitations was the necessity, at the Rome Conference, of ensuring that the newly created ICC would derive its strength from two competing but necessary sources: the strength of its provisions and the strength of the support it could muster. States needed to avoid creating either a Court that would enjoy general support but would be too weak to be effective, or a Court that would be strong on paper but would lack the support needed to be viable.

#### V. THE COURT TODAY

I would like to turn now briefly to the Court today—how it is implementing the Nuremberg legacy in practice.

Three States Parties to the Rome Statute—Uganda, the Democratic Republic of the Congo and the Central African Republic—have referred situations occurring on their territories to the Court. In addition, the Security Council has referred the situation in Darfur, Sudan, a state not party to the Rome Statute. The Prosecutor is conducting investigations in three situations—Uganda, the Democratic Republic of the Congo, and Darfur.

In 2005, the Court issued its first warrants of arrest in the situation in Uganda. The warrants were for five alleged members of the Lord's Resistance Army, including its leader, Joseph Kony. The crimes against humanity and war crimes alleged in the warrants include sexual enslavement, rape, intentionally attacking civilians, and forced enlistment of child soldiers. None of the five have yet been arrested. The Court does not have its own police force. It is the responsibility of states and international or regional organizations to arrest and surrender these persons to the Court.

Earlier this year, Mr. Thomas Lubanga Dyilo, a national of the Democratic Republic of the Congo, was surrendered to the Court, pursuant to an arrest warrant. He is alleged to have committed war crimes, namely, conscripting and enlisting children under the age of fifteen and using them to participate actively in hostilities. A hearing will be held to confirm these charges before trial. If the charges are confirmed, the trial will begin.

In addition to the legal differences I mentioned earlier, there is another important difference between Nuremberg and the ICC. The ICC operates



in a very different environment than the Nuremberg Tribunal. By the time the Nuremberg Tribunal was formed, the war was over. The defendants were already in custody, where some of them have been for several years. The occupying armies had taken control and had ready access to documents. As Henry King said, the Nuremberg trials were conducted under ideal conditions.

The ICC, on the other hand, is active in situations of ongoing conflict where crimes continue to be committed. These circumstances do not make the role of the Court any less important. Indeed, the deterrent value of the Court may be greater in the short term as a result. However, operating in these circumstances presents enormous security challenges relating to the protection of the Court's staff, victims and witnesses.

In addition, the ICC faces significant logistical challenges that were unknown at Nuremberg. The situations before the Court are spread across very different countries that often have poorly developed infrastructures in the areas under investigation. Each situation involves multiple local and regional languages.

One of the biggest differences to Nuremberg is that the Court does not have its own police force, much less an army. As Ben Ferencz said, all societies need laws, courts and enforcement. For the ICC, enforcement capabilities are in the hands of states, not the Court. The cooperation of states is, therefore, absolutely crucial in obtaining the arrest and surrender of persons wanted by the Court. Cooperation is also essential in other areas, such as in providing evidence, relocating witnesses, and enforcing the Court's sentences. The main challenge to the success of the Court will be ensuring sufficient cooperation.

## VI. CONCLUSION

Despite the differences I have mentioned, I have emphasised how the International Criminal Court is the continuation of the Nuremberg trials. It took nearly fifty years for the Nuremberg participants' vision of a permanent successor to their efforts to be established. Now, we have that permanent court. The establishment of the ICC is the natural continuation of Nuremberg's legacy.

However, there is still much work to do. Whitney Harris made this point in the context of the adoption of the ICC Statute in Rome. He wrote, "Seven hundred years may pass before mankind is able to eliminate war in the world and establish a system of universal justice. Rome was the

beginning, the end may never come. For like Rome itself, the struggle for peace, law and justice in the world is eternal.”<sup>6</sup>

The ICC is not, and can not be, a panacea. It alone cannot end impunity or deter crimes. Doing so will require international cooperation with and support for the Court. It will also require national efforts to investigate and prosecute crimes. We must not forget that punishing crimes is primarily a national responsibility. The ICC is only a Court of last resort to redress the gravest crimes.

Nuremberg is our collective heritage. Fulfilling its legacy is our collective responsibility. In this conference we heard mention of the problems and challenges facing the ICC. It is important to address such issues, but it is also important not to focus so much on immediate issues as to forget that we have a Court that is permanent in nature and that is only three years-old. There will be easier and harder periods for the ICC. We must always keep in mind that the fundamental reasons why it was created are as relevant as ever and that we share a collective responsibility to ensure the Court’s success.

The world has come too far, and the consequences of failure are too great. We must continue to carry forth the Nuremberg legacy and make an effective, permanent international court a lasting reality.

Thank you.

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6. 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. 689 (2007).