Lehrstuhl für Strafrecht, Strafprozessrecht, Internationales Strafrecht und Völkerrecht

Professor Dr. Christoph Safferling, LL.M. (LSE)

FRIEDRICH-ALEXANDER UNIVERSITÄT ERLANGEN-NÜRNBERG
FACHBEREICH RECHTSWISSENSCHAFT

Keynote Address at the Reception of the Free State of Bavaria on 4 November 2017 in Nuremberg

The Nuremberg Principles – 70 Years On

State Minister Prof. Bausback

Lord Mayor Dr. Maly,

Attorney General Dr. Frank,

Presidents Küspert and Strötz,

President of the Advisory Board of the International Nuremberg Principles Academy. Prof. Buergenthal

Director Rackwitz,

Federal Minister Dr. Schneider

Participants of the Nuremberg Forum,

Ladies and Gentlemen,

1. Introduction

On 11 December, 1946, the General Assembly of the United Nations in resolution 95 adopted the Nuremberg Principles and thus, ten weeks after the verdicts had been handed down in Nuremberg, elevated the most important achievements of this unique first international criminal trial to principles of international law:

Principle I

Any person who commits an act which constitutes a crime under international law is responsible therefor and liable to punishment.

Principle II

The fact that internal law does not impose a penalty for an act which constitutes a crime under international law does not relieve the person who committed the act from responsibility under international law.

Principle III

The fact that a person who committed an act which constitutes a crime under international law acted as Head of State or responsible government official does not relieve him from responsibility under international law.

Principle IV

The fact that a person acted pursuant to order of his Government or of a superior does not relieve him from responsibility under international law, provided a moral choice was in fact possible to him.

Principle V

Any person charged with a crime under international law has the right to a fair trial on the facts and law.

Principle VI

The crimes hereinafter set out are punishable as crimes under international law:

a. Crimes against peace;

b. War crimes;

c. Crimes against humanity.

Principle VII

Complicity in the commission of a crime against peace, a war crime, or a crime against humanity as set forth in Principle VI is a crime under international law.

In doing this, the international community wanted to derive the right lessons from the then greatest disaster of humanity and use the means of law and reason to check the abuse of power which does not heed human dignity.

The admonitory words spoken by US chief prosecutor, Supreme Court Justice Robert H. Jackson were still ringing in their ears. On 21 November, 1945, Jackson, in his opening statement had said that humanity would not survive a repetition of such horrors and there was therefore an obligation to punish the perpetrators.

And where are we today, 70 years later? War in Syria; armed conflict in the Ukraine, in Afghanistan; anarchy and outbursts of violence in Libya, in Yemen; mass movements of refugees fleeing from exploitation and suppression; failed peace negotiations in Colombia; and also, ladies and gentlemen, full coffers for arms manufacturers and arms dealers – I could fill my remaining time with descriptions of further crisis hotspots.

In view of this situation, do the Nuremberg Principles currently have any meaning at all?

2.

When we talk about international criminal law today, this concept means something to people. Today, with the International Criminal Court, we have a permanent institution which is supposed to prosecute the most serious international crimes worldwide. Today, at a national level, we have departments at the Federal Prosecutor General's office and at the Federal Criminal Police Office which investigate international crimes. And they are not short of work. International criminal law has to a certain extent become part of our legal and political everyday reality. And everybody, from a FARC rebel willing to make peace in Colombia to the President of Burundi and a German army officer deployed in Kunduz must face up to this.

At the same time, however, we have to observe that international criminal law in general as well as the number of members of the International Criminal Court are stagnating. With 124 member states, the level is quite decent, but further growth seems doubtful. On the contrary: South Africa was the first state to declare its withdrawal from the Statute of the International Criminal Court, Burundi followed, and in Gambia, Namibia and Kenya, there are similar deliberations on whether to send written notification to the UN Secretary General, as required in article 127 of the Statute.

The history of Africa and the International Criminal Court has been chequered, and it is now experiencing a further inglorious crescendo. At the same time, only 7 African states did not sign the Statute in 1998. More than two thirds are/were members of the ICC. Uganda, the Democratic Republic of Congo, the Central African Republic, Ivory Coast, Mali, are all states which have transferred situations to the ICC, i.e. which have placed a certain advance trust in the ICC. The original hopes seem to have been disappointed in view of the fact that now, 13 years after the opening of the court

only one situation investigated by the ICC is not from the African continent. That is Georgia.

Was the court maybe only established to allow the former colonial powers to again wield their power over the continent in favour of the western world, from a misinterpreted imperialist perspective? The African states themselves feel patronised.

In Germany – and similarly, in Japan – people will show understanding for this; for after all, as losers of World War II, for nearly 50 years, these countries were the only ones which were delivered to international criminal prosecution, in Nuremberg and in Tokyo. The ugly term “victors’ justice” expresses this dissatisfaction. However, attempts at setting up their own, African criminal court as a section of the African Court of Justice and Human Rights have failed so far, because of the disunity of African rulers. The ICC Chief Prosecutor, Fatou Bensouda, in office since 2012 and from Gambia herself, so far has not found a way to reel in the African continent again.

At the moment, the ICC is not really operating on a global level, but concentrates on the most underprivileged region of the world. This is hardly changed by the court’s official observations of the situations in Afghanistan, Colombia, Honduras, Iraq, the Ukraine and Palestine.

But criticism of the ICC also refers to its forensic practice. The Al-Masri case and the effective sentencing to nine years imprisonment for destruction of cultural assets in Timbuktu has sent out a long overdue positive signal. However, the trials in general take too long, they fail because of inadequate investigations and are fraught with ambiguities in criminal proceedings and divergent ideas about the presentation of evidence, a fair trial and victims’ participation. If each chamber has to reinvent essential parts of its procedural law for each trial, this should not come as a surprise.

3.

71 years ago, in Court Room 600 in Nuremberg, a trial began which was unique at the time. 21 Nazi main war criminals were treated like ordinary criminals and had to answer to a criminal tribunal.

Two years before, in the Moscow Declaration, the allied powers, i.e. the Soviet Union, Great Britain and the USA (France was only allowed to join the victorious powers in 1945) had decided not to let the matter of the crimes committed rest after the war, but to prosecute the main war criminals in a joint criminal procedure.

This was a courageous step and a step away from previous practice at the end of wars. Nobody was more aware of this than Winston Churchill who understood that the elements of crime and proving them would be a major challenge in a trial according to the rule of law.

The fact that Stalin was in favour of the trials, and that the Russian delegation cooperated in a constructive manner both in the preparation and the implementation of the trials, should perhaps be called to mind more often, both by us and by today's Russia.

But it was mainly Robert H. Jackson who finally was instrumental in developing the idea of an international criminal trial according to the rule of law, and who with his fine sensitivity for the legitimacy of this specific trial stated that whilst the standard set here in Nuremberg in this particular case was only used to judge the German aggressor, this standard had to apply to all states world-wide, and also to the allied victorious powers. It is precisely this moral significance which was taken up 70 years ago in the Nuremberg Principles and was declared to be a rule of international criminal law.

But dealing with World War 2 through criminal proceedings in Nuremberg and Tokyo and many other places worldwide in national courts was soon to come to an end.

When the International Law Commission had finished working out the Nuremberg Principles in 1950, the war in Korea started. The first and so far the only war waged by the United Nations themselves. With modest success, as is generally known, for the repercussions of this war and of the defence of the 38th degree of latitude resulting in heavy losses can be seen in the media on an almost daily basis, even today. No, then, in 1950, there were other problems. International criminal law was no longer on the agenda; on the contrary, criminal law standards were rather seen as an obstacle.

In Europe, too, the newly established Federal Republic was needed as an ally against the Soviet arch enemy and its satellite states. In the mid-1950s, in West Germany, anti-communism was much more important than the question of the war criminals of World War 2.

I had the great privilege of being commissioned by the Federal Ministry of Justice to research the early years of the Federal Republic of Germany. I was very surprised indeed to find that in the penal legislation for the protection of the state, in fighting the enemy, the same means were used as before 1945, and that the Federal Attorney General, driven on by a deluded 3rd criminal division, displayed a zeal in prosecution which is not comprehensible from the perspective of a liberal democratic state under the rule of law, and which bears comparison with the McCarthy practices. I discovered how, in the preparation of a military criminal code and proceedings, they explicitly looked for experienced Wehrmacht judges; how – strictly in secret, of course – long before the Emergency Constitution was formally adopted, they planned nationwide restrictions of fundamental rights in case of emergency; and how, without any involvement of parliament, they had special secret editions of the Federal Law Gazette printed which were then – also strictly in secret – destroyed in 1968. The

matter had become too hot. You can read all of this in “The Rosenburg File. The Federal German Ministry of Justice and the Nazi Era”

In the times of the so-called Cold War, there were, however, detailed formulations of Human Rights. The Universal Declaration of Human Rights of 1948, the Genocide Convention of 1948, four Geneva Conventions of 1949, the two UN Covenants of 1966. In 1977, international humanitarian law was re-invented to a certain extent, in two comprehensive additional Geneva Protocols. In this age of normative measures, it was possible to develop new concepts for regulations and to consolidate existing ones. They were, however, only rarely applied.

Of course, one of the welcome exceptions is the European Court of Human Rights. In a short time, it has become a court which functions like an ordinary constitutional court. The supra-national review of the respect for human rights has established itself in Europe. Not all of the 47 member states of the European Convention on Human Rights are equally happy about the institution of the court. The Federal Republic, too, in recent times, has had the bitter experience of realising that its system also suffers from considerable human rights problems.

From an international criminal law point of view, the time of the Cold War was not as useless as is often claimed today. At the end of the Cold War, at the time when the wall fell, we were much better prepared to deal with the implementation of international elements of crime, such as genocide, crimes against humanity and war crimes.

But after the détente of the East-West conflict it was expected that possibly international criminal law might become what it had always been meant to be: a reliable global world order for freeing the world from the scourge of war and for protecting human rights, as it is stated in the Preamble of the Charter of the United Nations of 1945.

But the end of the suppression and gagging of states and peoples in Eastern Europe had fatal consequences. Many states managed the transition in a peaceful manner. But in the territory of former Yugoslavia this did not work. With incredible brutality and incredible hatred, religious differences raged. Faced with massive assaults and violations of international humanitarian law, people remembered Nuremberg and the good things that had developed from Nuremberg: a peaceful Western Europe! This might also work here, they thought. Quickly, they copied the Nuremberg Statute, and through a Security Council resolution, established an ad-hoc criminal tribunal. Shortly after, following the incredible massacres in Rwanda, a further ad-hoc tribunal for Rwanda was established. Further attempts were made in Sierra Leone, East Timor and finally also in Cambodia.

In 1998, it was almost a miracle that the world community adopted a Statute for an International Criminal Court during a major diplomatic conference in Rome. A

tentative attempt. They did not agree on the universality principle. They did not create a court of law which was immediately to be in charge of all conflicts in the world. They created an international criminal court, which, according to general international legal regulations, was to be determined by membership, i.e. by signature and ratification of the Statute. A proper legislative method in international law, which of course brings with it a large measure of dependence on the states. Europe almost unanimously agreed. Quite in contrast with the United States of America. Even though the Americans had themselves applied criminal law, both in Nuremberg and in Tokyo, to stigmatise their former opponents in World War 2 as criminals, they wanted to prevent by all means this law being used by an the International Criminal Court against their own nationals and possibly even against their own president, in clear contradiction to their own chief prosecutor Jackson in Nuremberg.

But also in China, in India and in Russia, people could not envisage an international criminal justice system they themselves might have to answer to. So the world's most powerful states were against it in spite of all the concessions made to them.

So it did not take long until the Statute actually came into force. The 60 ratifications needed were achieved in the course of 4 years, and in March 2003, the first office was opened with a sign at the door saying "International Criminal Court". Almost 60 years after the Nuremberg trial of the main war criminals, Nuremberg was thus to a certain extent institutionalised and eternalised.

4.

Are we now gambling away what has been achieved and sacrificing the Nuremberg Principles on the altar of political necessities?

Criminal law is often overstrained, mainly, in my perception anyway, by agents of civil society. Of course, seen from an international law perspective, international criminal law is the only solid instrument. Unlike other aspects of international law, it can have real consequences: a verdict, a sentence, a transparent and visible court procedure! Nowhere else is international law as effective as here, so it would seem. Because of this, of course, everybody tries to take their problems and their situations to the International Criminal Court.

This is one of the reasons why expectations of the International Criminal Court have been much too high. Suppressed peoples hoped for freedom; the foundation for a new liberal and pluralist system was to be laid by international criminal procedures. In addition, the victims were to be involved in the trials, finally to be heard, finally to be allowed to raise their voices.

And for the powerful states? Here, international criminal law often seems to serve as an alibi. Helplessness on other levels and the certainty that at least one had done

something, seem to be the driving force for referrals to the International Criminal Court. Of course, this is also a cheap measure, comparatively cheap anyway, if you look at the cost of other measures for creating and maintaining peace.

5.

We must not be discouraged by setbacks. International criminal law, by its nature, is a thorn in the flesh of tyrants all over the world and must not tout for their recognition.

The idea of using the means of criminal law to fight at least against the worst excesses of abuse of power was right in 1918 and 1945 and remains right today.

What we cannot do without, however, is the quest for a solid and stable basis for the legitimacy of international criminal law. This is one of the reasons why two years ago, we established the International Nuremberg Principles Academy in Nuremberg. It is to be a forum for reflection and in-service training at the very place where the idea of international criminal justice was implemented for the first time, as a reaction to the worst genocide in human history. It is part of our German responsibility for our own history, to maintain a salutary remembrance, also for future generations and to learn from it.

There is, incidentally, another matter for which we could take responsibility. I refer to the subsequent Nuremberg Trials / Nuremberg follow-up trials. Everybody knows about the Doctors' Trial, the Lawyers' Trial, the Industrialists' Trials and the Wilhelmstraße Trial [The Ministries Case]. But what precisely do we know about these 12 mammoth trials with a total number of 177 persons indicted? The indictments and the verdicts, as well as some other documents were published in the so-called "Green Series". Apart from that, so far, there is only an omnibus volume dealing with these trials in an academic manner.

The fact that forensic practice is longing for precedents can be seen in the first decisions made by the Yugoslavia Tribunal which keep referring to these trials. Later on, international jurisdiction developed into a self-referring system no longer directly quoting the Nuremberg sources, but its own decisions referring to Nuremberg.

It would be so easy to rectify this information deficit. The complete trial documentation is kept no further than 250 metres to the north as the crow flies, in the Nuremberg State Archives (and only in the Library of Congress in Washington D.C. apart from that, by the way). The State Archive also has a unique treasure: the documents of the defence counsels! It would be a major step forward for the academic world and for legal practice, if we could make these documents accessible in a digitalised and academically sound database on the internet. This would be a brilliant asset to be put into good account for the Academy. The research unit for international criminal law at the Friedrich-Alexander University would be ready to undertake the academic work; and the IT department of the technical faculty of the

University of Erlangen-Nürnberg, already has IT solutions which might be applied to this type of project. The State Archive itself would be happy to be part of this digital campaign, as its Director General has assured me, so that the 250,000 sheets of paper documenting the trials could be made available worldwide. But to do this here, in Nuremberg, would be a further sign that Germany is earnest about dealing with its past.

When looking for a stable basis for the legitimacy of international law, in my opinion, it will be necessary to focus on human beings, not the state. The link between international criminal law and human right, in my opinion, is much too neglected.

Developments of the past 10 years have also shown that crimes against humanity are maybe the normatively strongest penal norm in international criminal law.

The moral concepts behind the concept of crimes against humanity are that human dignity is inviolable, that all human beings are equal, and that nobody must be killed, hurt, tortured and excluded. These are values, whose truth and justness, maybe for different reasons, are nevertheless valid all over the world.

Massive and systematic violations of these fundamental human rights, regardless of whether they are committed by states or by private actors, cannot be tolerated!

Liberation from state arbitrariness, a guarantee of respect for these fundamental rights in constitutions world-wide, that’s what we should build on in the future.

Human rights are the core concern of the international community and of the United Nations. The dogmatic figure of speech, “Responsibility to Protect”, acknowledged by the International Court of Justice, even results in an obligation for the international community to intervene in cases of the most serious violations of human rights.

The obligation of states to set up an effective criminal justice system to strengthen and enforce the right to life and physical integrity, has been repeatedly emphasised by the European Court of Human Rights and by the Inter-American Court of Human Rights.

And this development is based on a much wider foundation than just that of criminal law. The dialogue about the rule of law, about human rights, the integration of social human rights, such as the right to education and nutrition and accommodation, the insistence on the universality of these rights, the support of transitional justice measures in hurt and bleeding societies, all this is just as much part of this process as putting your own house in order.

In our societies, human rights are continuously monitored. Not just those of refugees and asylum-seekers, but also those of perpetrators, of those in preventive detention.

We must reflect that any legal system only has one focus: the human person. There is no other reason for demanding, wording and enforcing legal regulations. It is always the human being at the centre.

If we succeed in focusing international criminal law on human beings and emancipating it, at least to a certain extent, from the states, then international criminal law has a new future. This gives meaning to the first Nuremberg Principle: Any person who commits a crime under international law is responsible for this and is liable to punishment.

Human dignity shall be inviolable!