

Landmark Cases in Public International Law

Edited by
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1

Introduction

EIRIK BJORGE AND CAMERON MILES

There is some tendency on the part of English lawyers to regard that body of custom and convention which is known as International Law, as fanciful and unreal; as a collection of amiable opinions, rather than a body of legal rules. The text writers have much to answer for in this respect. Their real function is to record and collate existing usage. The function which they have striven to assume has been that of authorship. They frequently prescribe, not what is, but what they think ought to be, the practice of nations. Rules originating thus, necessarily command but scanty reverence; and perhaps nothing has tended more to lessen the esteem in which International Law is held than the misapprehension which has been begotten.¹

I

IN THE AUTUMN of 1885, Pitt Cobbett²—a barrister of Gray’s Inn and a tutor at the Universities of Oxford and London—published a volume of leading cases on public international law. Books of this kind were, in an age before the *International Law Reports* and the *Max Planck Encyclopedia of Public International Law*, essential to the discipline’s practice, containing excerpts of and helpful commentary on the various decisions (almost entirely of domestic courts) that had helped shape the field, such as it then was.

¹ P Cobbett, *Leading Cases and Opinions on International Law* (London, Stevens and Haynes, 1885) v (*Leading Cases*).

² Cobbett was not much of a barrister: despite having chambers at 4 King’s Bench Walk in the Temple, he saw himself as an academic, and never practised. He was, however, one of the principal legal figures of early Australia. Born in Adelaide in 1853, he migrated to England with his parents in 1864, matriculating into University College, Oxford, in 1873. He took a BA in 1876, an MA and BCL in 1880, and a DCL in 1887. In 1890, he returned to Australia, where he was appointed to the Challis Professorship in the Faculty of Law at the University of Sydney and became its first Dean. *Leading Cases* ran to three editions—the second appeared in 1892 and the third (in two volumes, *Peace* and *War and Neutrality*) in 1909 and 1913. Further editions were published by others posthumously. At the time of his death in 1919, he was completing a major work on the Constitution of Australia. The manuscript was very close to completion; but in 1920, the High Court of Australia handed down judgment in *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129 (the famous *Engineers’ Case*), which radically altered the nature of federalism in the Commonwealth through eradication of the doctrines of implied intergovernmental immunities and reserved state powers. The book would have required substantial revisions and was thus never published. Further: FC Hutley, ‘Cobbett, William Pitt (1853–1919)’ in *Australian Dictionary of Biography*, vol 8 (Melbourne, Melbourne University Press, 1981).

It is fair to say that much of Cobbett's *Leading Cases* would be unfamiliar to the modern eye—both in terms of its structure and the cases that Cobbett alighted upon as being worthy of reportage. The most recent edition of *Brownlie's Principles of Public International Law*³ is divided into 11 parts, beginning with the sources and relations of international law, and then moving through personality and recognition, territorial sovereignty, the law of the sea, the environment, international transactions, jurisdiction, nationality, state responsibility, the protection of individuals and groups (diplomatic protection, human rights and international criminal law) before concluding, somewhat euphemistically, with disputes (encompassing the claims process, settlement of international disputes, and the use and threat of force by states). A single chapter—the last in *Brownlie's Principles*—is given over to questions relating to war, and it confines these within the four walls of the UN Charter.

Leading Cases, on the other hand, is divided into three parts: peace, war, and neutrality. 'Peace' begins with a discussion of international personality by reference to the *Cherokee Nation v State of Georgia*,⁴ in which the US Supreme Court determined that whilst the Cherokee were a distinct political society, they could not be considered foreign states for the purposes of the US Constitution, likening the relation between the US and the various Native American tribes as like that of 'a ward to its guardian'. It then moves through the topics of state jurisdiction (comprising a single case, *R v Keyn*,⁵ also known as *The Franconia*), before dealing with public and private vessels, foreign sovereigns, questions of nationality, ambassadors, the slave trade, and piracy. 'War' considers steps short of war, the effects of declarations of and the outbreak of hostilities, trading with the enemy, ransom contracts, capture in war, prize and booty, salvage, and the termination of hostilities. The majority of cases and incidents included in this part concern the activity of ships.⁶ Less than familiar names leap out: *The Hoop*,⁷ *The Vrouw Margaretha*,⁸ *The Swineherd*.⁹

³ J Crawford, *Brownlie's Principles of International Law*, 8th edn (Oxford, OUP, 2012).

⁴ 30 US (5 Peters) 1 (1831). Surprisingly, the following year, the Court declared that the Cherokee nation was sovereign, such that Georgia state law could not be enforced in Cherokee territory: *Worcester v Georgia*, 31 US (6 Peters) 515 (1832). Further: JC Burke, 'The Cherokee Cases: A Study in Law, Politics, and Morality' (1969) 21 *Stanford LR* 500.

⁵ (1876) 2 Ex D 63. It is irresponsible to suggest that this case stands for any concrete proposition: see CA Miles, 'The *Franconia* Sails On: Revisiting the Intellectual History of the Territorial Sea in the United States, Canada and Australia' (2013) 13 *OUCLJ* 347.

⁶ A high number of these concern judgments given by Sir William Scott, a judge in the English High Court of Admiralty and perhaps the greatest British international lawyer of his day, during the Napoleonic Wars and in the aftermath of the American War of Independence: HJ Bourguignon, *Sir William Scott, Lord Stowell: Judge of the High Court of Admiralty, 1798–1828* (Cambridge, CUP 1987).

⁷ Setting out the general rule that in times of war trading with the enemy without the permission of the Sovereign was forbidden: (1799) 1 C Rob 196.

⁸ Establishing that property consigned by an enemy to a neutral vessel will be held liable for condemnation unless evidence is furnished that the consignee is the true owner of the goods: (1799) 1 C Rob 336.

⁹ Establishing that war, although usually terminated via treaty of peace, can in certain situations be terminated by simple cessation of hostilities, or the conquest and submission of one of the belligerent states, in whole or in part: extracted in P-A Merlin, *Répertoire de jurisprudence, Tome XI (Prise)* (Paris, Chez Garnery, 1815) 183.

'Neutrality' follows a similar theme: neutral territory is considered at length, followed by a lengthy section on the duties of neutral states, the laws of blockade, contraband, continuous voyage, and the Rule of the War of 1759.¹⁰ One case does prompt recognition in modern eyes: the *Alabama Claims*¹¹ (cited as 'the Geneva Arbitration and Award') is the subject of substantial discussion. Another familiar sight is not a case at all: *The Caroline* incident.¹² Although *Leading Cases* might today seem parochial, by the standards of its time, the fact that Cobbett's collection contained *any* genuinely international materials was nothing if not forward-looking.¹³

The overlap (or rather, the *lack* thereof) between the schema of *Leading Cases* and *Brownlie's Principles* demonstrates the 'widening and thickening'¹⁴ that international law has experienced in the 128 years between the publication of the two books. Cobbett's international law was little more than a rule-based extrusion of international diplomacy, in which what few directives there were for the regulation of hostilities took pride of place, with the rest occupied by the corollaries of sovereignty: personality, territory, nationality, and immunity. The engine room of the lawmaking process was diplomatic interaction between the chancelleries of states awarding themselves the epithet 'civilised' and the judgments of their courts. Even temporary international tribunals were scarce, and the idea of a permanent international court impossible. Beyond bodies such as the various river commissions, international organisations did not exist in any meaningful sense. *Leading Cases*, therefore, was a fair presentation of a case law worthy of the somewhat dubious name given to it by WE Hall—'a rough jurisprudence of nations'.¹⁵

The international law of *Brownlie's Principles*, however, is reflective of a fully articulated legal system, complete with a distinct theory of sources, developed secondary rules of responsibility, an international organisation of plenary membership in the UN, and an ever-expanding constellation of international courts and tribunals headed informally by the International Court of Justice (ICJ) and producing hundreds of decisions, judgments, and awards annually. It regulates—and is acknowledged as regulating—the relations of states with a depth and complexity that would have been impossible when *Leading Cases* went to press. Cobbett, one suspects, would have been pleased (and possibly surprised) to see what his chosen field has become.

¹⁰ Being that, on the outbreak of war, a neutral was entitled to continue trade that it had previously possessed, but was not permitted to commence new trade with either belligerent without violating the law of neutrality: *The Immanuel* (1799) 2 C Rob 186.

¹¹ *Alabama Claims* (US/UK) (1871) 29 RIAA 125.

¹² *The Caroline* (1840–1841) 29 BFSP 1129. Further: RY Jennings, 'The *Caroline* and *McLeod* Cases' (1938) 32 *AJIL* 82.

¹³ Contemporaneous collections pertaining to international issues would contain only judgments by the domestic courts, including the prize courts, whereas the opinions on international matters which were included were by domestic Law Officers: see, eg, G Chalmers (ed), *Opinions of Eminent Lawyers* (Burlington, C Goodrich & Co, 1858); RG Marsden (ed), *Documents relating to Law and Custom of the Sea* (London, Navy Records Society, 1916).

¹⁴ R Higgins, 'A Babel of Judicial Voices: Ruminations from the Bench' (2006) 55 *ICLQ* 791, 792.

¹⁵ WE Hall, *A Treatise on International Law*, 8th edn (Oxford, OUP, 1924) 395.

II

The purpose of this slightly meandering introduction is to highlight that the structure, complexity, and mission of international law has evolved rather more in the past century than other systems of law. That being the case, it is appropriate to take stock, to consider how we reached this point and what cases have been—or are thought to have been—essential in bringing us here. *Landmark Cases in Public International Law* brings together 22 analyses of some of the most prominent international decisions of the past two centuries in international law with a view to interrogate critically their continued relevance. Confirming the rapid evolution of the field, only one would have been familiar to Cobbett: *The Charming Betsy*,¹⁶ an 1804 decision of the US Supreme Court that he did not, more than 80 years later, see fit to include in his *Leading Cases*.¹⁷ Even if one accepts that, in the normal course of events, a period of reflection is needed before a case can be considered a landmark, that seems a glaring omission.¹⁸

This brings us on to the question of what makes a case a ‘landmark’. In its literal sense, a landmark is a point of reference on the road to somewhere else—an object that lets the traveller know that they are not the first person in that place. In a more metaphorical sense, it is something of continued significance, attesting to the progress of a particular subject. All of the cases in this volume were selected by us, as editors, for their *reputation* as landmarks of public international law. In receiving the brief, contributors were given little more guidance than this description, an assigned case (or cases), and the request that they actively question whether these judgments, awards, or opinions were still to be afforded that appellation—or, indeed, whether they had deserved it in the first place. Given the unique environment in which international law still operates, they were also asked to analyse their assigned cases as diplomatic as well as legal artefacts.

In selecting the cases, we were motivated by several considerations: (1) to prioritise the decisions of international courts and tribunals over domestic courts so as not to replicate the kind of parochialism that was forced on Cobbett and his contemporaries; (2) to ensure an even balance between international courts and tribunals; and (3) to ensure parity between different sub-systems of international law. A possible criticism of the final selection might be that it gives too much weight to the combined case-law of the Permanent Court of International Justice (PCIJ) and its successor, the ICJ. To our minds, this is defensible: as the informal apex of the system of international courts and tribunals, the Court (in both its guises) has been responsible for many of the foundational decisions of the modern system of international law, and continues to serve this function today as the only permanent international court of plenary jurisdiction. Furthermore, and notwithstanding the recent florescence of

¹⁶ *Murray v The Charming Betsey*, 6 US (2 Cranch) 64 (1804). WS Dodge, this volume, ch 1.

¹⁷ The case was granted right of berth in the third edition: *Leading Cases*, 3rd edn, vol 1 (London, Stevens and Haynes, 1909).

¹⁸ That being said, having had ourselves to make the kind of difficult determinations that Cobbett was called on to make, however, we do not believe that all the beams are in the eyes of others: we take heart from the possibility that obvious omissions can be included in later editions or volumes.

international adjudicatory bodies, it was for most of its history the proverbial ‘only game in town’.¹⁹ To seek diversity at the expense of the Court’s contribution would potentially undermine the project’s mission. Nevertheless, efforts have been made to balance these competing requirements. At any rate, whilst the reader may question the inclusion of some cases rather than others, we hope they will agree that the cases selected and the insights of the individual contributors give a three-dimensional understanding of international law: what it was, what it is, and what it might yet become.

* * *

The book commences with William S Dodge’s discussion of two of the foundational cases for the interaction of international and municipal law: *The Charming Betsy*; and *The Paquete Habana*.²⁰ Both are decisions of the US Supreme Court and represent the only municipal cases in the volume, for the reasons already given. In a nice piece of symmetry, Dodge’s analysis is bookended by the final chapter, Omri Sender and Sir Michael Wood’s contribution on *Jurisdictional Immunities of the State*, the ICJ’s signal elaboration on the law of state immunity and its interaction with the jurisdiction of municipal courts.²¹

Although the chapters in between are arranged chronologically, distinct themes and sub-groups appear—as is often the case, however, the decisions within these groups often make significant forays into more general questions of international law. The first of these are a series of diplomatic protection cases before the PCIJ and ICJ that provided much of the grounding not only in that area of law but in diverse areas such as the definition of state acts, remedies in international law, and corporate nationality. Michael Waibel discusses the *Mavromattis Palestine Concessions* case, a classic of diplomatic protection.²² Chester Brown considers the various phases of the *Factory at Chorzów* saga²³ and the famous pronouncement of the PCIJ on remedies in international law. Judge Giorgio Gaja analyses the ongoing relevance of *Barcelona Traction*,²⁴ the decision that refined the rules on corporate nationality and

¹⁹ See KJ Alter, ‘The Multiplication of International Courts and Tribunals after the End of the Cold War’, in CPR Romano, KJ Alter and Y Shany (eds), *The Oxford Handbook of International Adjudication* (Oxford, OUP, 2014) 63.

²⁰ To pre-empt an obvious criticism, the volume does not commence with a discussion of the *Alabama* Claims for two reasons. First, the decision is today cited more for the fact that it took place than for any enduring principles of law—the substantive questions raised in the arbitration were determined in accordance with certain agreed rules on the duties of neutrals that have little or no application today. (Though, we recognise that the decision is still cited as an early authority for the principles—now largely taken for granted—of *compétence de la compétence* (see, eg, *Dallah Real Estate and Tourism Holding Company v The Ministry of Religious Affairs, Government of Pakistan* [2011] 1 AC 763, [81]) and that international law prevails over domestic law (see, eg, *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947*, [1998] ICJ Rep, 12, 34)). Second, and more importantly, it would be difficult to improve on the superlative analysis of the arbitration by Lord Bingham: T Bingham, ‘The *Alabama* Claims Arbitration’ (2005) 54 *ICLQ* 1.

²¹ O Sender and M Wood, this volume, ch 22.

²² M Waibel, this volume, ch 3.

²³ C Brown, this volume, ch 4.

²⁴ G Gaja, this volume, ch 13.

formally recognised the concept of obligations *erga omnes*. The historical endpoint of this discussion is reached in Sam Luttrell's chapter on the proceedings in *Vivendi v Argentina*,²⁵ an episode representative of the modern system of treaty-based investor–state dispute settlement that made a significant contribution to the distinction between contract and treaty claims in international law.

Another distinct bloc contains two early cases on the law of territory. Eirik Bjorge tackles the *Island of Palmas* case,²⁶ and with it the modern foundation of the *lex temporis* in international law. This chapter also represents an opportunity to consider the legacy of one of the great figures of the field in the early twentieth century: Max Huber, who sat as sole arbitrator in that case. Ambassador Rolf Einar Fife then considers *Legal Status of Eastern Greenland*,²⁷ an early case that elaborated on the modern requirements for the assertion of sovereignty over territory and the effect of unilateral undertakings by states in international law.

Later in the book, cases begin to emerge on another significant sub-system: international law and the environment. Multiple chapters touch on this area. Duncan French addresses *Trail Smelter*,²⁸ the dispute between the US and Canada that begat an entirely novel tributary of law: transboundary harm. Laurence Boisson de Chazournes and Makane Moïse Mbengue consider the ICJ's decision in *Gabčíkovo-Nagymaros*,²⁹ the famous 'Danube Dam' case that also made significant statements on state responsibility and the law of treaties. Finally, Callum Musto and Catherine Redgwell discuss *US—Shrimp*³⁰ (also known as *Shrimp/Turtle*), a decision on trade and the environment that brings into play dispute settlement and the World Trade Organization.

Another later chronological appearance is international criminal law and the law of human rights. Katherine O'Byrne and Philippe Sands revisit the origins of the former field in the *Nuremberg Trials*,³¹ at which the concept of an international crime was made reality and the word 'genocide' first used in open court. Sarah Nouwen and Michael Becker consider the decision in which international criminal law emerged in its modern form, the interlocutory appeal in *Tadić v Prosecutor*,³² charting the contributions of that case to general international law, international humanitarian law, international criminal law and international legal reasoning. From the perspective of human rights, Sir Nigel Rodley opines on *Tyler v UK*,³³ a decision of the European Court of Human Rights with much to say on the interpretation of treaties, and which crystallised the modern standard of what constitutes inhuman, cruel, and degrading treatment.

Yet another grouping is that of the law of the sea. Two chapters address this theme, although they are perhaps more significant for what they say about other areas of international law. Douglas Guilfoyle confronts the case of the *SS Lotus*³⁴

²⁵ S Luttrell, this volume, ch 19.

²⁶ E Bjorge, this volume, ch 6.

²⁷ RE Fife, this volume, ch 7.

²⁸ D French, this volume, ch 8.

²⁹ L Boisson de Chazourne and MM Mbengue, this volume, ch 18.

³⁰ C Redgwell and C Musto, this volume, ch 20.

³¹ P Sands and K O'Byrne, this volume, ch 9.

³² SMH Nouwen and MA Becker, this volume, ch 16.

³³ N Rodley, this volume, ch 14.

³⁴ D Guilfoyle, this volume, ch 5.

and subjects to searching inquiry its notorious eponymous principle—that what is not expressly prohibited for states in international law must be permitted. Nikiforos Panagis and Antonios Tzanakopoulos address the *North Sea Continental Shelf* cases—formally a maritime delimitation, but also arguably the source of the modern understanding of the development of customary international law and its relationship to treaty norms.

International humanitarian law and the law concerning use of force form yet a further distinct cluster. In this context, Robert Kolb considers the various phases of *Nicaragua*,³⁵ a true landmark concerning both the use of force under the UN Charter and the extent to which international law and the ICJ could be used to hold a superpower such as the US to account. Surabhi Ranganathan addresses the ICJ's conclusions in the *Nuclear Weapons Advisory Opinions*,³⁶ and uses these as an opportunity to address the Court's troubled relationship with nuclear weapons more generally. Finally, John Dugard addresses another of the Court's advisory opinions in *Wall*,³⁷ and what that decision says about international humanitarian law, the law of occupation, the law of self-defence, and other areas. He also takes the opportunity to consider the wider effect of the Court's advisory jurisdiction, and to address one of the most long-running and problematic issues in international affairs, the situation of Israel–Palestine.

Finally, three chapters consider cases connected to the ICJ and its relationship with the UN as its principal judicial organ. At the broadest level, Tom Grant and Rowan Nicholson, in their chapter on the *Early United Nations Advisory Opinions*,³⁸ address some of the early decisions of the ICJ that set in place the administrative structure of the UN and refined its relationship with its member states, setting it on course to become the vital body it is today. In so doing, the Court also shaped the contours of the modern law of international organisations. Judge James Crawford and Paul Mertenskötter consider the *South West Africa Cases*,³⁹ a two-judgment and four-advisory-opinion epic that reveals important truths about the workings of the ICJ and its relationship with the other principal organs of the UN, wrapped up in the historical context of South Africa's long-running resistance to international law and public opinion in relation to its occupation of Namibia. Finally, Cameron Miles addresses the Court's role in the development of the international civil procedure through the lens of *LaGrand*,⁴⁰ a case in which the ICJ put to an end a controversy of some eight decades concerning its capacity to order binding interim relief.

III

As it is customary to remark, books of this kind would not exist without the assistance of a large number of people. With that in mind, we first extend our profound thanks to the contributors, who tolerated with charm and good humour the usual combination

³⁵ N Panagis and A Tzanakopoulos, this volume, ch 12.

³⁶ S Ranganathan, this volume, ch 17.

³⁷ J Dugard, this volume, ch 22.

³⁸ TD Grant and R Nicholson, this volume, ch 11.

³⁹ J Crawford and P Mertenskötter, this volume, ch 10.

⁴⁰ C Miles, this volume, ch 21.

of chaser emails and ‘helpful’ suggestions that characterise modern academic editors,⁴¹ and despite which they produced chapters of uniformly high quality.⁴²

We also thank Sir Franklin Berman KCMG QC for his gracious Foreword, produced under similar circumstances, as well as the anonymous referees to whom we sent selected chapters for review.

This project commenced with an academic seminar held at All Soul’s College, Oxford, on 17 June 2015. That seminar, which was successful, would not have been possible without the good offices of Catherine Redgwell, to whom we are extremely grateful. Similar essential assistance, of a financial character, was provided by Jesus College, Oxford and Trinity Hall, Cambridge.

At Hart Publishing (now an imprint of Bloomsbury) Sinead Moloney was enthusiasm personified in receiving the original proposal for the book, and Bill Asquith and Francesca Sancarlo efficiently moved it through the publication process. Much-needed copy-editing assistance was ably provided in the first instance by Reece Lewis, a doctoral candidate in public international law at the University of Bristol. Hart’s own copy-editor, Vicki Hillyard, was a model of efficiency.

Finally, a word of explanation is perhaps owed for the image that graces the cover of this book. It is the architectural drawings for the ‘World Peace Centre’ in The Hague, reflecting an expansion plan for the Dutch capital by the architect, urban planner and designer Hendrik Petrus Berlage (1856–1934).⁴³ This elaborate design would have incorporated the Peace Palace, which can be seen in the top right of the octagon that dominates the image. However, like many things in international law, despite the best will in the world, issues of cost and practicality intervened, and the *lex ferenda* never became *lex lata*.

* * *

On 25 January 2017, shortly before this volume went to press, Professor Sir Nigel Rodley died.⁴⁴ He was 75 years old. He is survived by his wife, Lyn. They were married in 1967.

⁴¹ Although some older descriptions of the editorial function remain perfectly adequate. See eg A Bierce, *The Devil’s Dictionary* (Oxford, OUP, 1999):

EDITOR, n. A person who combines the judicial functions of Minos, Rhadamanthus and Aeacus, but is placable with an obolus; a severely virtuous censor, but so charitable withal that he tolerates the virtues of others and the vices of himself; who flings about him the splintering lightning and sturdy thunders of admonition till he resembles a bunch of firecrackers petulantly uttering his mind at the tail of a dog; then straightway murmurs a mild, melodious lay, soft as the cooing of a donkey intoning its prayer to the evening star. Master of mysteries and lord of law, high-pinnacled upon the throne of thought, his face suffused with the dim splendors of the Transfiguration, his legs intertwined and his tongue a-cheek, the editor spills his will along the paper and cuts it off in lengths to suit. And at intervals from behind the veil of the temple is heard the voice of the foreman demanding three inches of wit and six lines of religious meditation, or bidding him turn off the wisdom and whack up some pathos.

⁴² It should be noted that although limited opportunity was given to the authors to update their chapters during the publication process, the law as presented is generally as it was in December 2016.

⁴³ A Effinger, *Het Vredespaleis, 1913–1988* (The Hague, AW Sijthoff, 1988) 61.

⁴⁴ See now G Robertson and I Crewe, ‘Sir Nigel Rodley obituary: Human rights lawyer committed to eradicating torture’ (*The Guardian*, 2 February 2017) <www.theguardian.com/law/2017/feb/02/sir-nigel-rodley-obituary> accessed 4 April 2017; B Çali, ‘In memoriam: Professor Sir Nigel Rodley’ (*EJIL: Talk!*, 2 February 2017) <www.ejiltalk.org/in-memoriam-professor-sir-nigel-rodley/> accessed 4 April 2017.

For most students and scholars of international law, it is considered a life well spent to have contributed to the field in a manner worthy of citation in the spirit of Article 38(1)(d) of the ICJ Statute. Giants of the discipline may, however, exceed this. Sir Nigel, in a very real sense, was one of the creators of what we now know to be the international law of human rights. Born in the West Riding of Yorkshire in 1941, he was educated initially at Clifton College, then attended the University of Leeds (LLB, 1963), Colombia University (LLM, 1965) and New York University (LLM, 1970). He was awarded a PhD from the University of Essex (1992) and an LLD from Dalhousie University (2000), where he had taken up his first teaching position as a young academic.

Sir Nigel's professional contributions to human rights commenced when in 1973 he took up a position as the legal adviser of Amnesty International, a role he held until 1990 whilst also occupying a teaching position at the London School of Economics. Whilst in these positions, he played a key role in the drafting of the UN Convention Against Torture.⁴⁵ After that time, he was appointed a Reader at the Faculty of Law at the University of Essex, and promoted to full Professor in 1994. From 1993 to 2001, he served as Special Rapporteur on Torture of the UN Commission on Human Rights, thereafter becoming a member of the UN Human Rights Committee, as established under the International Covenant on Civil and Political Rights,⁴⁶ he served as its chairperson from 2013 to 2014. His academic writings on human rights and international humanitarian law were no less essential, in particular his 1973 article (co-authored with another giant of the field, Tom Franck) in the *American Journal of International Law* on the law of unilateral humanitarian intervention,⁴⁷ his 1987 treatise on *The Treatment of Prisoners under International Law*,⁴⁸ and his 2002 contribution to *Current Legal Problems* on the definition of torture in international law,⁴⁹ produced at a time of moral crisis for practitioners in the field.

As befitted his colossal energies, Sir Nigel was made a Knight Commander of the Order of the British Empire in 1998 in recognition of his services to human rights and international law. In 2005, he received the American Society of International Law's Golter T Butcher Medal for distinguished work in human rights.

For all this, Sir Nigel was and remained an unfailingly generous and encouraging man and it was in this capacity that we knew him as a contributor to this volume. His chapter on *Tyrer v UK* is characteristic of his voice: deeply human, deeply learned and perceptive of the strengths and weaknesses of international law. We dedicate this book to his memory.

⁴⁵ Convention against Torture and Other Cruel, Inhuman and Degrading Treatment, 10 December 1984, 1465 UNTS 85.

⁴⁶ 16 December 1966, 99 UNTS 171.

⁴⁷ T Franck and N Rodley, 'After Bangladesh: The Law of Humanitarian Intervention by Military Force' (1973) 67 *AJIL* 275.

⁴⁸ N Rodley, *The Treatment of Prisoners under International Law* (Oxford, OUP, 1987). A second edition appeared in 1999 and a third—produced with the assistance of Matt Pollard—in 2009.

⁴⁹ NS Rodley, 'The Definition(s) of Torture in International Law' (2002) 55 *CLP* 467.

Trial Before the International Military Tribunal at Nuremberg (1945–46)

KATHERINE O'BYRNE AND PHILIPPE SANDS¹

I. INTRODUCTION

OVER SEVEN DECADES ago, on 21 November 1945, US Chief Prosecutor Robert H Jackson gave his opening address² at the trial of major Nazi war criminals before the International Military Tribunal ('IMT' or 'the Tribunal') at Nuremberg.³ Jackson told the eight judges:

The privilege of opening the first trial in history for crimes against the peace of the world imposes a grave responsibility. The wrongs which we seek to condemn and punish have been so calculated, so malignant, and so devastating, that civilization cannot tolerate their being ignored, because it cannot survive their being repeated. That 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.⁴

On 30 September and 1 October 1946, for the first time in history, an international tribunal convicted individuals of international crimes, including crimes against peace (waging aggressive war), war crimes and crimes against humanity. The principles of international law recognised in the Charter⁵ and Judgment⁶ of the Nuremberg Tribunal were later affirmed by the UN General Assembly,⁷ and the

¹ Thanks to Megan Hirst and Ailsa McKeon for their editorial assistance on previous drafts of this chapter.

² Given on Day 2, 21 November 1945, the Indictment having been read on Day 1.

³ This chapter deals only with the trial of major war criminals before the IMT, and not the subsequent trials of lower-level functionaries and private citizens before the Nuremberg Military Tribunals 1946–49. As to the subsequent trials, see the comprehensive analysis in KJ Heller, *The Nuremberg Military Tribunals and the Origins of International Criminal Law* (Oxford, OUP, 2012).

⁴ Nuremberg Trial Proceedings, Volume 2, Day 2, Wednesday 21 November 1945, Transcript 97–98. The Proceedings Volumes, including full transcripts, are available online via Yale Law School at the Avalon Project: <http://avalon.law.yale.edu/subject_menus/imt.asp>.

⁵ United Kingdom of Great Britain and Northern Ireland, United States of America, France and Union of Soviet Socialist Republics, *Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis* ('London Agreement'), and *Charter of the International Military Tribunal* ('Nuremberg Charter'), 82 UNTS 280 (entered into force 8 August 1945).

⁶ *France v Göring*, Judgment and Sentence [1946] 22 IMT 203, (1946) 41 AJIL 172, (1946) 13 ILR 203, ICL 243 (IMTN 1946) (1 October 1946) ('Nuremberg Judgment').

⁷ UNGA Res 95(I), 'Affirmation of the Principles of International Law Recognized by the Charter of the Nürnberg Tribunal', adopted on 11 December 1946.

seven key principles established at Nuremberg were codified by the International Law Commission.⁸

At the time of the trial itself, many individuals closely involved recognised it to be a landmark. In his closing address before the Tribunal, Sir Hartley Shawcross, the chief British prosecutor, stated:

This Trial must form a milestone in the history of civilization, not only bringing retribution to these guilty men, not only marking that right shall in the end triumph over evil, but also that the ordinary people of the world—and I make no distinction now between friend or foe—are now determined that the individual must transcend the state.⁹

The judges presiding over the trial were no less convinced of the trial's significance. Norman Birkett (later Lord Birkett), the associate British judge, called it 'the greatest trial in history'.¹⁰ US prosecutor Telford Taylor, even more involved in later cases, wrote that Nuremberg was conceived as 'an episode that would leave an enduring judicial monument, to mark as a giant step in the growth of international law'.¹¹ US Secretary of War Henry Stimson, one of the architects of the Tribunal, concluded: 'The surviving leaders of the Nazi conspiracy against mankind have been indicted, tried, and judged in a proceeding whose magnitude and quality make it a landmark in the history of international law'.¹² Even Nuremberg's defence lawyers, while criticising aspects of the trial's legitimacy, admitted to its landmark qualities. Otto Kranzbühler, representing Hitler's successor Admiral Karl Dönitz, wrote: 'Nuremberg was conceived, and can only be understood, as a revolutionary event in the development of international law ... One was fully aware that a step forward was being ventured'.¹³

As significant as that step was, for a time it seemed as though it might be the only footfall along the path to realising international criminal justice. Certainly, the answer to the question whether Nuremberg is a landmark may have been different prior to the establishment of the ad hoc international criminal tribunals for Rwanda and Yugoslavia in 1993. Then, it may have been seen as a point of interest in the landscape, a postscript to a war that devastated the world, but otherwise as a failed or infertile model. During the second half of the twentieth century, crimes against humanity and mass killings abounded: not only in Yugoslavia and Rwanda, but in Cambodia, Bangladesh, Kenya, Zimbabwe, South Africa, Sudan, Indonesia, Iran, Iraq, East Timor, China, Chile and Argentina; revolutions, conflicts and repressions

⁸ Pursuant to General Assembly Resolution 177 (II), paragraph (a); see International Law Commission, *Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal* (1950), adopted by the International Law Commission at its second session in 1950 and submitted to the General Assembly as a part of the Commission's report covering the work of that session, including the commentaries of the Commission on the Principles, (1950) 2 ILC Ybk 374. The seven principles are: individual criminal responsibility for international crimes; internal law cannot relieve responsibility under international law; official position does not relieve responsibility; superior orders are not a defence; the right to a fair trial; crimes against peace, war crimes and crimes against humanity are punishable; and complicity is a crime.

⁹ Nuremberg Trial Proceedings, Volume 19, Day 188, Saturday, 27 July 1946, Transcript 527–28.

¹⁰ MR Marrus, 'The Nuremberg Trial: Fifty Years After' (1997) 66 *The American Scholar* 563, 563.

¹¹ T Taylor, *Nuremberg and Vietnam: An American Tragedy* (New York, New York Times Books, 1970) 80.

¹² HL Stimson, 'The Nuremberg Trial: Landmark in Law' (1947) 25 *Foreign Affairs* 179, 179.

¹³ O Kranzbühler, 'Nuremberg Eighteen Years Afterwards' (1965) 14 *DePaul Law Review* 333, 335.

rising from the disintegration of pre-war colonisation, opportunistic power grabs and age-old enmities. Most went unattended by judicial responses. Only after the end of the Cold War did international criminal law begin to flourish, with the establishment of the ad hoc tribunals, various hybrid mechanisms, and the International Criminal Court (ICC). Through the work of these institutions, the indictment and prosecution of warlords, military commanders, and former and serving heads of state gave new life to the principles established at Nuremberg. But for Nuremberg (and the proceedings in Tokyo,¹⁴ themselves catalysed by Nuremberg), it is unlikely that these subsequent developments would have occurred at all, or in the form they did.

Today, Nuremberg's status and reputation as a landmark in the topography of international law, particularly international criminal law, is not in doubt. All roads lead to Nuremberg, it may be said. But despite this legacy, the grand aspirations expressed during the Nuremberg trial have been fulfilled only to a limited extent, and serious questions remain as to the commitment of the international community to the role of international criminal courts. Seventy years after the trial, a vicious civil war rages in Syria, which international courts have so far failed to reach. Longstanding conflicts and repressive regimes continue to provide fertile ground for international crimes and impunity in the Middle East, Africa, Central Asia, and elsewhere. Meanwhile, in Libya, Sudan, the Democratic Republic of the Congo, the Central African Republic, Rwanda, Cambodia, and other states touched by the work of international criminal mechanisms, accountability continues to be the exception and the power of deterrence remains highly questionable. Western powers—including the United Kingdom and United States—appear to remain beyond the reach of international criminal courts, even where jurisdictional grounds are clear (as in the case of Afghanistan) or plausible (as in the case of allegations of involvement in 'extraordinary rendition'). Thinking about Nuremberg at this juncture raises fundamental questions. If Nuremberg is a landmark, what makes it so? What did it signify at the time, how have its principles been deployed and developed, and what does it mean for us today?

Nuremberg is a landmark for multiple legal, political, historical, and social reasons, all of which form the basis of extensive analysis elsewhere, and not all of which can be explored here. Much writing and discussion has been dedicated to analysing the context, precursors, progress, outcomes, and legacies of the trial. As well as creating a record of Nazi crimes, Nuremberg provided a model for new institutions of international law and an approximation of due process to the captured leaders of a totalitarian regime. Of course, the concept of a landmark does not necessarily carry normative content. The trial continues to be controversial,¹⁵ which is not surprising given that it was born of a compromised, experimental, and highly political process.

¹⁴ See International Military Tribunal for the Far East, Judgment of 12 November 1948, in J Pritchard and SM Zaide (eds), *The Tokyo War Crimes Trial* (New York, Garland, 1981), vol 22.

¹⁵ See, eg, Georg Schwarzenberger, 'The Judgment of Nuremberg', in G Mettraux, *Perspectives on the Nuremberg Trial* (Oxford, OUP, 2008) 167; E Borchard, 'The Impracticality of 'Enforcing' Peace' (1946) 55 *Yale LJ* 966; G Finch, 'The Nuremberg Trial and International Law' (1947) 41 *AJIL* 20; F Schick, 'The Nuremberg Trial and the International Law of the Future' (1947) 41 *AJIL* 770; D Luban, 'The Legacies of Nuremberg', in Mettraux, 638; K Sellars, 'Imperfect Justice at Nuremberg and Tokyo' (2010) 21 *EJIL* 1085.

The focus of this chapter is on three major themes which can be said to have established Nuremberg as a legal landmark. The first of these is the foundation of the Tribunal itself to create a new institution of international law. While not entirely without precedent, Nuremberg was for its time the most successful example of an international war crimes tribunal, which created a model for further international tribunals and trials.

The second major theme is the creation and development of new and distinct categories of international criminal liability in the Nuremberg Charter, Indictment and Judgment. The lawyers and judges involved in the Nuremberg trial formed the foundation for our modern conceptions of aggression (crimes against peace), crimes against humanity and genocide.¹⁶ Crimes against peace, made for the first time the subject of formal criminal sanctions in the Nuremberg Charter, were the predecessors of the crime of aggression in the Statute of the International Criminal Court, finally defined at Kampala in June 2010. The concept of crimes against humanity, first articulated in the Nuremberg Charter, has since developed to provide more concrete protection to individuals in civilian populations in times of war or peace. It is also necessary to say something of the role of Nuremberg as a platform for the development of Raphael Lemkin’s concept of ‘genocide’, despite the fact that genocide was not mentioned in the Charter or Judgment of the Tribunal.

The third major theme, that of the individual in international law, runs as an undercurrent through the institutional and substantive legal aspects of the trial. Nuremberg, for the first time in history, gave effect to international accountability for individual leaders and contributed to the provision of international protection to individual civilians. Nuremberg and its principles, alongside the advent of international human rights law, played a part in effecting a shift in the focus of international law on state-to-state relations towards a complex and ever-evolving exchange between individuals, groups, and states.¹⁷

Part II of this chapter briefly traverses the well-known history leading up to the establishment in 1945 of the IMT as a new international legal institution, the genesis of the trial, models and precedents, and its basic factual parameters. Part III examines the three key developments in international criminal law precipitated by Nuremberg, explains how they came to be, and analyses their developments since the trial. The chapter concludes in Part IV with a reflection on legacy, how Nuremberg cemented the place of individuals at the forefront of the international legal framework, and how it continues to serve as a foundational and imperfect model for international tribunals and prosecutions today.

¹⁶ In the limited space available, this chapter does not attempt to cover Nuremberg’s contribution to the concept of war crimes, which, while one of the pillars of international criminal law, existed previously in the law of armed conflict and was not subject to major innovation at Nuremberg. Similarly, the chapter does not explore the concept in the Charter of conspiracy or common plan.

¹⁷ For a detailed treatment of these themes, and of the lives and contributions of Sir Hersch Lauterpacht and Raphael Lemkin in particular, see P Sands, *East West Street: On the Origins of Genocide and Crimes Against Humanity* (London, Weidenfeld & Nicolson, 2016); P Sands, *My Nazi Legacy: What Our Fathers Did* (London, Wildgaze Films, 2015); P Sands, *A Song of Good and Evil* (various performances around the UK and Europe, 2014–16).

II. FOUNDATIONS FOR AN INTERNATIONAL TRIBUNAL

A. Fall and Capture of the Nazi Leadership

The horrors committed by the Nazi regime in Europe are well known. Sir Hartley Shawcross, in his closing speech at Nuremberg on 26 July 1946, described the ten million needless deaths of soldiers, sailors and other combatants in aggressive wars waged by Hitler in Poland, Denmark, Norway, Belgium, the Netherlands, Luxembourg, Yugoslavia, Greece, and the Soviet Union.¹⁸ He lamented the deaths of civilians:

12 million men, women, and children ... in the cold, calculated, deliberate attempt to destroy nations and races ... Two-thirds of the Jews in Europe exterminated, more than 6 million of them on the killers' own figures. Murder conducted like some mass production industry in the gas chambers and the ovens of Auschwitz, Dachau, Treblinka, Buchenwald, Mauthausen, Maidanek, and Oranienburg.

The foundations for Nuremberg were laid swiftly in the months following the fall of the Nazi leadership in Spring 1945. On 30 April 1945 in Berlin, Hitler, having announced to his generals that the war was lost, committed suicide with his wife, Eva Braun, inside the *Führerbunker*. The Battle of Berlin raged outside as the Soviet Red Army approached. The next day, Goebbels and his wife committed suicide, having killed their six children.¹⁹ Himmler followed suit after his capture and detention in British custody.

Those Nazi ringleaders who had survived the war were arrested by the Allied forces in the days and weeks following Hitler's demise. On 3 May 1945, Hans Frank, Hitler's chief lawyer and Governor General of occupied Poland, was captured by American troops near his home in Bavaria.²⁰ Hermann Göring, former Commander of the Luftwaffe, had been expelled from the Nazi Party after offering to take over as Führer, an overture perceived by Hitler as traitorous. On 6 May 1945, he made his way to American lines and was taken into custody. On 7 May 1945 in Rheims, France, Alfred Jodl, Chief of the Operations Staff of the Armed Forces High Command, signed an unconditional surrender to the Allies. On 23 May 1945, Karl Dönitz, named in Hitler's will as *Reichspräsident* and Supreme Commander of the Armed Forces, surrendered to British troops with the rest of the Flensburg Government.

¹⁸ Nuremberg Trial Proceedings, Volume 19, Day 186, Friday 26 July 1946, Transcript 432.

¹⁹ See, eg, WL Shirer, *The Rise and Fall of the Third Reich: A History of Nazi Germany* (New York, Simon & Schuster, 1960) ch 31: 'Goetterdaemmerung: The Last Days', 1016–17, 1019.

²⁰ Frank was arrested along with an extensive art collection and 42 volumes of his diaries, which were later used as evidence against him at trial. He had notated an address to his colleagues with the words: 'We must remember that we, who are gathered together here, figure on Mr Roosevelt's list of war criminals. I have the honour of being Number One'. The documents were prosecution exhibits at the proceedings of the IMT against Frank: Document 2233-AA-PS: Frank Diary, Official Meetings, 1943: Warsaw, 21/25/1943, in *Nazi Conspiracy and Aggression*, Volume IV: Documents 1409-PS-2373-PS (US Government Printing Office 1946) 916–17. See generally Sands, *East West Street* (n 17) 209–63.

B. Options for Dealing with the Nazi Leaders

The British judge at Nuremberg, Geoffrey Lawrence (Lord Oaksey), later posited: ‘There were, I suppose, three possible courses: to let the atrocities which had been committed go unpunished; to put the perpetrators to death or punish them by executive action; or to try them. Which was it to be?’²¹ Contemporaneous records reveal discussion of various approaches, but show that the decision to try the senior Nazi leadership was initially motivated primarily by politics, propaganda, and posterity, rather than a desire to develop or enforce international law.

During the war, at the Moscow Conference of October 1943, the UK, the US, and the Soviet Union, on behalf of 32 nations, issued a ‘Statement on Atrocities’ intended as both a plan for the delivery of summary justice post-war and as an undisguised warning to the Nazis, whom the Allies regarded as responsible for ‘government by terror’, ‘ruthless cruelties’, and ‘monstrous crimes’.²² Local trials were the proposed option for foot-soldiers, lower-level officers and regular party members, who would be ‘judged and punished’ in the countries where atrocities had been committed.²³ ‘Let those who have hitherto not imbrued their hands with innocent blood beware lest they join the ranks of the guilty,’ the Statement threatened, ‘for most assuredly the three Allied powers will pursue them to the uttermost ends of the earth’.²⁴

At that early stage, the attitude towards the Nazi leadership was more perfunctory, and envisaged a summary form of joint punishment without judgment: ‘German criminals whose offenses have no particular geographical localization ... will be punished by joint decision of the government of the Allies’.²⁵ The Morgenthau Plan of 1944,²⁶ initially supported by Roosevelt and Secretary Stimson, recommended that Nazi ‘Arch Criminals’ be identified, apprehended and ‘put to death forthwith by firing squads made up of soldiers of the United Nations’.²⁷ This met with public disapproval, particularly from Jewish groups in the US.²⁸ Stimson changed his mind, writing to the US President on 9 September 1944: ‘the very punishment of these

²¹ G Lawrence, ‘The Nuremberg Trial’ (1947) 23 *International Affairs* 151, 152–53. See further Stimson, ‘The Nuremberg Trial’ (n 12): ‘There were three different courses open to us when the Nazi leaders were captured: release, summary punishment, or trial’.

²² The Statement on Atrocities was appended to the *Joint Four-Nation Declaration* (30 October 1943) between the US, UK, the Soviet Union and China. Note that the Statement itself was agreed to only between the US, UK and the Soviet Union, not China.

²³ *ibid.* Over dinner at the Soviet Embassy in Tehran on 29 November 1943, Prime Minister Churchill, Marshal Joseph Stalin and President Franklin D Roosevelt discussed what was to be done with the German forces. While Stalin advocated their liquidation in large numbers, Churchill ‘took strong exception to what he termed the cold-blooded execution of soldiers who fought for their country’. Churchill said that ‘war criminals must pay for their crimes and individuals who had committed barbarous acts, and in accordance with the Moscow Document, which he himself had written, they must stand trial at the places where the crimes were committed. He objected vigorously, however, to executions for political purposes.’: Bohlen Minutes, Tehran Conference: Tripartite Dinner Meeting, November 29, 1943, Soviet Embassy, 8.30 pm.

²⁴ *ibid.*

²⁵ HJ Morgenthau, Memorandum to the President: ‘Treasury Plan for the Treatment of Germany’ (4 September 1944), in BF Smith, *The American Road to Nuremberg: The Documentary Record 1944–1945* (Stanford, Hoover Institution Press, 1982) 27–28.

²⁶ *ibid.*

²⁷ *ibid.*

²⁸ See, eg, American Jewish Conference, ‘Statement on Punishment of War Criminals’, 18 August 1944.

men in a dignified manner consistent with the advance of civilization will have the greater effect on posterity ... I am disposed to believe that at least as to the chief Nazi officials, we should participate in an international tribunal constituted to try them'.²⁹

Churchill, on the other hand, initially favoured dealing with the Nazi leadership by political means. In November 1943, Churchill proposed to his Cabinet that a list should be compiled 'of all major criminals', namely 'the Hitler and Mussolini gangs' and 'the Japanese War Lords', that they should 'be declared world outlaws' and that once captured and identified, should be 'shot to death within six hours and without reference to higher authority ... By this means we should avoid all the tangles of legal procedure'.³⁰ The recently declassified diaries of Guy Liddell, then head of counter-espionage at MI5, reveal that Churchill proposed at the Yalta Conference in February 1945 that 'a fact-finding committee should come to the conclusion that certain people should be bumped off and that others should receive varying terms of imprisonment',³¹ with punishment to be implemented by military bodies. Roosevelt and Stalin preferred that the Nazis should be tried before a court: Roosevelt favoured this course of action because 'Americans would want a trial'; Stalin, 'on the perfectly frank grounds that Russians liked public trials for propaganda purposes'.³²

What the historical documents make clear is that the establishment of the IMT was not initially driven, at least at the highest level, by an appetite for a legal process per se or any sort of commitment to the elaboration of a new and broader model of international criminal justice—indeed, leaders including Churchill wished to avoid overcomplicated legalism. Their priority was not the creation of a new legal institution, but how to extend their military might to ensure that the Nazis were penalised and permanently vanquished. The Allied occupation of Germany has been characterised as an *occupatio sui generis* enabling war crimes proceedings based on Germany's unconditional surrender and the assumption of supreme authority by the four powers.³³ It was judges, lawyers and legal philosophers, whose contribution is discussed below, who pressed the argument that the world needed new legal rules and instruments to demonstrate abhorrence and to guard against the recurrence of such atrocities, and who devised the legal principles on which the Tribunal was based. The IMT managed to unite, though imperfectly, both principled and pragmatic aims.

The British eventually acquiesced in the plan for a trial under pressure from the Americans. President Roosevelt had died on 12 April 1945, and was replaced by the more vociferously pro-trial President Harry Truman.³⁴ No doubt the decision

²⁹ Cited in GJ Bass, *Stay the Hand of Vengeance: The Politics of War Crimes Tribunals* (New Jersey, Princeton University Press, 2000) 165.

³⁰ *ibid.*, 186, 188.

³¹ See I Cobain, 'Britain favoured execution over Nuremberg trials for Nazi leaders', *The Guardian* (26 October 2012).

³² *ibid.*

³³ See RK Woetzel, *The Nuremberg Trials in International Law* (London, Stevens & Sons Limited, 1962) 58–95, esp 89.

³⁴ The British turnaround appeared to have been prompted by a statement on 2 May 1945 by President Truman, announcing America's commitment to a trial: 'It is our objective to establish as soon as possible an international military tribunal; and to provide a trial procedure which will be expeditious in nature and which will permit no evasion or delay—but one which is in keeping with our tradition of fairness toward those accused of crime': see E Stover, V Peskin and A Koenig, *Hiding in Plain Sight: The Pursuit of War Criminals from Nuremberg to the War on Terror* (Berkeley, University of California Press, 2016) 29.

to proceed with a trial was also influenced by the fact that the distasteful prospect of affording a manifestly evil leader a platform to mount a defence was obviated by events at the close of the war. Hitler, Himmler, Goebbels and Mussolini, the ring-leading ‘gangsters’ most likely to make a trial both unpalatable and unmanageable,³⁵ were all dead by the end of the spring of 1945.

C. Models for the Tribunal

Although there was no concrete model for an international trial for wartime crimes of military leaders captured by a victorious enemy, some precedents did exist. The examples most often cited include the trial in 1474 by judges of Austria and a number of Swiss cities of Peter von Hagenbach, the former Governor of Breisach on the Upper Rhine, for atrocities including rape and murder;³⁶ the executive action taken against Napoleon Bonaparte by the Congress of Vienna following his escape from Elba in 1815; and the arrest and trial at Leipzig of German war criminals in 1921, following World War I, under Articles 227–30 of the Treaty of Versailles.³⁷ This included a failed attempt to extradite ex-Kaiser Wilhelm von Hohenzollern from the Netherlands for a ‘supreme offence against international morality and the sanctity of treaties’, resisted by the Netherlands on the basis that no such crime existed in international law.³⁸

The uncovering of previously buried historical materials means that comparators continue to accumulate. In early 2017, the Wiener Library in London opened the archive of the UN War Crimes Commission, closed since the late 1940s. The archive contains documents relating to thousands of prosecutions, by member states of the Commission, of Axis leaders including Hitler, including evidence and charges compiled while the concentration camps were in operation.³⁹

Commentators have debated whether such examples constitute true precedents for Nuremberg, and distinctions are frequently drawn based on the nature of each forum, the crimes tried, the law applied, and the relationship between trial

³⁵ T Taylor, *The Anatomy of the Nuremberg Trials: A Personal Memoir* (New York, Skyhorse Publishing, 1993) 32.

³⁶ See, eg, G Gordon, ‘The Trial of Peter von Hagenbach: Reconciling History, Historiography and International Criminal Law’, in KJ Heller and G Simpson (eds), *The Hidden Histories of War Crimes Trials* (Oxford, OUP, 2013); T McCormack, ‘From Sun Tzu to the Sixth Committee: The Evolution of an International Criminal Law Regime’ in T McCormack and G Simpson (eds), *The Law of War Crimes: National and International Approaches* (The Hague, Kluwer Law International, 1997) 31–63.

³⁷ Treaty of Versailles, 1919 (225 CTS 188), Art 227.

³⁸ See M Cherif Bassiouni, ‘An Appraisal of the Growth and Developing Trends of International Criminal Law’ in J Dugard and C Van den Wyngaert (eds), *International Criminal Law and Procedure* (Aldershot, Dartmouth, 1996) 79–95.

³⁹ See Wiener Library, United Nations War Crimes Commission: records, available at <<http://wiener.soutron.net/Portal/Default/en-GB/RecordView/Index/92681>>; O Bowcott, ‘Opening files on Holocaust will “rewrite chapters of history”’, *The Guardian* (18 April 2017). For the first academic analysis of this material, see D Plesch, *Human Rights After Hitler—The Lost History of Prosecuting Axis War Crimes* (Washington DC, Georgetown University Press, 2017).

and armed conflict.⁴⁰ Looking back, from a perspective informed by the modern proliferation of war crimes tribunals with a variety of jurisdictional set-ups and by prosecutions at the domestic level of international crimes, it may be argued that such distinctions serve to illustrate the forward movement of international prosecutions in various forms. It cannot, however, be said that any provides a parallel; Nuremberg was in a class of its own in virtually every respect.

In addition to its innovations of procedure and principle, it is arguable that Nuremberg represented the first tribunal that could properly be called ‘international’ in character. This argument has been based primarily on two forms of international sanction:⁴¹ first, that 23 nations signed up to the London Agreement and the Charter, representing a significant proportion of the international community of states at the time; and, second, that the international community through the General Assembly of the United Nations later endorsed the principles applied at Nuremberg⁴² and confirmed the understanding that the Charter and Judgment were instruments of international law.⁴³

In late 1944, a new plan, drafted primarily in the form of a six-page memorandum by US War Department lawyer Lieutenant Colonel Murray C Bernays entitled ‘Trial of European War Criminals’,⁴⁴ was presented to the US Secretary of State. Bernays’ plan contained a number of innovations, particularly in the area of collective criminality, sowing seeds that developed into what we now view as some of Nuremberg’s most significant legacies.

First, Bernays developed the notion of criminal liability for ‘conspiracy or common plan’, which allowed the Nuremberg indictment to reach individuals at the top of the Nazi power structures and the authors of Nazi political doctrine for acts prior to 1939, not just those who carried out orders and implemented policies. Second, the plan supported prosecution of crimes committed against German and Axis-territory nationals on religious, racial or political grounds, which, because they were not committed against enemy populations, were not traditional war crimes (ie what became the concept of crimes against humanity). Third, Bernays recommended the collective criminalisation of organisations including the SA, the SS, the Gestapo, the Nazi Government, and the Nazi Party.

Meanwhile, the Soviet lawyer, legal academic and head of the Soviet Extraordinary State Commission for the Investigation of German War Crimes, Professor Aron Trainin, put forward two further major innovations in the Soviet plan: trying the Germans for waging aggressive war (crimes against peace) and doing so with

⁴⁰ See, eg, Woetzel, *The Nuremberg Trials* (n 33) 17–39.

⁴¹ *ibid.*, 49–57.

⁴² UNGA Res 95(I) (n 7).

⁴³ See International Law Commission (n 8). The Commentaries state at paragraph 96 that ‘since the Nürnberg principles had been affirmed by the General Assembly, the task entrusted to the Commission ... was not to express any appreciation of these principles as principles of international law but merely to formulate them’.

⁴⁴ Secretary of War to Secretary of State, Annex: Trial of European War Criminals (memorandum dated 15 September 1944), 27 October 1944. See MC Bernays, ‘Legal Basis of the Nuremberg Trials’ (1946) 35 *Survey Graphic* 5; Smith, *The American Road to Nuremberg* (n 25).

premeditated brutality (crimes against the laws of war).⁴⁵ Bernays’ proposals became the basis of the US plan for a war crimes trial⁴⁶ and the foundation for negotiations between Britain, the US, the Soviet Union and France for the establishment of an international tribunal. Together the proposals set the stage for the design of the Tribunal and its principles at the London Conference in Summer 1945.

D. Overview of the Proceedings

On 8 August 1945, following several months of negotiations, the Charter of the Tribunal was agreed in London by four nations (Britain, the US, the Soviet Union and France).⁴⁷ The London Agreement was ratified by 19 other states. It gave the Tribunal jurisdiction in respect of three substantive crimes (crimes against peace, war crimes, crimes against humanity), via two modes of responsibility: commission of a defined crime, regardless of superiority (‘individual responsibility’), and ‘common plan or conspiracy’. The offences appeared in Article 6 of the Charter as follows:

The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility:

(a) ‘*Crimes against peace*’: namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing.

(b) ‘*War crimes*’: namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labour or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity.

(c) ‘*Crimes against humanity*’: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.

Article 6 went on to provide that criminal responsibility could arise from a conspiracy or common plan:

Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan.

Articles 7 and 8 respectively provided that the official position of a defendant could not be invoked in defence or mitigation, and that superior orders could be considered

⁴⁵ See AN Trainin and AY Vishinsky (eds), A Rothstein (tr), *Hitlerite Responsibility Under Criminal Law* (London, Hutchinson & Co, 1945).

⁴⁶ As approved at meeting at the Pentagon on 9 November 1944.

⁴⁷ See above (n 5).

not as a defence but as a mitigating factor in respect of punishment. Article 9 provided that:

At the trial of any individual member of any group or organization the Tribunal may declare (in connection with any act of which the individual may be convicted) that the group or organization of which the individual was a member was a criminal organization.

The Article allowed for an individual member of the organisation to apply to be heard on the question of its criminality.

Each of the four Allied powers named one judge and one alternate judge, eight judges in all.⁴⁸ Prosecutors were nominated from each of the four countries, including several leading lawyers. Among them were Jackson, a former Attorney-General and serving Supreme Court Justice, for the US, and Sir David Maxwell-Fyfe, assisting Sir Hartley Shawcross, for Britain. Assisting the British team was an Austro-Hungarian-born lawyer, then the Whewell Chair of International Law at the University of Cambridge, Hersch Lauterpacht. Lauterpacht was instrumental in drafting aspects of Article 6 of the Charter and in catalysing the recognition in international law of crimes against individuals. A Polish lawyer, Raphael Lemkin, also born in East Central Europe, travelled from Washington DC to Nuremberg where he clung to the periphery of the American team, but waged his own campaign: having failed to get the concept of genocide included in the Charter, he managed to get it inserted into the Indictment.⁴⁹

Twenty-four accused were named on the Indictment⁵⁰ as having been charged with various combinations of the Charter crimes; 23 were arrested and 21 appeared at trial.⁵¹ The trial began in Courtroom 600 at the Nuremberg Palace of Justice on 20 November 1945, and ran until 1 September 1946. The Tribunal handed down its Judgment on 30 September 1946; individual convictions and sentences were read out on 1 October 1946. Nineteen accused were convicted,⁵² 12 sentenced to death and seven to prison sentences ranging from 10 years to life imprisonment. Ten accused were executed by hanging on 16 October 1946.⁵³ Martin Bormann, Hitler's private secretary, was never captured and was convicted and sentenced *in absentia*. Hermann Goering committed suicide in his cell by biting into a smuggled cyanide pill the night before he was due to be hanged.

⁴⁸ They were: Lord Justice Colonel Sir Geoffrey Lawrence, President of the Tribunal (United Kingdom); Sir Norman Birkett (British alternate); Francis Biddle (United States); John J Parker (American alternate); Professor Henri Donnedieu de Vabres (France); Robert Falco (French alternate); Major General Iona Nikitchenko (Soviet Union); Lieutenant Colonel Alexander Volchkov (Soviet alternate).

⁴⁹ Sands (n 16) 188–89.

⁵⁰ Nuremberg Trial Proceedings, Volume 1, Indictment, Defendants, [I].

⁵¹ They were Hermann Göring, Karl Dönitz, Hans Frank, Wilhelm Frick, Hans Fritzsche, Walther Funk, Rudolf Hess, Alfred Jodl, Ernst Kaltenbrunner, Wilhelm Keitel, Konstantin von Neurath, Franz von Papen, Erich Raeder, Joachim von Ribbentrop, Alfred Rosenberg, Fritz Sauckel, Hjalmar Schacht, Baldur von Schirach, Arthur Seyss-Inquart, Albert Speer and Julius Streicher. Robert Ley, Head of the German Labour Front, committed suicide before the trial began. Gustav Krupp von Bohlen und Halbach, a leading industrialist, was found medically unfit for trial. Martin Bormann, Hitler's private secretary, was not captured and tried *in absentia*, as noted below.

⁵² Fritzsche, von Papen and Schacht were acquitted.

⁵³ Frank, Frick, Jodl, Kaltenbrunner, Keitel, Ribbentrop, Rosenberg, Sauckel, Seyss-Inquart and Streicher.

III. LAWS FOR A NEW WORLD

A. Drafting the Charter

A second respect in which the Nuremberg trial constituted a landmark was its role in the conception and development of new substantive rules of international law. Alongside the design and establishment of the Tribunal itself, those who drafted the Nuremberg Charter made a number of formative contributions to substantive international law, which were applied in the Judgment of the Tribunal and created a legacy that shapes international criminal law today. The core contents of the Charter of the Tribunal, the opening and closing speeches and many of the legal and factual arguments made over the course of the proceedings, as well as the Tribunal's Judgment in 1946, enshrined soon thereafter by the UN General Assembly in the Nuremberg Principles,⁵⁴ changed the landscape and shaped the future direction of international law.

Of all the substantive innovations in the Charter, the drafting, use at trial, and subsequent development of the two most significant concepts are discussed in detail below: crimes against peace (Article 6(a)) and crimes against humanity (Article 6(c)). Also discussed is an international crime that did not make it into the Nuremberg Charter, but which nonetheless has been one of the most significant legacies of the trial: the crime of genocide, or acts intended to destroy groups.

From 26 June to 8 August 1945, representatives of the four victorious powers—the US, France, UK, and the Soviet Union—met in London to draft the Agreement and Charter that would establish the architecture of the Tribunal and the crimes to be tried. There was disagreement on the content of the Charter, and negotiations were difficult.

Some key individuals influenced the inclusion and articulation in the Charter of crimes against peace and crimes against humanity. Robert Jackson, then a former Attorney-General and US Supreme Court Justice known for championing individual liberties, was appointed as US chief counsel in May 1945, and proved a vigorous force during the negotiations on the Charter in London during Summer 1945.⁵⁵ Jackson described the Nuremberg Charter itself as ‘something of a landmark, both as a substantive code defining crimes against the international community and also as an instrument establishing a procedure for prosecution and trial of such crimes before an international court’.⁵⁶ He saw as particularly significant the fact that the

⁵⁴ UNGA Res 95(I) (n 7).

⁵⁵ Sellars explains that he nearly walked out several times: (n 15), 84–85. As a prosecutor, Jackson was regarded as less effective than others in some respects: Telford Taylor recalls that he was criticised for his ‘disappointing’ cross-examination of Goering: Taylor, *Nuremberg and Vietnam* (n 11), 335–47. Maxwell-Fyfe wrote to his wife on 21 March 1946 about his own cross-examination of Goering: ‘Jackson had not only made no impression but actually built up the fat boy further. I think I knocked him reasonably off his perch’: A Topping, ‘Bringing a Nazi to justice: how I cross-examined “fat boy” Göring’, *The Guardian* (20 March 2009); correspondence of Sir David Maxwell-Fyfe available in The Papers of Lord Kilmuir, GBR/0014/KLMR, Churchill Archives Centre at the University of Cambridge. See further D Maxwell-Fyfe, *Political Adventure: The Memoirs of the Earl of Kilmuir* (London, Weidenfeld & Nicholson, 1964).

⁵⁶ Report of Robert H Jackson, United States Representative to the International Conference on Military Trials (Washington DC, US Government Printing Office, 1945) (‘Jackson Report’), viii.

Charter resulted from the collective efforts of individuals from vastly different legal backgrounds:

The significance of the charter's procedural provisions is emphasised by the fact that they represent the first tried and successful effort by lawyers from nations having profoundly different legal systems, philosophies, and traditions to amalgamate their ideas of fair procedure so as to permit a joint inquiry of judicial character into criminal charges.⁵⁷

In negotiating the content of the Charter, Jackson, a pragmatist, relied little on legal theorising; but he did credit the advice and insights of Professor Lauterpacht, with whom he personally consulted in relation to both crimes against peace and crimes against humanity. Lauterpacht had by that time been appointed to the Whewell Chair of International Law at Cambridge. He was personally affected by the subject matter of the Nuremberg trial: his family remained in the ghettos of Zolkiew and Polish Lvov (formerly Lemberg, soon to become Soviet Lviv),⁵⁸ detained as Jews by the Nazis following Operation Barbarossa and placed under the governorship of Hans Frank, one of the Nuremberg accused.⁵⁹ With the exception of Lauterpacht's niece, Inka, they did not survive.⁶⁰

Lauterpacht was engaged by the Foreign Office to work on Anglo-American matters, and in September 1945 was appointed to the British War Crimes Executive, charged with the preparation and presentation of the prosecution of German war criminals.⁶¹ Jackson consulted Lauterpacht on the intricacies of drafting the Charter during the London Conference, and Lauterpacht was instrumental in advising on the terminology and format for the list of crimes. 'I do hope', Jackson wrote in May 1945, 'that we can get together and that I can have the benefit of your good judgment and learning on the difficult subjects with which we must deal'.⁶² On 29 July 1945, Jackson visited Lauterpacht's house in Cranmer Road, Cambridge.⁶³ Elihu Lauterpacht recalled: 'It was at these meetings that Hersch put forward the idea of presenting the case against the major war criminals under three principal headings: crimes against the peace; war crimes; and crimes against humanity'.⁶⁴ That was almost exactly how they were reflected in the Charter.

As will be seen, of all the legal dilemmas faced by the drafters of the Charter, the question of retroactivity of crimes was perhaps the most challenging. In respect of crimes against peace and crimes against humanity, whether the delegates were codifying generally accepted principles of positive law or creating sources of criminal

⁵⁷ *ibid.*, viii–x, quoted in Mettraux, *Nuremberg Trial* (n 15) xiv.

⁵⁸ Polish–Soviet Border Agreement, signed 16 August 1945, entry into force 5 February 1946.

⁵⁹ Sands (n 17) 219–20.

⁶⁰ *ibid.*, 102–05, 299–301.

⁶¹ Sir Hartley Shawcross also drew extensively on Lauterpacht's expertise in preparing for Nuremberg, asking him to draft substantial sections of his speeches for both the opening and closing of the trial. Lauterpacht's drafts were published in full for the first time in H Lauterpacht, 'Draft Nuremberg Speeches' (2012) 1 *CJICL* 45.

⁶² Letter from Robert H Jackson to Hersch Lauterpacht (30 May 1945), quoted in E Lauterpacht, *The Life of Hersch Lauterpacht* (Cambridge, CUP, 2010) 272.

⁶³ Lauterpacht (n 62) 271 fn 18, 272.

⁶⁴ Jackson subsequently attributed this formulation to 'an eminent scholar of international law' (Jackson Report (n 56) 416), whom William E Jackson later identified as Lauterpacht: (n 62) 272 fn 20. See further on this point Sands (n 17) 110–11.

liability *ex post facto* was a vexed question. That the drafters engaged in some innovation is not in doubt, and is part of what makes Nuremberg so significant. In this respect, Nuremberg was a sign of things to come. The issue of retroactivity is an ongoing challenge in international criminal law today: even where the substantive law is established, it is problematic that many of the international tribunals (although not the ICC)⁶⁵ have been established during or after the events they are designed to charge and try.⁶⁶ In respect of individual accused, the willingness to overlook or de-emphasise the *nullum crimen sine lege* and *nulla poena sine lege* principles is a reflection of the wider tension between international criminal law and the right to a fair trial under international human rights law.

Tragically—some may say ironically⁶⁷—the signing of the London Agreement was bookended by two cataclysmic acts of war. Two days beforehand, on 6 August 1945, the US dropped an atomic bomb on Hiroshima. Nagasaki followed one day after the signing, on 9 August 1945.

B. Crimes Against Peace

The term ‘crimes against peace’ derived from the work of Aron Trainin,⁶⁸ who attended the London Conference on behalf of the Soviet Union. The British negotiator, Lord Chancellor William Jowitt, suggested:

I think Professor Trainin’s book treats aggression not as the crime of war but as a crime against peace, and I do think that if you do have a nomenclature it would be well to have a nomenclature that comes from his book, and instead of calling it ‘crime of war’, call it ‘crime against peace’.⁶⁹

⁶⁵ As to which see Rome Statute of the International Criminal Court, UN Doc A/CONF 183/9, 2187 UNTS 90, opened for signature 17 July 1998, (entered into force 1 July 2002) (‘Rome Statute’), Art 24.

⁶⁶ See, eg, D Luban, ‘Fairness to Rightness: Jurisdiction, Legality, and the Legitimacy of International Criminal Law’, in S Besson and J Tasioulas (eds), *The Philosophy of International Law* (Oxford, OUP, 2010) ch 28.

⁶⁷ Note the remarks of Justice Pal in dissent at the International Military Tribunal for the Far East regarding the Allied powers’ use of the atomic bomb: ‘History will say whether ... it has become legitimate by such indiscriminate slaughter to win the victory by breaking the will of the whole nation to continue to fight ... This policy of indiscriminate murder to shorten the war was considered to be a crime. In the Pacific war under our consideration, if there was anything approaching what is indicated in the above letter of the German Emperor, it is the decision coming from the Allied powers to use the bomb. Future generations will judge this dire decision ... It would be sufficient for my present purpose to say that if any indiscriminate destruction of civilian life and property is still illegitimate in warfare, then, in the Pacific war, this decision to use the atom bomb is the only near approach to the directives of the German Emperor during the first world war and of the Nazi leaders during the second world war’: Pal’s dissent was 1,235 pages long and is available at ‘Dissentient Judgment of Justice RB Pal, Tokyo Tribunal’ (12 November 1948) (Tokyo, Kokusho-Kankokai, 1999), at www.cwporter.com/pal10.htm. See also R Falk, ‘The Shimoda Case: A Legal Appraisal of the Atomic Attacks Upon Hiroshima and Nagasaki’ (1965) 59 AJIL 759; Y Tanaka and R Falk, ‘The Atomic Bombing, The Tokyo War Crimes Tribunal and the Shimoda Case: Lessons for Anti-Nuclear Legal Movements’ and Comment (2009) 44 *The Asia-Pacific Journal* 1, esp at 19; CL Blakesley, ‘Acting out against terrorism, torture and other atrocious crimes: contemplating morality, law and history’, in LN Sadat and MP Scharf, *The Theory and Practice of International Criminal Law: Essays in Honor of M. Cherif Bassiouni* (Leiden, Martinus Nijhoff, 2008) 164–67.

⁶⁸ Trainin and Vishinsky, *Hitlerite Responsibility* (n 45).

⁶⁹ Jackson Report (n 56) 416–17.

The question of retroactivity of crimes reared its head in relation to crimes against peace. Did a crime of waging aggressive war exist as a matter of customary international law at the time the Nazis invaded and instigated conflicts in countries across Europe, such that it could give rise to individual criminal responsibility and be made the subject of a criminal charge? And did it matter? If the principle was not so recognised, could it simply be asserted that the Charter was making new law which could legitimately be applied?

It was clear that, by the start of World War II, waging aggressive war was regarded as *unlawful* under international law, and that the Axis powers themselves had subscribed to this view, but it was not yet recognised as a source of individual criminal responsibility. Attempts to curtail the exercise by states of aggressive military force date back to antiquity, but the first codification of a prohibition on aggression at the international level was in the Covenant of the League of Nations, signed by its original parties at Versailles in 1919.⁷⁰ Following World War I, a Commission was formed by the Preliminary Peace Conference to consider the possible criminality of the acts that had provoked the conflict. The Commission concluded that deliberate violations of international law—specifically, breaches of binding treaty obligations—were culpable acts and, on that basis, recommended that the Conference formally condemn such acts. The Commission concluded, however, that no criminal charge could be laid against the responsible authorities or individuals, on the basis of institutional limitations and difficulties of proof, and thought it ‘desirable that, for the future, penal sanctions should be provided for such grave outrages against the elementary principles of international law’.⁷¹ As Lord Birkenhead, British Attorney-General, said at the time:

It is necessary for all time to teach the lesson that failure is not the only risk which a man possessing at the moment in any country despotic powers and taking the awful decision between Peace and War, has to fear. If ever again that decision should be suspended in nicely balanced equipoise, at the disposition of an individual, let the ruler who decides upon war know that he is gambling, amongst other hazards, with his own personal safety.⁷²

The Commission’s recommendation went unheeded. In September 1927, the League of Nations published a Declaration Concerning Wars of Aggression, adopted by roll call of its members,⁷³ which included Germany, Italy and Japan. The Assembly noted its conviction that ‘a war of aggression can never serve as a means of settling international disputes and is, in consequence, an international crime’, and declared that ‘all wars of aggression are, and shall always be, prohibited’ and that ‘the States

⁷⁰ *Treaty of Peace Between Allied and Associated Powers and Germany*, signed 28 June 1919 (entered into force 10 January 1920), Part 1. See further S Glaser, ‘The Charter of the Nuremberg Tribunal and New Principles of International Law’, in Mettraux (n 15); S Glueck, *The Nuremberg Trial and Aggressive War* (New York, Knopf, 1946) 25–34.

⁷¹ ‘Commission on the Responsibility of the Authors of the War and the Enforcement of Penalties’ (1920) 14 *AJIL* 95, 118.

⁷² D Lloyd George, *Memoirs of the Peace Conference* (New Haven, Yale University Press, 1939) 60.

⁷³ *Declaration Concerning Wars of Aggression*, Special Supplement No 53, *League of Nations Official Journal*, 22 (24 September 1927) 22. This document is reproduced as Document No 5 in BB Ferencz’s work, *Defining International Aggression—The Search for World Peace* (Dobbs Ferry, Oceana Publications, 1975), vol 1, and available at www.derechos.org/peace/dia.

Members of the League are under an obligation to conform to these principles'.⁷⁴ In 1928, Germany, Italy and Japan were all original signatories to the Kellogg–Briand Pact,⁷⁵ declaring 'that they condemn recourse to war for the solution of international controversies, and renounce it as an instrument of national policy in their relations with one another'.⁷⁶ Germany had also concluded non-aggression treaties with numerous countries including England,⁷⁷ France,⁷⁸ the Soviet Union⁷⁹ and Poland.⁸⁰

Despite, however, the ambiguous reference to 'an international crime', these instruments did not explicitly make aggression a source of individual, as opposed to state, responsibility which could be prosecuted under international law. If a law, it was a law without a sanction capable of being incurred by individuals. Lauterpacht had in the early 1940s expressed the view that the punishment by legal means of aggressive war was a social necessity:

There appear to be compelling reasons for the establishment in the future of an International Criminal Court having jurisdiction to try the crime of war (i.e. resort to war in violation of international law) ... In this matter the position is now different from that which obtained in 1914 and which prompted the Commission of Responsibilities set up in 1919 by the Paris Conference to declare that 'by reason of the purely oppositional character of the institutions at The Hague for the maintenance of peace (International Commissions of Enquiry, Mediation and Arbitration) a war of aggression may not be considered as an act directly contrary to positive law.' The law of any international society worthy of the name must reject with approbation the view that between nations there can be no aggression calling for punishment. It must consider the responsibility for the premeditated violation of the General Treaty for the Renunciation of War as lying within the sphere of criminal law.⁸¹

Views of participants at the London Conference were split over whether the Charter could, or more to the point whether it should, declare that crimes against peace could attract individual criminal responsibility.⁸² Jackson and the US delegation answered both questions firmly in the affirmative:

International Law is more than a scholarly collection of abstract and immutable principles. It is an outgrowth of treaties or agreements between nations and of accepted customs ... Innovations and revisions in International Law are brought about by the action of

⁷⁴ *ibid.*

⁷⁵ General Treaty for Renunciation of War as an Instrument of National Policy, signed 27 August 1928, 94 LNTS 57 (entered into force 24 July 1929).

⁷⁶ *ibid.*

⁷⁷ German–British Non-Aggression Pact (30 September 1938).

⁷⁸ German–French Declaration ('Die deutsch-französische Erklärung') (6 December 1938).

⁷⁹ Molotov–Ribbentrop Pact (23 August 1939).

⁸⁰ German–Polish Non-Aggression Pact (26 January 1934).

⁸¹ H Lauterpacht, 'The Law of Nations and the Punishment of War Crimes' (1944) 21 BYIL 58, 81 and fn 1; also published in E Lauterpacht (ed), *International Law: Collected Papers* (Cambridge, CUP, 2004), vol 5, 519 and fn 42.

⁸² See S Glueck, 'The Nuernberg Trial and Aggressive War', in Mettraux (n 15), for an exposition of the positions by an attendee at the London Conference. Glueck, for his part, had not been convinced of the idea in 1944 but came around based on the argument that the Pact of Paris together with other treaties and resolutions was sufficiently developed custom: see *ibid.*, fn 3.

governments designed to meet a change in circumstances. It grows, as did the Common-law, through decisions reached from time to time in adapting settled principles to new situations.⁸³

Jackson therefore was ‘not disturbed by the lack of precedent for the inquiry we propose to conduct’. In his view, by the time the Nazis came to power it was established that launching an aggressive war was illegal and the defence of legitimate warfare was unavailable. ‘It is high time that we act on the juridical principle that aggressive war-making is illegal *and criminal*’.⁸⁴

The French delegation had concerns, however, that designating aggression as a criminal charge was neither principled nor wise. On 19 July 1945, Professor André Gros voiced his objections to the American draft:

We do not consider as a criminal violation the launching of a war of aggression. If we declare war a criminal act of individuals, we are going farther than the actual law ... We do not want criticism in later years of punishing something that was not actually criminal ... It is said very often that a war of aggression is an international crime, as a consequence of which it is the obligation of the aggressor to repair the damages caused by his actions. But there is no criminal sanction ... We think it will turn out that nobody can say that launching a war of aggression is an international crime—you are actually inventing the sanction.⁸⁵

Interestingly, Gros’ objections derived at least in part from his belief that the parties were engaged in the building of a landmark, and that therefore the legal principles contained in the Charter must be robust. ‘The statute of the International Tribunal will stand as a landmark which will be examined for many years to come’, he said, ‘and we want to try to avoid any criticisms’.⁸⁶

Lauterpacht, as ever, analysed the applicable principles in detail, and in doing so assisted in assuaging the concerns about a lack of precedent. In his role on the British War Crimes Executive, he wrote to the Foreign Office after the signing of the Charter on 20 August 1945:

The main criticism which the Government will have to meet in this matter will be that [Article 6(a)] is an innovation. The paragraph which I am sending you shows that it is not so ... The General Treaty for the Renunciation of War not only rendered aggressive war unlawful; it condemned it and thus created the basis for a declaration that aggressive war is not only unlawful, but also criminal. It is very important that full use should be made in this connection of the General Treaty for the Renunciation of War—a universal treaty solemnly ascribed to by Germany, Italy and Japan. The legislative character, if any, of the Agreement of August 8, 1945, consists in the acceptance of the principle—which is an unavoidable principle if the law is not to be reduced to an absurdity—that the agency which commits a criminal act is not the abstract mystical entity of the State, but human beings who plan and execute the crime. There is, therefore, on sound principle no element of retroactivity either

⁸³ Jackson Report (n 56) 51–52.

⁸⁴ *ibid.*, 52 (emphasis added). In a letter to Sir Stephen Schwebel in May 1999, Jackson’s son William recalled that Lauterpacht agreed with this analysis when they consulted together in Cambridge. William Jackson had accompanied his father on the trip from London. ‘The subject of discussion, as I recall, was whether a war of aggression was a crime under international law (which was central to my father’s position during the London negotiations). I believe that Professor Lauterpacht shared and supported my father’s position’: quoted in Lauterpacht (n 62) 271 fn 18.

⁸⁵ Jackson Report (n 56) 295.

⁸⁶ *ibid.*

in expressly declaring an aggressive war to be a criminal act or in fixing that responsibility upon the individual human agents.⁸⁷

Lauterpacht knew that convincing the Tribunal would not be easy. In drafting Shawcross's opening speech, Lauterpacht took care to demonstrate that the criminalisation of waging of aggressive war was 'not in any way an innovation'.⁸⁸ Lauterpacht devoted pages to identifying legal sources establishing the illegality of aggression, then again took the further step of arguing that the criminal prosecution of individuals for such conduct was not the retrospective operation of new law. Rather, it amounted to holding the individuals representing the 'controlling minds' of the state responsible, rather than permitting them to hide behind the 'veil' of the state. The mental energy Lauterpacht dedicated to this issue, however, demonstrates that the question exercised him greatly. When it came to Shawcross's closing speech, Lauterpacht was even more emphatic, asserting that, 'in a very real sense, the crime of war had become the parent of and the opportunity for the war crimes'.⁸⁹

The Tribunal agreed. On 1 October 1946, in the Judgment, aggression was declared the 'supreme international crime'.⁹⁰ The Tribunal had preceded this assessment by describing the charges of planning and waging aggressive war as 'charges of the utmost gravity. War is essentially an evil thing. Its consequences are not confined to the belligerent States alone, but affect the whole world'.⁹¹

The legal theorist Hans Kelsen, who taught Lauterpacht in Vienna in the early 1920s, later reflected that it was the Charter, and not the Judgment, that created aggression as an international crime:

The rules created by this Treaty and applied by the Nuremberg Tribunal, but not created by it, represent certainly a new law, especially by establishing individual criminal responsibility for violations of rules of international law prohibiting resort to war.⁹²

The legacy created by the Charter and the Judgment in recognising the crime of aggression has reverberated through international legal history, and ultimately come full circle. It is striking that such significant advances, culminating in criminal convictions, were made at Nuremberg when, 50 years later, in negotiating the Rome Statute of the International Criminal Court, state parties still could not agree on the definition of the crime. Some states disputed whether the Court should have jurisdiction over aggression at all. As a compromise measure, it was agreed that aggression should be included in the Court's subject matter jurisdiction, but its definition, and the exercise by the Court of that jurisdiction, would be postponed.⁹³

⁸⁷ Hersch Lauterpacht to Patrick Dean, Foreign Office legal adviser, 20 August 1945, quoted in Lauterpacht (n 62) 273.

⁸⁸ H Lauterpacht, *Draft Opening Speech—Part I* (typed foolscap, 1945) 17, quoted in P Sands, 'Twin Peaks: The Hersch Lauterpacht Draft Nuremberg Speeches' (2012) 1 *CJICL* 37, 39.

⁸⁹ H Lauterpacht, *Draft Closing Speech* (typed foolscap, 1946) 35, quoted in Sands, *Twin Peaks* (n 88) 41.

⁹⁰ Nuremberg Trial Proceedings, Volume 22, Day 217, 30 September 1946, 426.

⁹¹ *ibid.*

⁹² H Kelsen, 'Will the Judgment in the Nuremberg Trial Constitute a Precedent in International Law?', in Mettraux (n 15) 275.

⁹³ See discussion of the debates surrounding the inclusion of the crime of aggression in the Rome Statute in WA Schabas, *The International Criminal Court: A Commentary on the Rome Statute*, 2nd edn (Oxford, OUP, 2010) 303–05. Schabas notes that it was 'literally on the final day of the Conference,

That task was accomplished⁹⁴ at the Review Conference of the Rome Statute in May and June 2010, in Kampala, Uganda, within the framework established by the Assembly of States Parties to the Rome Statute. Stefan Barriga and Claus Kreß describe the mood amongst those individuals present on the final evening of the conference at Kampala on 11 June 2010:

After two weeks of intense consultations, the endgame was as dramatic as anyone could have imagined. After the President of the Conference had tabled his last attempt to reach consensus shortly before midnight on the final day of the Conference, delegates held their breaths as one delegation raised its flag to voice a number of concerns. A collective sigh of relief filled the room as it became clear that, despite these concerns, no delegation was willing to stand in the way of consensus. Moments later, thunderous applause erupted as the President declared the Kampala compromise on the crime of aggression adopted. That night, the terrace of the vast Munyonyo Commonwealth Resort, with its splendid view of Lake Victoria, was transformed into the place where delegates from the world over celebrated the conclusion of an almost century-long process of trying to define the crime.⁹⁵

The crime of aggression has thus been brought into the twenty-first century and defined to reflect modern warfare. But the conviction of individuals at Nuremberg for waging aggressive war is yet to be replicated. The amendments require two further conditions to be fulfilled for the International Criminal Court to exercise jurisdiction. The jurisdiction of the Court may begin one year after the 30th ratification of the amendment, but not before the Assembly of States Parties has approved the commencement of jurisdiction after 1 January 2017. While 32 states have now ratified the amendments, the approval of commencement of jurisdiction has yet to occur. In addition, the amendments only come into force for parties that have ratified the amendments. Germany has done so. Other powerful parties to the Rome Statute, including the United Kingdom, France, Canada, Japan, South Korea and Australia, have not. Non-party states, including the United States and Russia, as well as Israel, India and China, have chosen not to be bound by principles similar to those that bound the German defendants at Nuremberg. The jurisdictional requirements for the prosecution of aggression, in Article 15 *bis* of the Rome Statute, have the effect that the ICC will only have jurisdiction over an act of aggression committed by a state party which has accepted that jurisdiction, and only when that act is also committed against a state party.⁹⁶

[that] agreement was reached that authorized the Court to exercise jurisdiction over aggression once the crime was defined and its scope designated in a manner consistent with the purposes of the *Statute* and the ideals of the United Nations': 305.

⁹⁴ Article 8 *bis* of the Rome Statute now defines the crime of aggression as 'the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression': (1). An 'act of aggression' is 'the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations': (2). Article 15 *bis* provides for jurisdiction over aggression. The Court will not exercise such jurisdiction over a State that has declared that it does not accept jurisdiction: (4) or a State that is not party to the Rome Statute: (5).

⁹⁵ S Barriga and C Kreß (eds), *The Travaux Préparatoires of the Crime of Aggression* (Cambridge, CUP, 2012) xv. See further C McDougall, *The Crime of Aggression under the Rome Statute* (Cambridge, CUP, 2013).

⁹⁶ See KJ Heller, 'The Sadly Neutered Crime of Aggression', *Opinio Juris* (13 June 2010) available at <<http://opiniojuris.org/2010/06/13/the-sadly-neutered-crime-of-aggression>>.

Despite the painstaking development of a complex legal framework over a period of a century, in which Nuremberg was undoubtedly a landmark, the legacy remains imperfect. It remains the fact that the instigators of wars that may be characterised as aggressive may never be prosecuted as such. In any event, even in addition to the restrictive jurisdictional requirements, the crime of aggression is likely to be very difficult to apply in practice. The idea that in every inter-state conflict one or both sides must be a wrongdoer is arguably unrealistic, when the concept of whether a war is legitimate is usually a subjective and partisan one.⁹⁷ Nor can it be said, in many cases, that a decision whether to go to war is ‘suspended in nicely balanced equipoise’,⁹⁸ even if ultimately the final decision is taken by an individual or a group of individuals.

C. Crimes Against Humanity

The concept of crimes against humanity, ultimately defined in Article 6(c) of the Charter, crystallised against the backdrop of the Charter’s drafters being faced with the problem that traditional principles of international humanitarian law left a gap. ‘War crimes’ did not cover acts of atrocity committed by a state against its own people. Essentially, as Sir Hartley Shawcross explained in his closing speech during the trial, crimes against humanity were intended to cover atrocities ‘which the Criminal Law of all countries would normally stigmatise as crimes: murder, extermination, enslavement, persecution on political, racial or economic grounds’⁹⁹ when committed against a civilian population, as well as discriminatory persecution of the kind that was rife during the Nazi regime. In substance, therefore, the crimes were similar to war crimes; but their legal foundation differed.

On the questions of legal innovation and retroactivity, it appears clear that the concept of individual criminal responsibility for crimes against humanity was novel. In older documents, the terms ‘humanity’, ‘laws of humanity’, ‘dictates of humanity’ and the like had been used non-technically—for example, in the Fourth Hague Convention of 1907.¹⁰⁰ In May 1915, the Allies used the term in a joint declaration on the massacre of Armenians:

In view of these new crimes of Turkey against humanity and civilization the Allied governments announce publicly ... that they will hold personally responsible ... all members of the Ottoman government ... who are implicated in such massacres.¹⁰¹

The inclusion of the term in the Charter, however, marked its first appearance in an instrument of international law using the formulation ‘crimes against humanity’ as

⁹⁷ See, eg, the critical perspective offered by M Walzer, ‘The Crime of Aggressive War’ (2007) 6 *Washington University Global Studies Law Review* 635.

⁹⁸ See above (n 72).

⁹⁹ Nuremberg Trial Proceedings, Volume 19, Day 186, 26 July 1946, Transcript 470.

¹⁰⁰ Laws and Customs of War on Land (Hague IV) (18 October 1907), Preamble.

¹⁰¹ United States Department of State, *Papers relating to the foreign relations of the United States, 1915, Supplement, The World War* (1915), Part IV: Other problems and responsibilities, 981, ‘The Ambassador in France (Sharp) to the Secretary of State [Telegram], Paris, May 28, 1915’.

a source of individual criminal liability. In 1947, the principal French IMT judge, Professor Henri Donnedieu de Vabres, frankly observed in hindsight that, in contrast to war crimes, ‘the concept of “crimes against humanity” is a new one. It had probably been conceptualised by some authors for a certain time, but only with the Nuremberg trial did this notion enter into judicial practice’.¹⁰²

Lauterpacht was of a similar view, and (privately at least) did not seek to make a case against retroactivity. He explained to the Foreign Office that the concept of ‘crimes against humanity’ was ‘clearly an innovation’:

It is a fundamental piece of international legislation affirming that international law is not only the law between States but also the law of mankind and that those who transgress against it cannot shield themselves behind the law of their State or the procedural limitations of international law ... It will be as well if the four Governments frankly admit that—notwithstanding the doctrine and the various historical instances of humanitarian intervention—all this is an innovation which the outraged conscience of the world and an enlightened conception of the true purposes of the law of nations impel them to make immediately operative.¹⁰³

It will be recalled that Article 6(c) of the Charter defined crimes against humanity as ‘murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, *before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal*’ (emphasis added). The French and English texts of the Charter originally contained a semi-colon after the phrase ‘before or during the war’. This was thought to create two different types of crimes against humanity, one encompassing any of the enumerated acts against a civilian population, and one comprising persecutions with a connection (or ‘nexus’) to crimes against peace, war crimes or common plan. As Lauterpacht explained, ‘The principle part of paragraph (c), namely; its first sentence^[104] is very wide indeed; it is not limited by the somewhat vague qualifications to which the crimes enumerated in the second sentence are subject’.¹⁰⁵ It was, however, later discovered that the Russian text contained a comma in place of the semi-colon in the definition, creating a drafting ambiguity as to whether the ‘nexus’ requirement applied to the whole of Article 6(c), or only to its second phrase.¹⁰⁶ On 6 October 1945, the prosecutors from all four nations signed the Berlin Protocol agreeing that the Russian text was correct.¹⁰⁷

¹⁰² H Donnedieu de Vabres, ‘The Nuremberg Trials and the modern principles of international criminal law’ in Mettraux (n 15) 227. Egon Schwelb, in ‘Crimes against Humanity’ (1946) 23 *BYIL* 178, 179, similarly described crimes against humanity as a ‘novel’ concept in law, while Hannah Arendt, writing after the trial in Israel of Adolf Eichmann, called it ‘new and unprecedented’: *Eichmann in Jerusalem: A Report on the Banality of Evil* (first published 1963; New York, Penguin, 2006) 255, 257.

¹⁰³ Letter from Hersch Lauterpacht to Patrick Dean, FO371/51034 (20 August 1945), quoted in Lauterpacht (n 62) 274.

¹⁰⁴ It may have been that Lauterpacht meant the first ‘phrase’ of Article 6(c), before the semi-colon, rather than the first sentence, as Article 6(c) did not contain more than one sentence.

¹⁰⁵ Letter from Hersch Lauterpacht to Patrick Dean, FO371/51034 (20 August 1945), quoted in Lauterpacht (n 62) 274.

¹⁰⁶ For a full discussion of this issue see C Fournet, *Genocide and Crimes Against Humanity: Misconceptions and Confusion in French Law and Practice* (Oxford, Hart, 2013) 21–22.

¹⁰⁷ Berlin Protocol signed on 6 October 1945, available at <<http://avalon.law.yale.edu/imt/jack61.asp>>.

Nevertheless, the Indictment, signed on the same day, charged crimes pursuant to Article 6(c) under two headings. Part X(A) mirrored the language of the first phrase of Article 6(c): 'murder, extermination, enslavement, deportation, and other inhumane acts committed against civilian populations *before and during the war*' (emphasis added) in relation to civilians believed to be hostile or potentially hostile to the Nazis, including the operation of concentration camps since 1933.¹⁰⁸ Part X(B) mirrored the second phrase, charging 'persecution on political, racial, and religious grounds *in execution of and in connection with the common plan mentioned in count one*' (emphasis added) in relation to the Jews, including internment at concentration camps, murder and ill-treatment, also dating back to 1933. This bipartite division of the concept, with nexus to the common plan applying only to the second part, would suggest that the Allies did not intend at an early stage for the nexus requirement to apply to the whole of Article 6(c), or to exclude crimes occurring before 1939 from the jurisdiction of the Tribunal. It is unlikely, however, that the parties would have gone to the effort to sign the Berlin Protocol for the sake of a comma if they had not considered that it altered the scope of Article 6(c).¹⁰⁹

Ultimately, the Tribunal found the charges of crimes against humanity substantiated. It declined, however, to find that crimes against humanity were carried out before the war, in the years between 1933 and 1939, because it interpreted the nexus requirement in the second phrase of Article 6(c) as applying to the whole paragraph. The Tribunal observed that:

To constitute crimes against humanity, the acts relied on before the outbreak of war *must have been in execution of, or in connection with, any crime within the jurisdiction of the Tribunal*. The Tribunal is of the opinion that revolting and horrible as many of these crimes were, it has not been satisfactorily proved that they were done in execution of, or in connection with, any such crime. The Tribunal therefore cannot make a general declaration that the acts before 1939 were crimes against humanity within the meaning of the Charter.¹¹⁰

Nonetheless, the Tribunal went on to make the first findings of crimes against humanity, stating that

from the beginning of the war in 1939 war crimes were committed on a vast scale, which were also crimes against humanity; and insofar as the inhumane acts charged in the Indictment, and committed after the beginning of the war, did not constitute war crimes, they were all committed in execution of, or in connection with, the aggressive war, and therefore constituted crimes against humanity.¹¹¹

The significance of the convictions for crimes against humanity was later identified by Hannah Arendt, in her Epilogue to *Eichmann in Jerusalem: The Banality of Evil*.¹¹²

¹⁰⁸ Nuremberg Trial Proceedings, Volume 1, Indictment, Count Four—Crimes Against Humanity.

¹⁰⁹ For a contemporaneous view see E Schwelb, 'Crimes Against Humanity' (1946) 23 *BYIL* 178; see also the extensive analysis in M Cherif Bassiouni, *Crimes Against Humanity in International Law*, 2nd edn (Kluwer Law International, 1999) 25–30.

¹¹⁰ Nuremberg Judgment (n 6) 'The Law Relating to War Crimes and Crimes Against Humanity', available at <<http://avalon.law.yale.edu/imt/judlawre.asp>>.

¹¹¹ *ibid.*

¹¹² Arendt (n 102).

There, she argued that while the Nuremberg judges appeared more comfortable with convicting the accused of the more readily recognisable war crimes, they reserved crimes against humanity for the most egregious cases. Arendt added: ‘they revealed their true sentiment by meting out their most severe punishment, the death penalty, only to those who had been found guilty of those quite uncommon atrocities that actually constituted a “crime against humanity”’.¹¹³ Indeed, without exception, all those sentenced to death had been convicted of crimes against humanity.¹¹⁴ This priority given to protecting individuals including German citizens as well as those of other nationalities was what Schwelb later described as a ‘radical inroad ... into the sphere of the domestic jurisdiction of sovereign states’.¹¹⁵

The single most significant development in the concept of crimes against humanity since Nuremberg has been its liberation from the ‘nexus’ requirement linking it to armed conflict.¹¹⁶ In fact, the requirement was not mentioned in Allied Control Council Law No 10, under which the Allies supervised the subsequent trials of lower-level functionaries and private citizens before the Nuremberg Military Tribunals from 1946 to 1949.¹¹⁷ In 1947, the UN General Assembly requested the International Law Commission to draft a code of offences against the peace and security of mankind based on the Nuremberg Principles. The Draft Code was not completed for 50 years, but significantly, its 1996 iteration omitted the requirement for inhumane acts to be committed ‘before or during the war’.¹¹⁸ While the Statute of the International Criminal Tribunal for the former Yugoslavia retained a requirement that crimes against humanity be committed ‘within armed conflict’,¹¹⁹ whether international or non-international, the Statute of the International Criminal Tribunal for Rwanda omitted the formal nexus with armed conflict but instead required that the inhumane acts must be part of a ‘systematic or widespread attack against any civilian population on national, political, ethnic, racial or religious grounds’.¹²⁰ The Rome Statute similarly mandates that ‘murder, extermination, torture, rape,

¹¹³ *ibid*, 257.

¹¹⁴ The converse was almost true: with only a few exceptions, a conviction of crimes against humanity resulted in a death sentence. The exceptions were Walther Funk (life imprisonment), Baron Konstantin von Neurath (15 years), Baldur von Schirach (20 years) and Albert Speer, the only defendant to plead guilty (20 years).

¹¹⁵ Schwelb, ‘Crimes Against Humanity’ (n 109) 179.

¹¹⁶ K Ambos and S Wirth, ‘The current law of Crimes against Humanity: an analysis of UNTAET Regulation 15/2000’ (2002) 13 *Criminal Law Forum* 1, 3–13; Antonio Cassese, *International Law* (2nd edn, Oxford, OUP, 2005), 442; and see generally Beth van Schaack, ‘The Definition of Crimes against Humanity: Resolving the incoherence’ (1998) 37 *Columbia Journal of Transnational Law* 787.

¹¹⁷ Allied Control Council Law No 10, Article II(1)(c).

¹¹⁸ International Law Commission, *Draft Code of Crimes against the Peace and Security of Mankind with commentaries* (1996), adopted by the International Law Commission at its 48th session, in 1996, and submitted to the General Assembly as a part of the Commission’s report covering the work of that session [50]. The report, which also contains commentaries on the draft articles, appears in (1996) *ILC Ybk*, vol II, Part Two.

¹¹⁹ UN Security Council, Statute of the International Criminal Tribunal for the Former Yugoslavia (as amended), 25 May 1993 (as established by UNSC Res 808/1993, 827/1993 and amended by UNSC Res 1166/1998, 1329/2000, 114/2002) (‘ICTY Statute’), Art 5.

¹²⁰ UN Security Council, Statute of the International Criminal Tribunal for Rwanda (as amended), 8 November 1994 (as established by UNSC Res 955 (1994) of 8 November 1994 and last amended by UNSC Res 1717 (2006) of 13 October 2006) (‘ICTR Statute’), Art 3.

political, racial, or religious persecution and other inhumane acts' reach the threshold of crimes against humanity only if they are 'part of a widespread or systematic attack directed against any civilian population'.¹²¹

While crimes against humanity are not yet the subject of their own specific convention (the ILC is currently elaborating a draft convention under the stewardship of Professor Sean Murphy),¹²² their flexibility has enabled them to embrace developing conceptions of inhumanity, such as torture, rape and sexual assault.¹²³ Although protections against gender-based violence were not a feature at Nuremberg,¹²⁴ they have become a fundamental aspect of modern international humanitarian and criminal law, which Lauterpacht's conception of crimes against humanity has been sufficiently wide to embrace. As David Luban has put it, the phrase 'has acquired enormous resonance in the legal and moral imaginations of the post-World War II world' in two senses, being crimes that aggrieve all human beings as well as violating the core value of our shared humanity.¹²⁵ In May 1999, Serbian President Slobodan Milošević became the first serving head of state to be indicted for crimes against humanity, for alleged acts in Kosovo. In April 2012, Charles Taylor was the first head of state to be convicted of crimes against humanity. A few months later he was sentenced to 50 years in prison.

The unshackling of crimes against humanity has not only allowed for successful prosecutions, but has gone further. For example, in 2013 the UN Human Rights Council established a Commission of Inquiry on Human Rights in the Democratic People's Republic of Korea.¹²⁶ The Commission's mandate was to investigate 'systematic, widespread and grave violations of human rights ... with a view to ensuring full accountability, in particular where these violations may amount to crimes against humanity'.¹²⁷ In its final report in 2014, the Commission considered that

¹²¹ Rome Statute (n 65), Art 7.

¹²² At its 66th session in 2014, the International Law Commission decided to include 'crimes against humanity' in its programme of work, and to appoint Professor Sean Murphy as Special Rapporteur for the topic: Report of the International Law Commission, 66th session (5 May–6 June and 7 July–8 August 2014), UN GAOR, 69th session, Supplement No 10, UN Doc A/69/10, Ch XIV, s A.1. For a summary of the Commission's ongoing work on crimes against humanity, with links to the relevant texts and instruments, see ILC, Summaries of the Work of the International Law Commission, Crimes against humanity, available at <http://legal.un.org/ilc/summaries/7_7.shtml>.

¹²³ Although the concept of crimes against humanity in the Charter did not refer to gender-based crimes, it has in later years become a useful tool for prosecuting them. Allied Control Council Law No 10 outlawed rape as a crime against humanity (Art II(1)(c)), though no rapes were prosecuted. Note the resolution adopted by UN Security Council in 2008, which noted that 'rape and other forms of sexual violence can constitute war crimes, crimes against humanity or a constitutive act with respect to genocide': UNSC Res 1820, UN SCOR, 63rd session, UN Doc S/Res/1820 (19 June 2008), [18].

¹²⁴ Indeed, there were hardly any women present at Nuremberg, the notable exception being Katherine B Fite, a US lawyer who was involved in the preparations for and proceedings of the IMT. See generally JQ Barrett, 'Katherine B Fite: The Leading Female Lawyer at London & Nuremberg, 1945' (Paper presented at the Robert H Jackson Third Annual International Humanitarian Law Dialogs, Chautauqua Institution, 31 August 2009). Katherine Fite was the staff lawyer who travelled with Jackson to meet Lauterpacht in Cambridge on 29 July 1945: Sands (n 17) 111.

¹²⁵ David Luban, 'A Theory of Crimes Against Humanity', (2004) 29 *Yale JIL* 85, 86.

¹²⁶ Human Rights Committee, *Situation of human rights in the Democratic People's Republic of Korea*, 22nd session, UN Doc A/HRC/RES/22/13 (9 April 2013).

¹²⁷ *ibid* [5].

its basic factual findings (including findings of murder, rape, forced disappearances, population transfers, persecution, and the particular inhumane act of knowingly causing prolonged starvation) could constitute reasonable grounds establishing the commission of crimes against humanity, warranting domestic or international criminal investigation.¹²⁸ The Commission's conclusions demonstrate the existence of a widespread and systematic attack on the civilian population, the relevant conduct occurring throughout and beyond the DPRK over an extended period, and being perpetrated 'pursuant to policies established at the highest level of the State'.¹²⁹

As the experience of the Commission shows, the absence of a war nexus requirement raises violations of basic human rights to a level equal with that of breaches of humanitarian law. The concept of crimes against humanity permits a state to be held responsible for grave failures in upholding the human rights of its own nationals, even in times of peace. Despite Nuremberg's more conservative approach, the articulation of crimes against humanity in the Charter and in the Judgment were crucial precursors to these more modern developments.

D. Genocide

Today, the mass killing of Jews, gypsies, Poles, homosexuals, and other minorities in the Holocaust, broadly defined, is the most obvious and frequently cited example of what we now regard as genocide. Yet the astute reader will note that genocide was not one of the crimes enumerated in the Nuremberg Charter, and nor was it mentioned in the Tribunal's Judgment. An analysis of Nuremberg's significance and legacy, however, would not be complete without making mention of the crime of genocide.

The recognition of genocide was initially an individual project. At and around the time of Nuremberg, genocide was the sole obsession of one individual, Raphael Lemkin. Born in what is now Belarus, Lemkin, like Lauterpacht, studied law at the University of Lwow where he obtained a doctorate in criminal law. He then worked as a public prosecutor in Warsaw.¹³⁰ At a conference in Madrid in 1933, his first paper was circulated, proposing that a new international law was needed to prohibit barbarism and repression against racial and religious groups.¹³¹ Lemkin cited examples: the Huguenots in France; the Protestants in Bohemia; the Hottentots in German West Africa; the Armenians in Turkey. He also warned about Hitler's recent rise to power in Germany.

¹²⁸ Human Rights Committee, *Report of the commission of inquiry on human rights in the Democratic People's Republic of Korea*, 25th session, UN Doc A/HRC/RES/25/63 (7 February 2014), [74].

¹²⁹ *ibid* [75].

¹³⁰ R Lemkin and D-L Frieze (ed), *Totally Unofficial: The Autobiography of Raphael Lemkin* (New Haven, Yale UP, 2013) 20–21. See generally D Irvin-Erickson, *Raphael Lemkin and the Concept of Genocide* (Philadelphia, University of Pennsylvania Press, 2017); JQ Barrett, 'Raphael Lemkin and "Genocide" at Nuremberg', in C Safferling and E Conze, *The Genocide Convention Sixty Years After Its Adoption* (The Hague, Asser, 2010); J Cooper, *Raphael Lemkin and the Struggle for the Genocide Convention* (New York, Palgrave Macmillan, 2008); S Power, 'A Problem from Hell': *America and the Age of Genocide* (New York, Basic Books, 2002).

¹³¹ Sands (n 17) 157, 175.

In the early 1940s, Europe was in the grips of what Churchill described as 'the crime without a name'.¹³² Lemkin escaped Europe as an academic refugee, taking up a post at Duke University in North Carolina, USA, carrying with him suitcases full of Nazi decrees and ordinances which he believed showed Hitler's underlying aims. Lemkin's analysis of German rule in occupied countries, *Axis Rule in Occupied Europe*, was published in November 1944.¹³³ In Chapter IX, he named the crime 'genocide', defined as the 'extermination of racial and religious groups'.¹³⁴ In Summer 1945, he was appointed as an advisor to the War Department and to Robert Jackson.

Lemkin's ideas were controversial and were resisted by the legal teams at Nuremberg, for both legal and political reasons. Lauterpacht considered the crime of genocide to be unsupported by past practice, and had previously been rather dismissive of Lemkin's work.¹³⁵ In the US, conservatives were anxious about whether African-Americans could invoke the term 'genocide' to seek redress from the state.¹³⁶ British and other colonial powers may well have had the same concerns about past acts directed at the elimination or assimilation of cultural groups.¹³⁷

Lemkin campaigned for the German leaders to be charged with the crime of 'genocide', but was disappointed to learn late in the summer that the Nuremberg Charter made no reference to the word. But, having flown to London to press for

¹³² BBC, 'Prime Minister Winston Churchill's broadcast to the world about the meeting with President Roosevelt' (24 August 1941), available at www.ibiblio.org/pha/policy/1941/410824a.html.

¹³³ Cited by the International Court of Justice when defining the protected group in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (2007) ICJ Reports 43, [193].

¹³⁴ Sands (n 17) 179.

¹³⁵ *ibid.*, 107, 108.

¹³⁶ Obstructionism also from conservatives prevented Congress's assent to the Genocide Convention in 1948: DT Critchlow and N MacLean, *Debating the American Conservative Movement: 1945 to the Present* (Lanham MD, Rowman & Littlefield, 2009), 138. Similar tactics had been used in relation to the inclusion of a non-discrimination clause in the Universal Declaration of Human Rights: A de Conde, *Ethnicity, Race, and American Foreign Policy: A History* (New Hampshire, UPNE, 1992) 129. Such fears proved to some degree well founded as, between 1946 and 1951, three American civil rights organisations directly petitioned the UN to obtain assistance in combatting racial discrimination in the United States. The third petition, submitted by the Civil Rights Congress in 1951, made specific allegations based on the newly adopted Genocide Convention that each level of US administration, from local to federal, was engaged in genocide against the black populace: see CH Martin, 'Internationalizing "the American dilemma": the Civil Rights Congress and the 1951 Genocide Petition to the United Nations' (1997) 16 *Journal of American Ethnic History* 35, 36. Nonetheless, redress was not forthcoming.

¹³⁷ See discussion of these objections in M Lewis, *The Birth of the New Justice: The Internationalization of Crime and Punishment, 1919–1950* (Oxford, OUP, 2014), 202–03. Indeed, Lemkin had conducted a detailed case study of the Tasmanian Aboriginal peoples as part of an unfinished work on genocide written in the 1940s–50s: see generally A Curthoys, 'Raphael Lemkin's "Tasmania": An Introduction' in D Moses and D Stone (eds), *Colonialism and Genocide* (Abingdon, Routledge, 2013). Nonetheless, prior to the UK's ratification of the Genocide Convention (delayed by concerns about the extradition obligation under Art 7), the British Conservative Government felt no qualms in 'giving an unqualified assurance that Her Majesty's Government would never themselves violate the principles embodied in the Convention': United Kingdom, *Parliamentary Debates*, House of Commons, 18 July 1962, 423–4 (Edward Heath). Similarly, despite advertence to Genocide Convention's applicability to treatment of indigenous peoples, it was apparently not considered at the time of Australia's ratification that the Genocide Convention might be relied upon by its Aboriginal and Torres Strait Islander peoples: Commonwealth, *Parliamentary Debates*, Senate, 6 July 1949, 2004–05 (Reginald Murray).

the inclusion of 'genocide' in the Nuremberg Indictment, Lemkin was in the end successful.¹³⁸ Count Three of the Indictment, on war crimes, under the heading 'Murder and ill-treatment of civilian populations of or in occupied territory and on the high seas', stated as follows:

Throughout the period of their occupation of territories overrun by their armed forces the defendants, for the purpose of systematically terrorizing the inhabitants, murdered and tortured civilians, and ill-treated them, and imprisoned them without legal process.

The murders and ill-treatment were carried out by divers means ... [The defendants] *conducted deliberate and systematic genocide, viz, the extermination of racial and national groups*, against the civilian populations of certain occupied territories in order to destroy particular races and classes of people and national, racial, or religious groups, particularly Jews, Poles, and Gypsies and others.

In the closing arguments for each of the prosecuting states at the end of the trial, the concept of 'genocide' was again used by the Soviet, French and British lawyers.¹³⁹ All three states supported a conviction for genocide. Sir Hartley Shawcross's closing speech,¹⁴⁰ as drafted by Lauterpacht, did not mention the word. Nor did Robert Jackson in his closing speech for the US. Nor, in the end, did the Tribunal's Judgment. Lemkin later recorded the day of the Judgment as 'the blackest' of his life.¹⁴¹

Lemkin redoubled his efforts before the United Nations. By the end of 1946, he had convinced the General Assembly to pass a resolution recognising genocide as a crime under international law.¹⁴² His efforts eventually led to the adoption of the Genocide Convention at the UN on 9 December 1948.¹⁴³ Article 2 defines genocide as 'any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group', namely, killings, serious bodily or mental harm, deliberately inflicting conditions of life calculated to cause physical destruction, preventing births and forcibly transferring children. In 1951, the ICJ confirmed that the Convention has *jus cogens* force.¹⁴⁴

In this respect, Nuremberg is a landmark not in the sense of being the site of recognition of the crime of genocide, but as a gateway to recognition. Nuremberg saw the first mention of 'genocide' in a formal international legal document, the

¹³⁸ In his unpublished autobiography, Lemkin speaks of having gone to London in 1945, as the Nuremberg Charter was concluded, and 'succeeded in having inscribed the charge of genocide against the Nazi war criminals in Nuremberg. Everything seemed to progress successfully with the genocide charge against the Nazis until things started to be spoiled at Nuremberg': R Lemkin, 'Totally Unofficial Man' in S Totten and SL Jacobs (eds), *Pioneers of Genocide Studies* (New Brunswick, New Jersey, Transaction Publishers, 2013) 375.

¹³⁹ Nuremberg Trial Proceedings, Volume 19, Day 186, 26 July 1946, Transcript 493, 496, 497, 508, 514 (Sir Hartley Shawcross); 530, 549, 550, 561, 563 (Auguste Champetier de Ribes); 569 (General Roman Rudenko).

¹⁴⁰ *ibid*, Transcript 432–528.

¹⁴¹ W Korey, *An Epitaph for Raphael Lemkin* (New York, Jacob Blaustein Institute for the Advancement Human Rights, 2001) 25.

¹⁴² *The Crime of Genocide*, UNGA Res 96(1), UN GAOR, 6th Comm, 1st session, UN Doc A/RES/96(I) (11 December 1946). Lemkin described the process of getting the resolution before the UN General Assembly in 'Genocide as a Crime under International Law' (1947) 41 *AJIL* 145, 148–50.

¹⁴³ *Convention on the Prevention and Punishment of the Crime of Genocide*, opened for signature 9 December 1948, 78 UNTS 277 (entered into force 12 January 1951).

¹⁴⁴ *Reservations to the Genocide Convention (Advisory Opinion)* (1951) *ICJ Reports* 15, 23.

Nuremberg Indictment. The proceedings raised the profile of the concept of genocide on the international stage. Somewhat paradoxically, its necessity was affirmed by the gap left in the Nuremberg Judgment by linking crimes against humanity to aggressive war or war crimes: acts directed at the extermination of groups during peacetime were excluded, as pointed out by Lemkin in an article for the *United Nations Bulletin*.¹⁴⁵ Again the determination of an individual and his ability to influence others both at Nuremberg and before other bodies on the international stage (albeit in a way that was not always entirely welcome), was critical in the development of international law.

The legacy of Nuremberg, and of Lemkin, has been in recognition rather than prevention of genocide. In the intervening period, there have been what have been recognised in law as more genocides (Rwanda, Bosnia, Cambodia, Darfur). While the Nuremberg defendants were not convicted of genocide, others have been. In 1968, Adolf Eichmann was convicted under an Israeli law reflecting the Convention definition of genocide.¹⁴⁶ The International Criminal Tribunal for Rwanda (ICTR) in *Akayesu*¹⁴⁷ handed down the first genocide verdict in modern international criminal law, and recognised for the first time that mass rape could amount to genocide. This was followed in the International Criminal Tribunal for the former Yugoslavia (ICTY) by the convictions of Radislav Krstić in 2004 for aiding and abetting genocide¹⁴⁸ and of Radovan Karadžić in 2016 for committing genocide as part of a joint criminal enterprise.¹⁴⁹ In September 2007, the International Court of Justice in The Hague ruled¹⁵⁰ that Serbia had violated the obligation to prevent genocide in Srebrenica. This was the first time that a state has been condemned for violating the Genocide Convention. In July 2010, President Omar al-Bashir of Sudan became the first serving Head of State to be indicted for genocide by the ICC.

Of course, genocide has been the subject of critique. The post-Nuremberg emancipation of crimes against humanity from the requirement of a nexus to armed conflict means that any act that meets the definition of genocide is also now likely to constitute a crime against humanity, whether committed in time of war or peace. Arguably this does not create total overlap or make genocide redundant, as the reverse is not true: the specific *mens rea* for genocide makes it notoriously difficult to establish.¹⁵¹

¹⁴⁵ Korey, *Epitaph for Raphael Lemkin* (n 141).

¹⁴⁶ *Attorney-General v Eichmann* (1968) 36 ILR 5 (District Court of Jerusalem), para 80. Section 1(b) of the *Nazis and Nazi Collaborators (Punishment) Law 1950 4 LSI 154* (1sr) is drafted to reflect the definition in Art 2 of the Genocide Convention, but is slightly wider than that insofar as it also includes destroying or desecrating Jewish religious or cultural assets or values, and inciting hatred of Jews. The *Eichmann* court observed, however, that those subsections had no relevance to his case: [16].

¹⁴⁷ *Prosecutor v Akayesu*, Trial Judgment (ICTR-96-4-T), 2 September 1998. This conviction was not disturbed on appeal.

¹⁴⁸ Judgment, *Prosecutor v Krstić*, Appeal Judgment (IT-98-33-A), 19 April 2004. Krstić had been convicted at trial of committing genocide as part of a joint criminal enterprise. However, his appeal against that finding was successful, leading to a substituted conviction on the accessory basis of aiding and abetting.

¹⁴⁹ *Prosecutor v Karadžić*, Trial Judgment (IT-95-5/18-T), 24 March 2016.

¹⁵⁰ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (2007) ICJ Reports 43.

¹⁵¹ See, eg, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v Serbia)* (2008) ICJ Reports 412.

Its characterisation, however, as ‘the crime of crimes’,¹⁵² which is singled out for ‘special condemnation’ by international courts,¹⁵³ regularly leaves victims of atrocities feeling cheated if they can make out only a ‘lesser’ offence, and risks devaluing other international crimes. Ultimately, however, genocide has been absorbed into the canon of international criminal law along with the fundamental principles established at the Nuremberg trial.

IV. CONCLUSIONS

Writing about the meaning of Nuremberg as a landmark, Secretary Stimson said:

A single landmark of justice and honor does not make a world of peace ... But the sins of others do not make the Nazi leaders less guilty, and the importance of Nuremberg lies not in any claim that by itself it clears the board, but rather in the pattern it has set.¹⁵⁴

Those words, written 70 years ago, are no less true today. Nuremberg was, from a legal perspective at least, a moment of crystallisation following a period of unspeakable horrors. In the context of the early plans for summary executions, it was notable that the Nuremberg trial occurred at all. Courtroom 600 is rightly regarded as the birthplace of the modern system of international criminal justice: the conception of a novel (if not entirely unprecedented) kind of international court, a fresh legal jurisdiction, and a new way of holding to account some of those responsible for atrocities against both individuals and groups, albeit in a way that was lopsided and left unpunished certain other crimes—including those committed by the Allies. Nuremberg reflects the marriage of pragmatism and principle. It has not altered the reality of war and law; attempts to deliver post-conflict justice remain flawed, insufficient and uneven. What Nuremberg did achieve was to set a framework or expectation that the consequences of conflict could be dealt with in a particular way, according to what are now recognised as fundamental international principles. Those principles have been deployed time and again, and have developed in ways that were not anticipated at the time of their conception.

The example set by Nuremberg would stand alone for 50 years before bearing fruit, but would ultimately be taken up in successor tribunals of various forms. The tribunals for the former Yugoslavia, Rwanda, Sierra Leone, Cambodia and Lebanon have drawn on the Nuremberg model in crafting hybrid jurisdictional arrangements.¹⁵⁵ In July 1998, more than 150 states adopted the Statute for an International Criminal Court. These tribunals have indicted, convicted and

¹⁵² *Prosecutor v Kambanda*, Judgment and Sentence (ICTR-97-23-S), 4 September 1998, [16].

¹⁵³ *Krstić* (n 148) [36].

¹⁵⁴ Stimson (n 12) 188.

¹⁵⁵ ICTY Statute (n 119); ICTR Statute (n 120); UN Security Council, Statute of the Special Court for Sierra Leone, 16 January 2002; United Nations, Agreement between the United Nations and the Royal Government of Cambodia Concerning the Prosecution under Cambodian Law of Crimes Committed During the Period of Democratic Kampuchea, 6 June 2003; UN Security Council, Security Council resolution 1757 (2007) on the establishment of a Special Tribunal for Lebanon, UN Doc S/RES/1757 (30 May 2007).

sentenced some former and sitting heads of state. There is no doubt, however, that the institutional legacy of Nuremberg remains flawed and unevenly applied. The notion of lopsided justice—a system used by the strong against the weak—is hard to refute. In a statement to the press on 9 August 1945, Robert Jackson said: ‘however unfortunate it may be, there seems no way of doing anything about the crimes against peace or against humanity except that the victors judge the vanquished’.¹⁵⁶ That observation, and its legacy, perpetuates today.¹⁵⁷

As well as Nuremberg’s contribution as a matter of substantive law, it has been an underpinning theme of this chapter that one of the key features of the Nuremberg trial was its recognition of individuals as subjects, as well as authors, of international law.¹⁵⁸ As seen in this chapter, the contributions of certain key individuals, rather than the anonymous acts of states, shaped the definition of crimes and the course of the trial, and ultimately mapped the landscape of international law.

As subjects of that law, individuals are given rights and obligated to abide by certain responsibilities, the breach of which results in criminal liability. Nuremberg established that rampant individualism, and the subordination of the group to the whims and totalitarian agenda of one individual, will be a matter of concern to the whole international community. As confirmed by Articles 7 and 8 of the Charter, the individual cannot hide from responsibility for his acts on the grounds that they were authorised by a state or by the order of a superior. The ruling of the Tribunal assisted in chipping away at the invincibility of the state as the supreme being of international law, concluding that ‘[c]rimes 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’.¹⁵⁹

We might ask whether the concept of individual criminal liability in international law has been taken too far. Over-emphasis on individual criminal liability may obscure egregious acts of states committed by arms of government that cannot be pinned to one particular individual, or which may be more systemic. All three crimes analysed in this chapter illustrate the underlying paradox that, although they are the subjects of individual criminal responsibility, in reality they are generally committed only pursuant to some form of collective deliberation, related to either a ‘widespread and systematic attack’, an ‘intent to destroy, in whole or in part, a group’, or ‘the planning, preparation, initiation or execution of an act of aggression’ of sufficient character, gravity and scale to constitute a manifest violation of the UN Charter.¹⁶⁰

¹⁵⁶ ‘The Texts of the War Crimes Committee Report and the Jackson Statement’ *New York Times* (9 August 1945).

¹⁵⁷ See, eg, D Zolo, *Victors’ Justice: From Nuremberg to Baghdad* (London, Verso, 2009); F Barr Lebo, ‘Proposing a new framework: Including China on the crossroads of transitional justice and reconciliation’ (2016) 1 *Asian Journal of Comparative Politics* 171, 181–82.

¹⁵⁸ See, eg, K Parlett, *The Individual in the International Legal System: Continuity and Change in International Law* (Cambridge, CUP, 2013) ch 4.

¹⁵⁹ Nuremberg Judgment (n 6) ‘The Law of the Charter’, available at <<http://avalon.law.yale.edu/imt/judlawch.asp>>.

¹⁶⁰ See Trainin and Vishinsky (n 45) 79: ‘as distinct from common crimes, international crimes are almost always committed not by one person, but by several or many persons—a group, a band, a clique’.

This was to some extent reflected at Nuremberg in the specific criminalisation of certain organisations as a means of targeting the whole group and not allowing its members to escape criminal liability. Modern international criminal prosecutions are in practice very often directed at groups of wrongdoers, even if not formally pursuant to a joint criminal enterprise. This is illustrative of the ongoing interplay between the individual and the group in international legal systems: through the Nuremberg trial, international law embraced both liability and protection of both the individual and the group.

Nuremberg remains the standard-bearer. It is a place and a process to which those who advocate for individual and collective rights in times of upheaval can point in order to demonstrate that the international community will not—or at least should not—allow impunity and injustice to prevail. In a time of ongoing turmoil on the international stage, safeguarding that legacy, however imperfect, remains important.