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1. Introduction: the Different Legal Nature of the Nuremberg IMT Charter and the ICC Statute

A. The IMT Charter and the ICC Statute

The Charter of the Nuremberg International Military Tribunal (the Charter) was based on the London Agreement of 8 August 1945 - an intergovernmental agreement of the four main Allied Powers, providing for the prosecution and punishment of major war criminals from the European Axis countries. According to Article 2 of the London Agreement, the Charter, which issued an integral part of the intergovernmental agreement, determined the constitution, jurisdiction and sentencing power of the International Military Tribunal (IMT). This Charter, as part of an intergovernmental agreement on the treatment under criminal law of leading personalities of the German Reich (which, although defeated and occupied, was still existent as an international legal subject), had the legal quality of occupation law; hence, it was bound by the international legal principles on occupation law, laid down in the Hague Convention of 1907, the Geneva Convention relative to the Treatment of Prisoners of War of 1929 and in state practice. The Charter presented, in the view of the IMT, ‘the exercise of the sovereign legislative power by the countries to which the German Reich unconditionally surrendered’ and is ‘the expression of international law existing at the time of its creation’. However, it also contains two provisions - the crime against peace and the crime against humanity (Article 6(a) and (c), respectively) - that went beyond the pre-existing occupation law which provided for the prosecution of an occupied state's official organ for war crimes only. The same is true for the Statute of the International Military Tribunal for the Far East, announced during the Potsdam Conference on 26 July 1945 and implemented by Executive Order of General Douglas MacArthur, the Supreme Commander for the Allied Powers in Japan, on 26 April 1946.

The Rome Statute of the International Criminal Court (ICC Statute) differs fundamentally from the IMT Statute in terms of its legal basis and, hence, its legal nature. It was adopted in Rome on 10 July 1998, during a diplomatic conference attended by most of the then 189 Member States of the United Nations. It was accepted by a large majority of the participating Member States and became effective following ratification by the 60th signatory state, on 1 July 2002.
The IMT was a joint national court, set up and run by the signatory states to the London Agreement. It exercised the jurisdiction of an occupation court, as defined by the rules of international law applicable after the Second World War. However, it was not a body with independent international legal jurisdiction, and the IMT never described itself as an international court. Its legal powers were derived, so the Court stated, partly from occupation law and partly from the internal penal power of the defeated German Reich. [FN5] The International Law Commission (ILC), in their Nuremberg Principles, did not go any further than this, either. In contrast, the UN General Assembly, in its Resolution 260 B (III) of 11 December 1946, mandated the ILC to begin ‘to study the desirability and possibility of establishing an international judicial organ for the trial of persons charged with genocide and other crimes’ or ‘the possibility of establishing a Criminal Chamber of the International Court of Justice’. [FN6] The Court has only once commented on the unilateral formation of the IMT: ‘With regard to the constitution of the Court, all that the defendants are entitled to ask is to *40 receive a fair trial on the facts and law’ [FN7] - a statement which was substantially accepted by the international public.

The International Criminal Court, in contrast, was, from the beginning, set up to act as a ‘court of the future’, and is therefore fundamentally different in nature from the Nuremberg IMT. As a joint organ of the States Parties, set up by international agreement, it has international legal personality and legal capacity (Article 4(1) of the ICC Statute). Consequently, the Court’s written decisions set out legal propositions relevant to the determination of the rules of international law, pursuant to Article 38(1)(d) of the Statute of the International Court of Justice (ICJ Statute). Moreover, in contrast to the IMT, the ICC is a permanent and general court of law, exercising universal jurisdiction. Naturally, any such jurisdiction will be limited to crimes committed by subjects of any of the States Parties (active nationality principle) and crimes committed within the territory of any of the States Parties (territoriality principle) (Article 12(2) of the ICC Statute). The ICC enjoys universal jurisdiction only in cases of direct referral from the Security Council, on the basis of Article 13(b) of the ICC Statute (universality principle). The qualifications, independence and impartiality of ICC judges are ensured by the requirements for candidacy, which call for approval by the Assembly of the State Parties on the basis of a two-thirds majority vote (Article 36 of the ICC Statute). The ICC is, thus, a truly international criminal court of justice, brought to life almost half a century after the UN General Assembly gave its mandate to the ILC in 1950, thanks to tireless efforts on the part of criminal and international legal scholars and the United Nations.

2. General Principles of International Criminal Law Upheld in Nuremberg Compared with Those Laid Down in the ICC Statute

A. The Principle of Legality

Laws, in the formal sense, applied by national criminal law do not exist in international law, but determination of substantive international criminal law can be similarly strict, through the rules of international law. These rules are generated by the sources of law listed in Article 38(1) of the ICJ Statute. However, the ICC Statute goes even further in Article 21(1)(c), where it upholds the applicability of the ‘general principles of law derived by the court from national laws of legal systems of the world’. It was necessary for international criminal law to take this approach because classic international law did not offer sufficient rules of criminal law. National law was not only to fill these gaps, but also to take psychological reasons into account.

The function of the principle of legality as a legal guarantee is expressed more specifically in the principle of specificity, the ban of analogy and the principle of non-retroactivity.
The principle of specificity can only be satisfied fully in international agreements, since those are set down in writing, just as are formal laws in national legal systems. In the case of customary international law, general principles of law and case law, the principle can only serve as a guiding doctrine, to be observed when interpreting the rules produced by these sources of law.

Of the three crimes covered by Article 6 of the Charter, the IMT could refer to customary law as a recognized source of international law only in the context of war crimes. [FN8] As regards crimes against peace and crimes against humanity, the IMT followed Article 6(a) and (c) as strictly binding occupation law; ‘The law of the Charter is decisive, and binding upon the Tribunal’. [FN9] However, it also invoked the argument that ‘[t]he Charter ... is the expression of international law existing at the time of its creation’. [FN10] The efforts undertaken by the IMT to prove its thesis can be left aside for the moment. For all decisive purposes, the IMT viewed Article 6(a) and (c) as binding occupation law of the four Allied Powers.

In contrast, the ICC Statute was able to uphold the principle of legality much more closely. War crimes are dealt with exhaustively in Article 6, in accordance with the principle of specificity; crimes against humanity are equally treated in Article 7 including the generic clause on ‘other inhuman acts of a similar character’ in Article 7(1)(k), specified more closely in the ‘Elements of Crime’. [FN11] The crime of aggression was shelved in Article 5(2), until a definition of the crime can be decided by international agreement between the State Parties. All crimes in the Statute are subject to the principle of specificity, according to Article 22(2) of the ICC Statute: ‘The definition of a crime shall be strictly construed’. Article 21(1)(a) ensures that criminal norms set out in the ICC Statute, and the relevant elements of crime, are invoked prior to any other source of international law.

International law pursues a strict ban of analogy only when dealing with international agreements; for customary law and the general principles of law, again, the ban only serves as a guideline in the framework of existing law.

The IMT, when dealing with the question of whether crimes against peace were already punishable, relied upon and compared two existing international agreements, [FN12] which did not, however, offer a convincing justification for the Court’s reasoning. The Hague Convention of 1907 did not penalize the violation of the law of war; the enduring practice of penalization which existed outside treaty law took root in the older customary law, for which there was, however, no basis in relation to crimes against peace until the end of the Second World War, Equally, the General Treaty for the Renunciation of War of 27 August 1928 (Briand-Kellogg-Pact) did not contain any sanction - not even a declaration to the effect that war as such was a crime. The Court’s argument that ‘those who wage aggressive war are doing that which is equally illegal, and of much greater moment than a breach of one of the rules of the Hague Convention’, [FN13] failed to see, again, that war crimes had been punishable under customary law and that the IMT Charter could not ground the criminal punishment of the crimes against peace envisaged in Article 6(a) in existing customary law. However, the Court’s remarks on the comparison of Article 6(a) with the Hague Convention and the Briand-Kellogg-Pact were made to bolster the Court’s argument, whilst, primarily, the Court focused on the binding effect of the Charter on its jurisdiction. As such, these considerations of the Court should not be read as a fundamental assertion of the admissibility of analogy in international law.

The ICC Statute, by contrast, rightly contains an express statement in Article 22(2) on the ban of analogy in international criminal law.

The principle of non-retroactivity applies to international criminal law. The IMT, thus, could not ignore the
General Defence's exhaustively justified objection of ‘ex post facto law’ to the prosecution of crimes against peace. [FN14] In its response, the Court primarily referred to the binding effect of Article 6(a) of the Charter, providing that those crimes were punishable. It was ‘therefore not strictly necessary to consider whether and to what extent aggressive war was a crime before the execution of the London Agreement’. [FN15] The IMT then went on to consider that, in opposition to prevailing legal opinion, the principle of non-retroactivity was ‘in general a principle of justice’ [FN16] rather than a norm protecting the accused against the arbitrariness of authorities. Punishment of the offender was not unjust, however: rather ‘it would be unjust if his wrong were allowed to be unpunished’. [FN17] As for crimes against humanity, the IMT did not provide for an explicit justification of its power to punish them. However, it was able to refer to national laws, where, as a general rule, punishment was provided for. Where national provisions were lacking, e.g. with regard to the persecution of Jews in the case of Streicher, [FN18] it could resort to the express exclusion of the principle of non-retroactivity at the end of Article 6(c) (‘whether or not in violation of the domestic law’).

The ILC, on the other hand, found the reason for departure from the principle of non-retroactivity by looking to Article 6(c) of the IMT Charter and applying it to all crimes in the Charter (Principle II).

In contrast to the relaxed attitudes put forward by the IMT, in the IMT Charter and the ILC, Article 11(1) of the ICC Statute unequivocally provides: ‘The Court has jurisdiction only with respect to crimes committed after the entry into force of this Statute’.

*43 B. The Principle of Individual Criminal Responsibility under International Criminal Law

In one of its most important and influential findings, the IMT held that every person can be subjected directly to obligations under international law, including the possibility of criminal responsibility for violations. This statement announced the end of the classic doctrine whereby only states possess legal personality in international law. The new principle of individual criminal responsibility found its way into the IMT Charter as early as the programmatic introductory remarks to Article 6, albeit limited to ‘acting in the interests of the European Axis countries’. The principle applicable to crimes falling under Article 6 ‘shall be individual responsibility’. The IMT took this to be an expression of the general principle whereby ‘crimes against international law are committed by men, not by abstract entities’. [FN19] Thus, the Court sent a message to the world and made an appeal to the international law community to establish an international criminal court in the future.

The ILC posed this new perspective on international law at the top of the Nuremberg Principles: ‘Any person who commits an act which constitutes a crime under international law is responsible therefore and liable to punishment’. In the explanatory statement, the ILC derives the universal meaning of the principle of individual criminal law responsibility directly from the IMT’s reasoning.

For the creators of the ICC Statute, to mention ‘individual criminal responsibility’ in the title of Article 25 was self-evident. The text excludes ‘corporate responsibility’ (Article 25(1) of the ICC Statute), determines liability for ‘a person who commits a crime within the jurisdiction of the court (Article 25(2) of the ICC Statute) and contains detailed provisions on commission and participation (Article 25(3) of the ICC Statute).

C. Immunity and Act of State Doctrine
1. Exclusion of Immunity

The question of whether persons that enjoy immunity under international or state law, e.g. heads of state (procedural privilege), so that they may not even be accused, and would therefore be excluded a priori from the IMT's jurisdiction on the basis of their office, was not expressly discussed in the Judgment. The Dönitz case would have been an opportunity to deal with the issue, for Dönitz was expressly found to have succeeded Hitler as head of state from 1 May 1945. [FN20] That the Judgment is silent on the issue of immunity does not imply, however, that immunity was ruled out. Article 7 of the IMT Charter established material criminal law responsibility for heads of state and hence excluded their (material) immunity; at the same time, it made groundless the procedural privilege of exemption from criminal jurisdiction. Limited to serious international law crimes, this norm has become one of the principles of general application in international criminal law.

*44 Article 27(2) of the ICC Statute thus explicitly excludes the possibility to invoke immunity under national and international law as an objection to the jurisdiction of the ICC.

2. Abolition of the Act of State Doctrine

Whilst procedural immunity of heads of state did not seem to play a major role in the IMT Judgment (in contrast to subsequent proceedings, e.g. Pinochet, Milos evi), what did become relevant in almost all proceedings before the IMT was the question of whether foreign jurisdiction over acts carried out in an ‘official capacity’ was to be excluded. The traditional rule, namely that official acts carried out by higher organs of the state in the name of a sovereign state cannot be subjected to criminal responsibility under a foreign jurisdiction, was bound to come under pressure in the light of Article 7 of the IMT Charter, which postulates that ‘the official position of defendants shall not be considered as freeing them from responsibility’. The abolition of the Act of State doctrine for the whole of international criminal law in general was later articulated in the IMT Judgment: ‘The principle which protects the representatives of a State cannot be applied to acts, which are condemned as criminal by international law.’ [FN21] Once taken on board by the ILC (see Principle III), this ruling was practically elevated to the rank of customary law.

Article 27(1) of the ICC Statute applies the new rule to the entire range of offences falling under the Court's jurisdiction, referring to the ‘official capacity as a Head of State or Government, a member of a Government or Parliament, an elected representative or a government official’. In doing so, it completes a major improvement in international criminal law, the foundations of which started out in the IMT Charter.

D. The Principle of Culpability

According to the principle of culpability - if we take it to mean more than the requirement of mens rea in Anglo-American law - means and measures of punishment must be based on a court's conviction that the defendant is personally reproachable for the crime he or she has committed. In Germany, culpability exists as a constitutional principle (nulla poena sine culpa). Abroad, as well, it has become widely accepted because what is at stake is not a theoretical argument, but an essential guarantee of criminal justice. In international criminal law, as far as war crimes are concerned, culpability had been applied in practice - to a greater or lesser extent - for some time before the Nuremberg law and the ICC Statute. The question is how these two bodies of law dealt with it.
1. Nuremberg Charter and IMT Judgment

There is no provision in the IMT Charter making punishment dependent on culpability. Article 6 deals with strict liability *(objektive Zurechnung)*, attaching it for all *participants in a common plan or conspiracy to the causality of ‘all acts performed by any person in execution of such a plan’*. This provision is silent on culpability, however. Nevertheless, the IMT expressly required culpability, at least in the case of crimes of organizations or groups (Article 10 of the IMT Charter), as they bear a danger of mass punishment on the basis of mere membership: ‘One of the most important (of well settled legal principles) is that criminal guilt is personal’. [FN22] Moreover, the acquittal of Schacht of charges of crimes against peace demonstrates that crimes under Article 6(a) require, in fact, proof of criminal intent (*Vorsatz*). The Court stated ‘that Schacht did in fact know of the Nazi aggressive plans, has not been established beyond a reasonable doubt’. [FN23] Also, the conviction of Hess for a crime against peace did not rest on strict liability (*objektive Zurechnung*), but rather on inferences drawn from circumstances establishing his criminal intent or *Vorsatz*: ‘Hess must have been informed.’ [FN24]

The ILC (in Principle IV) determines the criminal responsibility of inferiors acting on superior orders on the basis of the Court's finding that ‘the true test ... is whether moral choice was in fact possible’. Where no choice was possible, e.g. in cases where the defendant cannot be blamed for his or her ignorance of the unlawfulness of the orders, then, according to the ILC, it is nevertheless possible to envisage for the subordinate a ground for excluding criminal responsibility.

2. The ICC Statute

Article 30(1) of the ICC Statute sets out the principle of culpability by requiring the general elements of intent and knowledge (*Wissen und Wollen*): ‘A person shall be criminally responsible and liable for punishment ... only if the material elements are committed with intent and knowledge’. *Knowledge* is here taken to mean ‘awareness, that ... a consequence will occur in the ordinary course of events’ (Article 30(3) of the ICC Statute), including the concept of *dolus eventualis* used in continental European legal theory. Exceptions from culpability, as would be permitted under the formula ‘unless otherwise provided’, do not introduce, as one may think, a concept of strict liability. Rather, they refer to the subjective elements below the level of intent, [FN25] such as the ‘responsibility of commanders and superiors’ in the case of negligence under Article 28(a)(i) (‘should have known that the forces were about to commit such crimes’) or, generally, gross negligence in cases of ‘wanton’ destruction not justified by military necessity (Article 8(2)(a)(iv) of the ICC Statute).

3. Superior Orders

Questions relating to the criminal responsibility of subordinates for acts committed on superior orders include cases of mistake of law (where the inferior mistakenly believes *an unlawful order to be lawful*), or the boundaries of the duty to obey orders, where those orders are recognized by the subordinate as unlawful. The issue was raised in relation to three crimes under Article 6 of the Nuremberg Charter, when dealing with the military rank of some defendants. The IMT Charter dealt with the issue by simply excluding from trial any legal questions relating to superior orders; it stated in Article 8 that ‘The fact that the defendant acted pursuant to order of his Government or of a superior shall not free him from responsibility’. However, the Court's view that ‘[t]he provisions of this article are in conformity with the law of all nations’ [FN26] cannot hold. In fact, the contrary is true as regards military orders. Whilst the Court did find the ‘moral choice test’ to be admissible, [FN27] it did not consider the objections raised (and which one should have expected would be raised), namely
that a particular order could not allow for ‘moral choice’. In the case of Keitel, for example, the Court recognized that ‘his defense relies on the fact that he is a soldier and on the doctrine of superior order prohibited by the Charter as a defense’. [FN28] The same was true for Jodl. [FN29] In addition, the Court did not consider either mitigation according to Article 8 or the possibility of a defense of mistake of law (Verbotsirrtum) as to the unlawfulness of the war of aggression in any of these cases.

The ILC did mention the ‘moral choice test’ in Principle IV, but it left unmentioned a further issue, namely whether, in cases where the test fails (e.g. threat of execution for persistent refusal to obey), defenses of duress or coercion could be available.

The ICC Statute, conversely, in Article 33(1)(b) and (c) upholds the currently prevailing solution for the issue of superior orders. The inferior is not criminally liable where he or she did not recognize the unlawfulness of the order, provided that the order was not manifestly unlawful, that is that everybody could have recognized its illegality. The solution is more favourable to the defendant than the general clause on mistake of law in Article 32(2) of the ICC Statute, because, normally, the subordinate will not answer for mistake as to the lawfulness of the order, except in cases of manifest unlawfulness.

In cases of genocide or crimes against humanity, orders are per se manifestly unlawful in the ICC Statute (Article 33(2)). The underlying rationale in these cases clearly rests on the assumption that consciousness of the act being ‘unlawful’ is taken for granted. For war crimes, on the other hand, the general norm applies: the multitude of possible scenarios which might fall within Article 8 would seem to leave ample room for mistakes, particularly in cases of offenses committed during armed combat. Thus, inferiors should be protected from unjust criminalization.

4. Mistake of Fact, Mistake of Law

In the IMT Charter, we cannot find any provisions on error, be it mistake of fact or mistake of law. Similarly, there is no mention in the IMT Judgment of these classes of errors, presumably because, on the facts at hand, there was no immediate need to deal with the issue. The closest the Court came to discussing the nature of mistake in relation to the gravest form of crimes against humanity was possibly in the case of Streicher, who claimed he did not know about the killing of Jews in the occupied Eastern territories. [FN30] The Court, however, did not believe Streicher and, therefore, did not embark on a discussion of the question.

It was not until the ICC Statute (Article 32) that both types of mistake were provided for under international criminal law. A mistake of fact is present where the defendant has no knowledge of one or more objective elements relevant for his or her mens rea, i.e. intent and knowledge (Article 32(1)). The provision should be applied, by way of analogy, to circumstances that are not part of the ‘objective elements’ of the crime (meant here in the narrow sense as the objective factors establishing the crime), but should nevertheless be treated as such. Just as for mistake of fact, mistake regarding the circumstances should serve as defense where the circumstances, had they existed as mistakenly assumed, would have justified the action (e.g. in cases of erroneous self-defense (Putativnotwehr)). A mistake in law exists, on the other hand, where the defendant wrongly assumes the existence of a justification in law for his or her actions, where, in reality, the legal order does not recognize any (e.g. execution of defectors).

As a complement to mistake of fact, mistake of law (Article 32(2)) arises where the defendant recognizes the objective meaning of his or her action, but errs as to its legal quality (e.g. a soldier shoots an enemy soldier who
has surrendered). In accordance with Anglo-American criminal law, Article 32(2) of the ICC Statute deems a mistake of law relevant only ‘if it negates the mental element required by such a crime’. In truth, mistake of law is not concerned with the elements of crime, but rather with the unlawfulness of the conduct in a given situation. To construct mistake of law correctly, a provision would have to read roughly as follows:

A mistake of law is a ground for excluding criminal responsibility if it negates knowledge of the unlawfulness of the act, the factual situation of which is known. Such mistake is ground for mitigation of punishment, if the author should have known the unlawfulness of the act.

The correct provision in dealing with mistake of law should be introduced by an amendment adopted according to Article 121 of the Statute.

5. Necessity and Duress

Necessity designates present danger to life or limb by objective circumstances (see Dudley and Stephens, also called the Mignonette case [FN31]); duress requires the same danger, but emanating from another person (Erdemovic case). [FN32] Both are grounds of excuse.

The Charter of the IMT does not deal with necessity or duress. As described above, the mentioning in the IMT Judgment of a ‘moral choice’ test in cases of superior orders [FN33] may be interpreted to the effect that where there is present danger for the life of the inferior flowing from his or her persistent refusal to obey superior orders, the ‘moral choice’ test fails and ‘duress’ could be available. The Court did not, however, pursue this reasoning for any of the Nuremberg defendants. Taking a similar stance, the ILC (Principle IV) hinted that the test may be applicable in favour of a defendant, ‘provided a moral choice was in fact possible for him’ and, thus, pointed to the possibility in international criminal law of an excuse of superior orders (but, at the same time, did not go further).

By contrast, Article 31(1)(d) of the Statute exhaustively sets out the conditions of duress (‘threat of imminent death or of continuing or imminent serious bodily harm ... and the person acts necessarily and reasonably to avoid this threat’) and, hence, firmly establishes duress as a ground for excluding criminal responsibility. No express distinction is drawn any more between duress and necessity, mirroring a modern development in national criminal law (e.g. § 35 of the German Criminal Code (StGB)).

The taking on board by the ICC Statute of the principle of culpability in its most eminent features represents another important advance for international criminal law. That said, the provisions on mistake of law still need amending, as explained above.

3. Specific Principles of International Criminal Law Set Out in the Nuremberg Charter and Judgment and in the ICC Statute

A. Elements of Crimes against Peace, War Crimes and Crimes against Humanity

1. Crimes against Peace

The IMT Charter defined the crime against peace as ‘planning, preparation, initiation or waging a war of ag-
gression’ (Article 6(a)). The IMT deemed this provision sufficient for grounding its findings and considered an analysis of the status quo of international law before the London Agreement of 1945 ‘not strictly necessary’. [FN34] However, the reasoning of the IMT, that ‘the Charter ... is the expression of international law existing at the time of its creation’, [FN35] is not convincing as regards crimes against peace. The Briand-Kellogg-Pact of 1928, which the IMT used as its main argument, did not go as far as declaring war of aggression to be a crime. Rather, it confined itself to specifying sanctions for breaches of the ban on war, namely the loss of advantages flowing from the Pact for the responsible state. A sanction as grave as individual criminal responsibility for the war of aggression would have had to be spelled out *49 explicitly in the Pact in order to take effect in international law. Although punishment of the crime against peace was in fact ‘ex post facto law’, a clarification made by the Court is important, namely that the ‘organizers, instigators and accomplices’ of the war of aggression could only be higher organs of the culpable state (hence, such responsibility was denied, e.g. for Frank [FN36] and for Streicher [FN37]). It is furthermore important to note that both under the Charter and in the Judgment, in order to fulfil the conditions of the crime, it was sufficient to contribute to the preparation of a war of aggression within the framework of a ‘common plan’ or ‘conspiracy’.

The ILC followed the IMT Judgment on crimes against peace (Principle VI) and particularly emphasized that commission of these crimes was restricted to ‘high ranking military personnel and high state officials’.

The Rome Conference could not reach consensus on the question of whether to include the war of aggression in the ICC Statute. A compromise was hammered out, conferring on the ICC jurisdiction over aggression, providing, however, that it would be exercised no sooner than seven years after the coming into force of the Statute, if and when the States Parties, in their Review Conference, adopt (by a two-thirds majority) and set out as an amendment to the original Statute a definition of ‘war of aggression’, together with the conditions under which jurisdiction can be exercised (Article 5(1) and (2); Articles 121 and 123). Some commentators regard the acknowledgement of ICC jurisdiction over the war of aggression as a binding expression of its unlawfulness under international law. Whilst it appears doubtful whether the State Parties will reach agreement on the outstanding points, it would seem more sensible to look at it merely as a declaration of intent.

2. War Crimes

The IMT Statute in Article 6(b) adopted the classic definition of war crimes as ‘violations of the laws and customs of war’ and cited the most important examples that were later confirmed by the Court, [FN38] which, in its findings on war crimes, confirmed the notion with regard to those defendants held guilty of such crimes. The customary law definition is applicable to new forms of warfare, as long as what is at issue are grave criminal acts, because customary law does not rule out analogy. As regards conspiracy, the IMT referred to it only in relation to crimes against peace, [FN39] whilst it confirmed that responsibility for participation in a common plan applied to war crimes as well, again, however, restricted to leading personnel.

The ILC emphasises, in Principle VI(b), the customary law basis for the punishment of war crimes.

The ICC Statute, in Article 8 and the pertaining elements of crimes, orders war crimes into four categories: ‘Grave breaches’ of the four Geneva Conventions of 1949 (amongst them taking of hostages, previously not subject to punishment), further *50 serious breaches of the laws and customs of war (including the bombardment of open cities without military targets), serious breaches of the common Article 3 of the Geneva Conventions of 1949 in civil wars and further serious breaches of the law of war in civil wars.
3. Crimes against Humanity

Severe crimes against humanity have been committed throughout the history of humankind. But, they could not as yet be punished under international law (e.g. the massacres on Armenians by the Turks during the First World War). Article 6(c) of the IMT Charter thus contained new law, but most of it was in line with national law. The IMT Charter defined crimes against humanity as ‘murder, extermination, enslavement, deportation and other inhuman acts against any civilian population before and during the war’. Notably, the crime extended to protect a state’s own civilian population. In addition, it included ‘persecutions on political, racial or religious grounds’. These grounds are pre-eminent in our modern consciousness, but the IMT could not rule on them in a pre-war context, as a consequence of the IMT Charter’s inherent connection of crimes against humanity with war of aggression and war crimes. [FN40] Important also was the availability of ex post punishment for crimes not covered by national law (e.g. in the Streicher case, the continuing fanatical persecution of Jews). Retroactivity applied, under Control Council Law No. 10, Article II(1)(c), also before German courts in the early post-war period, e.g. in cases of denunciation.

The ILC stressed, in Principle VI(c), the protection of the state’s own civilian population, very rightly so because the foundations for a much larger movement on human rights and fundamental freedoms, to begin soon afterwards, were thus laid out.

The definition of crimes against humanity in Article 7 of the ICC Statute and the relevant elements of crime takes great care to apply the ‘strict construction’ principle laid down in Article 22(2). By including a ‘widespread or systematic attack against civilian population’, the provision introduces the appropriate general framework. New in comparison with the IMT Judgment are torture (Article 7(1)(f)); sexual crimes (Article 7(1)(g)); enforced disappearance of persons (Article 7(1)(l)) and the crime of apartheid (Article 7(1)(j)). The generic clause in Article 7(1)(k) on ‘other inhumane acts of a similar character’ is restricted by the elements of crime attaching to it. The crime of genocide is now one of the independent crimes in Article 6 of the ICC Statute whereas, earlier, it fell within the definition of crimes against humanity laid down in the IMT Charter.

The progress in legally regulating war crimes and crimes against humanity, when compared with the IMT Charter, lies in the principle of specificity underpinning this new regulation.

*51 4. Parties to Crime

An important complement to the three definitions of crimes discussed above are the provisions on criminal responsibility and participation in Article 25(3), clearly modelled on continental European doctrine. Here, the rather singular clause on contribution ‘in any other way to the commission or attempted commission of such a crime by a group of persons acting with a common purpose’, as set out in Article 25(3)(d), takes a special position, somewhere between conspiracy, joint commission and preparation.

5. Attempt

The provision on attempt (Article 25(3)(f) of the ICC Statute) equally fits into the overall framework of the Statute, particularly the well-drafted distinction between preparatory and executive acts, again coined by continental European theory.

B. Grounds for Excluding Responsibility for War Crimes

There are three of these grounds, each closely connected to war crimes. The objection, in principle, raised by the defendant, Rosenberg, against the applicability of the law of war in the Occupied Eastern Territories, was rightly rejected by the IMT. Those territories did not form part of Germany; hence, they were subject to occupation law according to the Hague Convention. [FN41]

1. Military Necessity

Military necessity provides a justification where a criminal act is limited to use or destruction of tangible property and the laws of war generally permit such interference. Thus, a justification is implicitly provided in the IMT Charter, where Article 6(b) mentions devastation not justified by military necessity. A parallel provision can be found in Article 8(2)(a)(iv) of the ICC Statute. By way of important limitation, for killing of civilians or deportation of the civilian population, military necessity is not available as a justification.

2. Reprisals

Ample use is made of another justification offered by the laws of war, namely reprisals (at present, for example, constantly used in the armed conflict between Israel and Palestine). A reprisal constitutes an intentional violation of the adversary's interests protected by international law, with a view to coercing the adversary to refrain from certain acts committed in breach of international law. The most severe form of reprisal consists of hostage-taking and, in extreme cases, killing of hostages. Nature and degree of reprisals are, at least in principle, restricted by the requirement of proportionality. This restriction was widely neglected by Germany and, albeit to a lesser extent, also by its adversaries, during the Second World War.

Article 6(b) of the IMT Charter mentions the killing of hostages as a war crime. *52 During the Nuremberg trial, it remained uncontested that the use of reprisals against prisoners of war was prohibited by Article II of the Geneva Convention of 1929. The IMT admitted evidence against the charge of unlawful killing of partisans in Yugoslavia and of the taking of the adversary state's civilians as hostages. Although the Court showed that it had doubts as to the facts in these cases, it did not categorically rule out the availability of reprisals as a justification. [FN42]

The ICC Statute adopted the provision of the Geneva Convention of 1949, declaring the taking of hostages a war crime (Article 8(2)(a)(viii)). Reprisals are not mentioned as part of the grounds for justification in Article 31. This would indicate that reprisals should not be admissible any more as a justification. This is all the more so because self-defence, used much less often than reprisal in the ordinary course of war, is dealt with exhaustively in the Statute.

3. Tu Quoque

When using the defence of tu quoque, the accused puts forward in his or her favour that he or she should not be punished for a war crime on the ground that the state power represented by the prosecution had regularly committed comparable crimes under similar circumstances. The Commander of the German submarines, Admiral Dönitz, prosecuted in the IMT trial for unrestricted submarine warfare, could prove that the British Navy had acted in the same manner in the Skagerrak. Moreover, the Court was handed a written statement by the Americ-
an Admiral Nimitz, ‘stating that unrestricted submarine warfare was carried on in the Pacific Ocean by the
United States from the first day that Nation entered the war’. [FN43] So, ultimately, the conviction of Dönitz
could not rest on his carrying out unrestricted submarine warfare. The same was held in favour of the Command-
er in Chief of the German Naval Forces, Admiral Raeder. [FN44]

The legal nature of *tu quoque* is unclear. It cannot be a justification. It should rather be considered a proced-
ural impediment (*Prozesshindernis*). It may equally well be that the common Code of Honour of the Navy did
not allow for a conviction of the enemy in such cases of comparable guilt. These are the only two instances in
the IMT Judgment where *tu quoque* was mentioned.

The ICC Statute makes no mention of the defense of *tu quoque* - and rightly so; it should be added, as the
Court would otherwise forgo the possibility to prosecute war crimes regularly committed by both sides to an in-
ternational conflict.

**C. Penalties and Determination of Sentences**

1. Penalties

The most unfortunate formulation in the IMT Charter was, without doubt, contained in Article 27 on punish-
ment. It reads ‘[t]he Tribunal shall have the right to impose *53* upon a defendant, on conviction, death or such
other punishment as shall be determined by it to be just’. A similarly simplistic provision on penalties cannot be
found anywhere else in criminal law. This introduced the death penalty as the sole punishment, expressly
provided for all charges and all defendants, without reference to sentencing criteria, and allowed unlimited dis-
cretion with regard to all other sanctions, in glaring disregard of the principle of specificity. All this was bound
to shift sentencing towards the most severe penalties, as was finally confirmed when the Judgment was handed
down. In addition, the Charter lacked a provision on types of penalties (other than the death penalty), on maxim-
um and minimum penalties and on sentencing criteria for all other sanctions. All these factors ultimately left the
defendants, where they were convicted, at the mercy of the judges.

In contrast to the IMT Charter, the ICC Statute contains an independent system of penalties in Article 77,
with life imprisonment as the maximum penalty, alongside sanctions such as imprisonment for a specified
number of years, up to 30 years: a fine calculated according to a system of daily rates from 30 days to five years
(Article 146(4) of the Rules of Procedure and Evidence (ICC RPE)); and forfeiture of proceeds, property and as-
sets derived directly or indirectly from the crime. The abolition of the death sentence, the reservation of life sen-
tences for cases of ‘extreme gravity of the crime’, a minimum imprisonment of one year and a minimum daily
fine of 30 days evince that imprisonment would normally be set for a medium term, and that the alternative of a
‘daily fine’ for a minimum period of 30 days would appear to be a drafting error, in view of the preamble text,
limiting the application of the Statute to ‘the most serious crimes of concern to the international community as a
whole’.

2. Determination of Sentence

The IMT Charter included no provisions on sentencing. Similarly, in its Judgment, the IMT gave no more
than the sentence for each convicted defendant, without justification. [FN45]
In contrast, the ICC Statute contains an exhaustive provision in Article 76 dealing with the sentencing procedure, quite obviously resting on the assumption that judgments must include a section justifying the sentence, just as reasons are also required for the other parts of the judgment (Article 74(5)). Material sentencing aspects are governed by the two principles of ‘gravity of the crime’ and ‘individual circumstances of the convicted person’. More detailed rules are set out in Rule 145(1)(a) of the ICC RPE. These identify culpability as the principle guiding modern criminal law: ‘The court shall bear in mind that the totality of any sentence of imprisonment and fine, as the case may be, imposed under Article 77 must reflect the culpability of the convicted person’. The rules go on to lay down the main criteria determining degrees of unlawfulness and culpability (Rule 145(1)(c) of the ICC RPE), followed by the main examples for mitigating circumstances (Rule 145(2)(a) of the ICC RPE) and aggravating circumstances (Rule 145(2)(b) of the ICC RPE). They conclude with a sentencing formula for life imprisonment (Rule 145(3) of the ICC RPE).

The sanctioning system of the ICC Statute provides an excellent example of reasonable, measured and sufficiently differentiated solution on penalties. Most importantly, the ICC appears to view sentencing as crucial to its activity and expressly makes it subject to the principle of culpability. Both - the system of penalties as well as that of sentencing - take the ICC Statute a considerable step forward when compared to the Nuremberg law.


The founding of the ICC with the coming into force of the Rome Statute on 1 July 2002 was one of the major events in the modern history of criminal and international law. The first permanent International Criminal Court is the common answer by many Member States of the United Nations to severe violations of international law and human rights, in particular in the Second World War but also in subsequent decades up until present times, that have constantly strained the conscience of humankind. The jurisdiction of the ICC is intended to put a check on widespread impunity, while, at the same time, clearly marking ICC crimes as punishable wrongs in the future. The ICC, thus, continues the work of other international institutions which, on different levels, have sought to pursue these aims, ever since the Second World War.

In its content, the ICC Statute upholds the principle that state officials may incur criminal responsibility under international criminal law, as was initially enunciated at Nuremberg in the IMT Charter. But it goes further than this by creating a criminal legal order, applicable to all human beings, coupled with an impartial international criminal law jurisdiction.

The establishment of the ICC was positively received throughout the world. The United States, however, took a decidedly negative attitude towards the Court, making its activities more difficult, yet not impossible. The US opposition is bitter, particularly as, ever since the First World War, they had promoted a permanent and universal international institution for the prosecution of crimes against international law. For a long time, their scholarship also actively supported the formation of an international court, particularly as regards the Charter of the IMT and the Nuremberg trial, a great part of which was essentially the work of the United States. It was no later than 1945 that Justice Robert H. Jackson, the American Prosecutor-in-Chief and leading initiator of the IMT trial, specifically made the case for an impartial international court of the future and a universally applicable international criminal law. This was what Americans had fought for during the Second World War, he said, namely: ‘that out of this war should come unmistakable rules and workable machinery from which any who might contemplate another era of brigandage would know that they would be held personally responsible and would be personally punished’. [FN46]
Justice Jackson even raised his voice against the ‘entirely partisan declaration of law’ in the Soviet draft of the crimes suggested for inclusion into the IMT Charter. He called for a Statute of general applicability, at least in the future: ‘If certain acts in violation of treaties are crimes they are crimes whether the United States does them or whether Germany does them, and we are not prepared to lay down a rule of criminal conduct against others which we would not be willing to have invoked against us’. [FN47]

The UN Security Council Resolution No. 1422 (2002) of 12 July 2002, enacted following considerable pressure from the United States, marked a departure from this long-standing American tradition. The Resolution exempts, as from 1 July 2002 and for the duration of one year, citizens of a state not party to the Rome Statute from the jurisdiction of the ICC ‘over acts and omissions relating to a United Nations established or authorized operation’. It is renewable every 1 July for another 12 months and was actually renewed in 2003.

The new US ideology certainly stands in glaring contradiction to the high mission they had undoubtedly won as leading peace power in the wake of the new world order after 1945, as a result of their active support for the establishment of the United Nations. The ICC is, after all, no more than an offspring of precisely the new world order which had been constructed, to a considerable extent, under the auspices of the United States itself.

The United States would fulfil its international responsibilities only by deciding to halt its blockage of the ICC. Without any difficulty or even loss of face, it could do so as from 1 July 2004 by resisting a further extension of the Resolution of 12 July 2002 every 1 July. This would leave time to see whether the activity of the ICC really would adversely prejudice the United States’ fundamental interest as a superpower. If that was the case, the Security Council Resolution could be renewed. In case there was no reason for concern, however, the ICC could immediately take up its urgently needed activities as the highest independent judicial authority on criminal law, on behalf of the international law community, to deal with all those crimes against humanity and war crimes in the international and internal armed conflicts that currently trouble humankind.

[FNa1]. Honorary President, International Association of Penal Law: former President, Dean and Professor of Criminal Law, Albert-Ludwig University, Freiburg im Breisgau: former Director, Max-Planck Institute for International and Comparative Criminal Law, Freiburg im Breisgau.


[FN2]. Judgment, supra note 1, at 216.


[FN4]. Ninety-eight states in all have ratified the Statute, including all 15 present Member States of the EU. The 18 judges of the ICC and the Prosecutor have been elected. On 11 March 2003, the Secretary-General of the UN,
Kofi Annan, gave a speech in the Knight's Hall (Ridderzaal) of the Dutch Parliament in The Hague to inaugurate the ICC, in the presence of Queen Beatrix. The ICC Statute constitutes an international law agreement between the Member States, with effect on themselves and on their citizens.

[FN5]. Judgment, supra note 1, at 216.

[FN6]. Formulation, supra note 1, at 134.

[FN7]. Judgment, supra note 1, at 216-217.

[FN8]. Ibid., at 219.

[FN9]. Ibid., at 216.

[FN10]. Ibid.


[FN12]. See Judgment, supra note 1, at 218-219.

[FN13]. Ibid.

[FN14]. Ibid., at 186.

[FN15]. Ibid., at 217.

[FN16]. Ibid.

[FN17]. Ibid.

[FN18]. Ibid., at 296.

[FN19]. Ibid., at 221.

[FN20]. Ibid., at 302.

[FN21]. Ibid., at 221.

[FN22]. Ibid., at 251.

[FN23]. Ibid., at 301-302.

[FN24]. Ibid., at 276.


[FN26]. See Judgment, supra note 1, at 221.

[FN27]. Ibid.

[FN28]. Ibid., at 283.
[FN29]. Ibid., at 313.

[FN30]. Ibid., at 342.


[FN33]. Ibid., at 221.

[FN34]. Ibid., at 217.

[FN35]. Ibid., at 216.

[FN36]. Ibid., at 289.

[FN37]. Ibid., at 294.

[FN38]. Ibid., at 224-249.

[FN39]. Ibid., at 248.

[FN40]. Ibid., at 249.

[FN41]. Ibid., at 288.

[FN42]. Ibid., at 365.

[FN43]. Ibid., at 305.

[FN44]. Ibid., at 308.

[FN45]. Ibid., 331-332.


[FN47]. Ibid., at 330.

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