

2006

# Transitional Justice: Postwar Legacies (Symposium: The Nuremberg Trials: A Reappraisal and Their Legacy)

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## Recommended Citation

27 *Cardozo L. Rev.* 1615 (2005-2006)

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# TRANSITIONAL JUSTICE: POSTWAR LEGACIES

*Ruti Teitel\**

## INTRODUCTION

In the public imagination, transitions to liberal rule are commonly linked with punishment and the trials of ancient regimes. Thus, the trials of Kings Charles I and Louis XVI constitute enduring symbols of the English and French Revolutions, which both led to transformation from monarchic to republican rule. Similarly, more than sixty years ago, the Nuremberg trials were convened to bring to justice the masterminds of World War II's terror, and to lay the foundation for a democratic Germany.

Even as the international community commemorates the anniversary of these trials, it is also in the midst of multiple efforts at international criminal justice. At the present moment, there are an unprecedented number of indicted political leaders in the dock, or, the shadow of its threat: Slobodan Milosevic, Saddam Hussein, Augusto Pinochet, Charles Taylor, Alberto Fujimori. Moreover, there are war crimes tribunals to prosecute violations of humanitarian law in former Yugoslavia, the attempted genocide in Rwanda, a hybrid court in Sierra Leone, as well the newly established standing International Criminal Court (ICC). These new tribunals re-raise the question of the ongoing legacy of the Nuremberg tribunal, and of how it informed the aims and forms of transitional and post-conflict justice.

Nuremberg established the principle of individual criminal accountability for human rights violations perpetrated against civilians in wartime: that certain crimes are so heinous that they violate the "law of nations" and may be prosecuted anywhere. The twentieth century has witnessed the commission of terrible atrocities: Turkey's massacre of the Armenians; Bangladesh; the Pol Pot regime in Cambodia; Iraq's brutal campaign against its Kurds; the more recent Hutu-Tutsi massacres in Rwanda; and the crimes of war-torn Yugoslavia. Yet, until recently, half a century after Nuremberg, there were few attempts to enforce international accountability. The twentieth century's record was largely one of state persecution and impunity, keeping alive the

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question of what is the meaning of rule of law when states turn on their citizens.

There is, therefore, a puzzling dimension to our understanding of Nuremberg's significance. Intended as a precedent for the future, the trials were aimed at teaching individual responsibility for crimes of aggressive war and crimes against humanity, so as to deter their recurrence. Nevertheless, it would be a full half-century before another international tribunal would be convened to bring a regime to justice for human rights abuses in times of conflict. Yet, despite the general record of failure of criminal accountability, and the Nuremberg Tribunal's anomalous nature, the Tribunal's impact transcends its circumstances to contribute a guiding force for a war-driven century.

The precedential ramifications extend well beyond the parameters of the postwar consensus to the prevailing international legal system. There continues to be a gap between international law's development of international humanitarian crimes and its enforcement. Yet, despite its extraordinary nature, the virtue of the international legal scheme is that it contributes a normative vocabulary that somehow mediates many of the dilemmas of transitional justice. The central dilemma intrinsic to transition is how to move from illiberal, often persecutory rule, and to what extent this shift is guided by conventional notions of the rule of law and principles of individual responsibility associated with established democracies. The exercise of criminal justice is thought to best undo past state injustice, and to advance the normative transformation of these times to a rule of law system. Repressive regimes are often characterized by criminal behavior—such as torture, arbitrary detention, disappearance, extrajudicial executions—that is substantially state sponsored. Even when past wrongdoing is perpetrated by private actors, the state is often nevertheless implicated, whether in policies of persecution, by acts of omission in failing to protect its citizens, or, finally, in the cover-up of criminal acts and impunity. While the circumstances of transition, that often imply the prior involvement of the state in criminal wrongdoing, make a compelling argument for punishment over impunity, the very transitional circumstances of the predecessor regime's implication in wrongdoing raise significant dilemmas that go to the purposes of the criminal law to advance the rule of law.

A core tension that emerges here goes to the potential use of law to advance transformation, rather than to adhere to conventional legality. To what extent is transitional criminal justice conceptualized and adjudicated as extraordinary in the relevant societies or guided by the ordinary rule of law of established democracies? This core dilemma implies many others. Where retributive justice is sought, what principles should guide the punishment policy? These are the dilemmas

over which successor societies commonly struggle. Ultimately, confronted with these dilemmas, a transitional compromise is struck leading to the “limited criminal sanction,” which, over time, frequently implied foregoing criminal justice, culminating in a symbolic form of punishment.

The gap between the international law apparatus for thinking about justice and its mechanisms for enforcement remains a yawning chasm. Nevertheless, despite its extraordinary nature, international law contributes a normative vocabulary that mediates many of the dilemmas of transitional justice. For this reason, more than a half century later, it is Nuremberg’s legacy that continues to guide our thinking about transitional and post-conflict justice.

### I. DILEMMAS OF TRANSITION

The central dilemma of transition is how to transform a society that has been subjected to illiberal rule and the extent to which this shift is guided by conventional notions of the rule of law and the responsibility associated with established democracies. A core tension emerges in the use of law to advance transformation, as opposed to its role in adherence to conventional legality. To what extent is transitional criminal justice conceptualized as extraordinary in the relevant societies or guided by the ordinary rule of law?

This core dilemma implies many others. Who should be held to account and for what offense? Under what legal order? International or national? Military or civilian? These are the dilemmas successor societies struggle with; ultimately, as discussed below, they commonly strike a transitional compromise, the “limited criminal sanction,” which is, more than anything, a symbolic form of punishment.

Until recently, the dominant force of the Nuremberg legacy lay in the way it constructed our understanding of state injustice, as well as the normative response to it. Its impact is evident in its domination of the legal culture of international human rights.

Exploring the significance of Nuremberg requires recognition of the diverse implications of the precedent, which may be understood in a number of ways. One might distinguish the fact of the tribunal’s proceedings from their broader precedential value. Nuremberg was self-consciously styled as the foundational trial of the postwar proceedings. There was precedential value in both the convening of the international tribunal and the standards and principles contained in the tribunal’s judgment. Seen from a historical perspective, Nuremberg would be foundational in terms of the law applied, the weight of its judgment, and the related ratification of postwar doctrine. There would

also be a more profound normative impact in the broader international humanitarian law discourse introduced.

## II. FOUR NUREMBERG IDEAS

A number of features of the postwar trials continue to play an ongoing significant role in defining the way we think about state persecution and the responses to such persecution—i.e., our sense of justice. The points of categorical change set in motion in these precedents can usefully be thought of in terms of a series of dualisms, which might be considered the “Nuremberg categories of justice.” These categories continue to shape the structuring of successor justice.

Four central Nuremberg categories will be discussed here: first, judgment and accountability; second, conceptions of responsibility; third, the problem of sovereignty and jurisdiction and the impact of Nuremberg on military versus civilian legal order (and related developments regarding the laws of war versus laws of peace and the relation between war crimes law and that of human rights); and, finally, the sense in which Nuremberg-style accountability transcends national borders to offer a form of global justice. While there are other points to make about Nuremberg, these features remain central because of their precedential impact.

### A. *Judgment and Its Centrality*

To begin, the Nuremberg precedent stood for postwar judgment and the idea that war-making was subject to judgment. The intended judgment was neither political nor moral, but legal. The central point here is the triumph of the law over the use of force as the guiding form of rule of law in international affairs. Judgment is where the rule of law and politics meet. Therefore, the significance at Nuremberg was that the war was adjudged unlawful. Aggression was deemed the “supreme” crime. Moreover, the apt form of judgment was the trial, and the appropriate forum for judgment was the International Military Tribunal.

Judgment after the war took the form of individual accountability. The judgment at Nuremberg represents the belief that, despite the pervasiveness of a culture of totalitarian criminality, normative transformation is possible through individual accountability. As early as the St. James Declaration,<sup>1</sup> the intent was asserted to renounce

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<sup>1</sup> The St. James Declaration was signed in 1942 in London by nine Nazi-occupied countries, the United States, the United Kingdom, and the Soviet Union, and announced Allied intentions to

vengeance and collective sanctions, and, instead, to pursue a policy of punishing the guilty. This punishment policy's significance is best understood in a historical light, that is, in the context of past postwar justice, as the trial at Nuremberg was convened in the shadow of post-World War I justice. Versailles's failure in not apportioning individual responsibility, together with the imposition of onerous collective sanctions, was seen as, in some fashion, to have been related to the recurrence of state aggression.

Judgment is what distinguishes the Nuremberg Tribunal's work from politics as usual. For this reason, it was critically important that the tribunal adhere rigorously to the regular procedural forms. Legality demands individual trials and specific charges be proven on the basis of evidence with full opportunity for due process. Right to counsel was guaranteed along with the presumption of innocence. These were not show trials, in the ordinary sense of a preordained result.

At Nuremberg, there was no difficulty establishing the necessary historical record. The evidence underlying the charges was so massive that the defenses were mainly those of law, involving the nature of the charges and the extent of individual responsibility. The trials generated a record for future proceedings as well as for subsequent historical study. Indeed, by now, whether through trials or historical commissions, this record-making dimension is now concededly an independent form of accountability.

Other dimensions of the postwar precedents concern the issue of legality and the resulting innovations. Though the trials largely adhered to accepted criminal procedures, they ran into problems of legality where their operation appeared to collide with adherence to the rule of law. The fundamental challenge was the charges' *ex post facto* nature, and the extent to which the issue of retroactivity was in tension with the tribunal's legality.<sup>2</sup> Retroactivity was particularly apparent in the extraordinary character of the proceedings and certain charges in the charter, such as "crimes against peace" and "crimes against humanity." No firm consensus existed on the definition of unjust war or the distinction between such wars and others advancing political aims. Holding individuals responsible for such offenses raised questions of fundamental fairness. Codified in the postwar charter, for the first time, the notion of "crimes against humanity" aimed at distinguishing political justice from the rule of law. For the invocation of "humanity"

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punish crimes against civilians following the war.

<sup>2</sup> The dilemma raised at Nuremberg relating to the rule of law catalyzed a debate on the nature of international norms and the extent to which these could be considered consistent with positive law. Ultimately, Nuremberg would imply a move away from support of positivist principles of interpretation and towards an endorsement of natural law principles. For an exploration of this issue, see Quincy Wright, *Legal Positivism and the Nuremberg Judgment*, 42 AM. J. INT'L L. 405 (1948).

situates the offense both outside the parameters of permissible war and outside politics. The concept of the offense against humanity is another place where the postwar trials attempted to move beyond political justice to express a normative message.

Consider the precedential implications: the significance of judgment is seen in the degree to which punishment and the law-enforcement model continue to dominate understandings of transitional justice. This harshest form of law has become emblematic of accountability and the rule of law; yet, its impact transcends its incidence. Review of transitional periods reveals that successor criminal justice continues to raise profoundly agonizing questions for the affected societies, often resulting in punishment foregone. The debate over transitional criminal justice is marked by profound dilemmas: Whether to punish or grant amnesty? Is punishment a backward-looking exercise in retribution or an expression of the renewal of the rule of law?

Over time, the role of judgment has revived in significance. This is seen in the number of present international and hybrid tribunals including the International Criminal Tribunals for the former Yugoslavia,<sup>3</sup> Rwanda,<sup>4</sup> Sierra Leone,<sup>5</sup> as well as the recently established permanent International Criminal Court. Moreover, in the contemporary, post-cold-war rise of unilateralism and terrorism, these legal distinctions are all that stands between us and total war—hence, the emphasis today on the law of war and its instantiations.

While for half a century the conception of just war had not been followed, with the cold war's end and the apparent potential of abjuration of force, not surprisingly, there was a call to redefine the concepts defining and enforcing aggression in ethical terms. This revival is seen in the recriminalization of "aggression," as discussed in Part II.D.<sup>6</sup> Any return to just war theory presents many issues as the concept remains, as of yet, undefined and lacking normative consensus.

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<sup>3</sup> See Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991, May 25, 1993, 32 I.L.M. 1192 [hereinafter International Criminal Tribunal for the Former Yugoslavia].

<sup>4</sup> See Statute of the International Criminal Tribunal for Rwanda, Nov. 8, 1994, 32 I.L.M. 1602.

<sup>5</sup> See Statute of the Special Court for Sierra Leone, Aug. 14, 2000, available at <http://www.sierra-leone.org/specialcourtstatute.html> (last visited Feb. 6, 2006).

<sup>6</sup> The ICC Charter includes "aggression" as one of the substantive offenses under its jurisdiction, yet the offense continues to lack a definition. See Rome Statute of the International Criminal Court art. 5(2), July 17, 1998, U.N. Doc. A/CONF.183/9, 37 I.L.M. 999 [hereinafter Rome Statute]; Jennifer Trahan, *Defining "Aggression": Why the Preparatory Commission for the International Criminal Court has Faced Such a Conundrum*, 24 LOY. L.A. INT'L & COMP. L. REV. 439 (2002).

## B. *Reconceiving Responsibility in Transition*

Who bears responsibility for past repression? To what extent should responsibility for repression be ascribable to the individual, the regime, or the society?

Nuremberg presented the problem of how to prosecute the massive systemic crimes of the modern bureaucratic state. In the transitional context, what does accountability mean? Later, the question would be expanded beyond the postwar conflict. In the shadow of Versailles, Nuremberg took an important step away from the notion of collective guilt and of state responsibility—the country as a whole would not be held accountable. Instead, in a giant departure from prevailing international law, where states were the relevant subjects, responsibility was conceptualized primarily along a human measure.

A dimension of the significance of Nuremberg was its fluid understanding of responsibility. The Tribunal's innovation, based on the American law of conspiracy, was linking up individual and organizational responsibility.<sup>7</sup> While later limited, the Nuremberg conception of criminal responsibility continues to present a radical reconceptualization and expansion of the understanding of individual responsibility for state persecution.<sup>8</sup> Responsibility for state wrongdoing transcended prevailing understandings of official state action.<sup>9</sup> In this respect, Nuremberg set the tone for the many subsequent national trials of collaborators throughout the formerly occupied countries. Nuremberg's easy attribution of collective, organizational guilt would also be reflected in widespread denazification policies in the postwar period.<sup>10</sup> Decades later, at the cold war's end, similar lustration policies would be adopted throughout Eastern Europe.

The distinctive conception of individual responsibility was subsequently codified in the United Nations General Assembly's "Nuremberg principles."<sup>11</sup> The seminal conception was reflected in two principles, which operated to eliminate two central defenses to

<sup>7</sup> For discussion of the approach at Nuremberg to the responsibility of Nazi organizations, see Robert H. Jackson, *The Law Under Which Nazi Organizations are Accused of Being Criminal*, 19 TEMP. L.Q. 371 (1946).

<sup>8</sup> Control Council Law No. 10 provided the legal basis for the subsequent American trials. It delineated the crimes that could be prosecuted under the heading crimes against peace, war crimes, and crimes against humanity.

<sup>9</sup> Compare articles 6(a), (b), and (c) of the Nuremberg charter. Charter of the International Military Tribunal at Nuremberg art. 6, Aug. 8, 1945, art. 6 (a)-(c), 59 Stat. 1546, 1547, 82 U.N.T.S. 279 [hereinafter Charter of the International Military Tribunal].

<sup>10</sup> Thus, in part, denazification occurred in Germany through the U.S.-imposed "Law of Liberation." For an account, see JOHN HERZ, *FROM DICTATORSHIP TO DEMOCRACY: COPING WITH THE LEGACIES OF AUTHORITARIANISM AND TOTALITARIANISM* (1983).

<sup>11</sup> See Affirmation of the Principles of International Law Recognized by the Charter of the Nuremberg Tribunal, G.A. Res. 95(I), at 188, U.N. Doc. A/64/Add.1 (Dec. 11, 1946).

individual culpability: act of state and due obedience. Removing these defenses would fundamentally transform the prevailing international law understanding of responsibility as to both the responsibility of the prior regime and military order and its chain of command. These principles regarding individual responsibility at Nuremberg have had an enduring effect on our understanding of individual responsibility for violations of the laws of war, as demonstrated both in the follow-up trials,<sup>12</sup> in subsequent denazification,<sup>13</sup> as well as in national war crimes trials, where the defense of obedience obtained no acceptance.<sup>14</sup>

This idea would have legs. In post-cold-war Germany, in another period that faced issues of transitional justice, the post-1989 border guards cases would similarly reject the defense of “following orders” and, in so doing, promote a unified rule of law for the country.<sup>15</sup>

Seen from a historical perspective, the Nuremberg Principles wrought a radical expansion of potential individual liability at both ends of the power hierarchy. Postwar jurisprudence signified a radical expansion in potential individual liability without any clear stopping point. While the prosecutions commenced with the major war criminals, nothing in the charter limited the ultimate attribution of responsibility to the regime’s top echelon. This potentially unbounded conception of responsibility continues to shape contemporary transitional justice, presenting the dilemma of the post-Nuremberg liability explosion. While the principles generated at Nuremberg radically expanded the potential individual criminal liability, they do not ultimately offer a basis for deciding, among all of those potentially liable, whom to bring to justice.

Therefore, the postwar expansion in potential liability raised ongoing and profound human rights dilemmas for successor regimes deliberating over whom to bring to trial, and for what crimes. To the extent that there is a normative guiding principle, it is the implied one of proportionality. The priority is to prosecute those “most responsible for the worst crimes”—i.e., attribution at the highest level of responsibility for the most egregious crimes.<sup>16</sup> Should this principle result in selective prosecution, it runs the risk of threatening the very rule of law such

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<sup>12</sup> See TELFORD TAYLOR, *THE ANATOMY OF THE NUREMBERG TRIALS: A PERSONAL MEMOIR* (1992).

<sup>13</sup> See *Law for Liberation from National Socialism and Militarism* (1946) (German legislation), available at <http://digicoll.library.wisc.edu/cgi-bin/History/History-idx?type=turn&entity=History004201870056&isize=M> (last visited Feb. 6, 2006).

<sup>14</sup> See ADALBERT RUCKERL, *THE INVESTIGATION OF NAZI CRIMES, 1945-1978: A DOCUMENTATION* (Derek Rutter trans., 1980).

<sup>15</sup> See RUTI TEITEL, *TRANSITIONAL JUSTICE 18-20* (2000) (discussing the border guards decisions).

<sup>16</sup> See, e.g., Richard Dicker & Elise Keppler, *Beyond the Hague: The Challenges of International Justice*, in HUMAN RIGHTS WATCH WORLD REPORT 2004: HUMAN RIGHTS AND ARMED CONFLICT (2004), available at <http://hrw.org/wr2k4/10.htm>.

processes seek to advance. Indeed, such tension is raised by the ad hoc International Criminal Tribunal for the former Yugoslavia where only a fraction of those responsible for war crimes and atrocities will be brought to justice.<sup>17</sup>

For some time now, the postwar conception of responsibility has continued to be influential. These principles have had a significant impact on the broader conception of transitional justice seen in several human rights trials held decades later, such as, for example, in Argentina during the aftermath of its military dictatorship.<sup>18</sup> The ongoing precedential value of the Nuremberg view of individual responsibility is evident in the contemporary international tribunals, such as the International Criminal Tribunal for former Yugoslavia, convened in the Hague, where the policy has been to indict a range of individuals from the top Serbian leaders, such as Slobodan Milosevic, Radovan Karadzic and Ratko Mladic, to low-level guards and members of the paramilitary.<sup>19</sup> This policy is vulnerable where those considered most responsible for atrocities remain at large, though, to some extent, the Milosevic trial has mitigated this perception.

These ideas, moreover, have been elaborated upon and expanded in the ICC charter in its principles regarding individual responsibility, which criminalize forms of aid and sponsorship.<sup>20</sup> The direction is seen in the sharp increase in trials and indictments of political leaders such as Slobodan Milosevic, Saddam Hussein, Augusto Pinochet, and Charles Taylor. The challenge in the political leader cases will be making out a demonstrable nexus between the leaders and the wrongs at stake. Wherever this is absent, the perception would be of a politicized trial at odds with the central aim of the rule of law.<sup>21</sup> While a challenge, in many ways, the present Milosevic trial represents a flowering of the postwar ideas.

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<sup>17</sup> See Ruti Teitel, *Bringing in the Messiah Through the Law*, in HUMAN RIGHTS IN POLITICAL TRANSITION: GETTYSBURG TO BOSNIA 177 (Carla Hesse & Robert Post eds., 1999).

<sup>18</sup> See *Federal Criminal and Correctional Court of Appeals, Buenos Aires: Conviction of Former Military Commanders*, 8 HUM. RTS. L.J. 368 (1987).

<sup>19</sup> See Press Release, International Criminal Tribunal for the Former Yugoslavia, Milan Martić, Radovan Karadžić and Ratko Mladić Indicted Along with 21 Other Accused (July 25, 1995) (see also statement by Justice Richard Goldstone, Apr. 24, 1995).

<sup>20</sup> See Rome Statute, *supra* note 6, art. 25, at 1016 (Individual Criminal Responsibility).

<sup>21</sup> Indeed, the reliance on “joint criminal enterprise” in the trial of Slobodan Milosevic has raised these issues. *Prosecutor v. Milosevic*, Case No. IT-02-54-T, Decision on Motion for Judgment of Acquittal, ¶ 142 (June 16, 2004), available at <http://www.un.org/icty/milosevic/trial/judgement/index.htm>.

### C. *Transformations in Sovereignty and Jurisdiction*

The core transitional dilemma is how to conceptualize justice in the context of a massive normative shift. Within the international legal scheme, the rule of law dilemma is mitigated as the framework offers a degree of continuity in law. By now, the postwar entrenchment of international legal norms affords a jurisdictional basis that transcends the limits of domestic criminal law. International law offers a way to circumvent the retrospectivity problem endemic to transitional justice. In this way, international standards and forums uphold the rule of law, while satisfying core fairness and impartiality concerns. The precedential and binding value of international legal action is frequently considered superior to efforts undertaken on a state-by-state basis. Heinous crimes, such as atrocities, are often defined in international law and fit awkwardly in national law. The remaining question is, to what extent ought these principles of postwar international justice guide domestic precedents? This question would spur ongoing deliberations concerning jurisdiction over recent decades in states debating how to deal with the question of transitional justice.<sup>22</sup>

Transitional justice, for some time now, navigates the models of war and peace, of domestic and international humanitarian law. Though deploying international armed conflict principles of responsibility may be sensible in a postwar context because transitions often follow war, they also occur in other ways. Wherever successor trials' policy bases criminal responsibility on political status, they extend the logic of the analogy of war crimes to dictatorship and other forms of repressive rule. After non-democratic rule, it may well seem fair to ascribe responsibility to the top political leadership. Nevertheless, grounding transitional justice in the extraordinary international law paradigm associated with armed conflict seems at odds with our intuitions about whether responsibility for wrongs perpetrated under repressive regimes can be fairly attributed to a state's top political echelon.

Putting into practice the above principles of accountability for grave rights violations challenges traditional sovereignty, raising issues regarding the nature of jurisdiction. For war crimes, at Nuremberg, were not tried in military court martial proceedings, but in an international court. Convening an international tribunal was based on

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<sup>22</sup> Indeed, most recently, this question would be debated concerning the trials relating to Saddam Hussein in Iraq, and the extent to which these should be convened instead offsite, and with a significant international dimension, instead of the national model the IST adopts. Though even this formulation is too simple for, while the proceedings are national, the conception of the charges is international. See Statute of the Iraqi Special Tribunal, Dec. 10, 2003, 43 I.L.M. 231; see also Ruti Teitel, *The Law and Politics of Contemporary Transitional Justice*, 38 CORNELL INT'L L.J. 837, 843-44, 848 (2005).

the legal premise that the implicated offenses were considered crimes everywhere; therefore, the Nuremberg Charter refers to “offenses” without “geographic location.” The deeds were considered so overarching that they defied the ordinary criminal jurisdiction principle of territoriality, to lay the foundation for the appropriate jurisdiction of an international military tribunal. This dimension will become more and more significant in a globalizing politics.

The postwar paradigm of justice would establish a vocabulary of international humanitarian law, which, despite its shortcomings, continues to frame the successor justice debate. While within the national legal scheme the problem of transitional justice seems inextricably political, from an international law perspective, the question becomes somehow divorced from national politics. Within the international legal system, the dilemmas of transitional justice fall away. International law is thought to lift the dilemmas out of their politicized national context.

Until recently, there were few instances following Nuremberg’s precedent of holding individuals accountable within international jurisdiction; the most significant exceptions have been the ad hoc International Criminal Tribunals for the former Yugoslavia and Rwanda.<sup>23</sup> But Nuremberg as jurisdictional precedent is not synonymous with the Nuremberg Tribunal. For Nuremberg did not contemplate exclusive international jurisdiction; rather, the precedent goes beyond the proceedings convened at the Military Tribunal, because, as the charter explicitly provides, Nuremberg contemplated further national trials for similar violations.<sup>24</sup> Thousands of follow-up trials were held, which followed Nuremberg’s guiding view of individual responsibility for persecution.<sup>25</sup> War-related national trials continue to the present time throughout Europe.<sup>26</sup> Therefore, the Nuremberg precedent has been reconciled and is fully compatible with more traditional jurisdictional principles associated with territoriality and national sovereignty.

These precedents have given rise to a debate over which form of jurisdiction best advances transitional rule of law. Such debates are as

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<sup>23</sup> See *supra* notes 3, 4 and accompanying text.

<sup>24</sup> According to the Nuremberg Charter, Article 6: “Nothing in this Agreement shall prejudice the jurisdiction or the powers of any national or occupation court established or to be established in any allied territory or in Germany for the trial of war criminals.” Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis art. 6, Aug. 8, 1945, 59 Stat. 1544, 1545, 82 U.N.T.S. 279, 282; See also Article 10 of the charter, providing for follow-up trials in national, military or occupation courts. Charter of the International Military Tribunal, *supra* note 9, art. 10, 59 Stat. at 1548, 82 U.N.T.S. at 290.

<sup>25</sup> Thus, Control Council Law No. 10 was the basis for war crimes trials held at Nuremberg after the International Military Tribunal.

<sup>26</sup> See TEITEL, *supra* note 15, at 63-65. The subsequent French trial of non-national Klaus Barbie was based on a “scene of the crime,” or territoriality principle of jurisdiction.

pervasive as they are reductive, for, over time, and the experiences of last decades of transition, it has become evident that international and national jurisdictions offer competing rule of law values. Deliberations over postwar trials in the former Yugoslavia, Sierra Leone, and Iraq reflect that acute tradeoffs often exist between advancing the aims of accountability versus neutrality. Indeed, these difficult choices are reflected in the compromise struck in the recent convening of the permanent ICC guided by the "principle of complementarity," which makes international jurisdiction reconcilable with domestic jurisdiction so long as the domestic system is not lacking in minimum legality.<sup>27</sup> While the postwar tribunal was treated as presenting an exceptional situation, in a time of a great number of failed states, such potential jurisdiction has become the norm.

Perhaps the most profound dimension of the Nuremberg precedent was the nexus of the substantive rights violations to changes in jurisdiction, reflecting that state-sponsored persecution could no longer be confined to national borders. Thus, in the post-Nuremberg understanding, violations of the "law of nations" could be prosecuted by any state, under universal jurisdiction. Like the construct of the "crime against humanity," the appeal to "universality" reflected the attempt to move beyond political justice. Despite this postwar sense, the subsequent Genocide Convention neither contemplated nor provided for "universality jurisdiction."<sup>28</sup> Still, the ongoing force of this dimension of universality is evident in a number of contemporary genocide and crimes against humanity cases.<sup>29</sup>

Relatedly, there is another important sense in which the postwar legacy has transformed our understanding of jurisdiction as it relates to our conception of criminal accountability. It is the contribution of the view, now attaining substantial consensus, that a state's persecution of its own citizens ought not be confined within national borders, but, rather, constitutes a matter of international, even universal, import.

For years, there was neither progress towards real codification of international criminal law nor progress in the establishment of an international criminal tribunal. There existed, nevertheless, a widely shared view of international accountability that, while not reflected in consistent law enforcement through prosecutions, became apparent through more pervasive exposure, censure, and through representation of human rights issues in the media. Through the media, contemporary

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<sup>27</sup> See Rome Statute, *supra* note 6, art. 1, at 1003.

<sup>28</sup> See Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 102 Stat. 3045, 78 U.N.T.S. 277.

<sup>29</sup> The leading example remains the trial of Adolf Eichmann in Jerusalem. See HANNAH ARENDT, EICHMANN IN JERUSALEM: A REPORT ON THE BANALITY OF EVIL 258-59 (Penguin Books 1994) (1963).

persecution knew no borders. Moreover, these international responses of exposure and condemnation share affinities with punishment insofar as their normative force. International law's perceived advantage in creating criminal accountability, in particular, through international humanitarian law combined with the real advances of the immediate postwar period, have rendered international criminal law the dominant language of successor justice. Though its impact is not yet evident in a record of international trials, its profound normative force is evident in the emerging understanding that state persecution transcends state borders to demand international accountability.

A shared language informed by the postwar precedents gives rise to a form of accountability in the identification and exposure of persecution across national borders. When states fail to protect, the leading response of the international human rights community to state persecution is in the documentation and reporting of grave abuses.<sup>30</sup> There has been a significant strengthening of international mechanisms aimed at investigating and publicizing claims of atrocities. Worldwide accountability occurs primarily through the exposure and public censure of state persecution. Moreover, there has been a major development through the permanent ICC whereby international jurisdiction is not predicated on exceptionalism, but instead, upon complementarity. Though adjudications are likely to remain exceptional, the ICC will function as an ongoing investigatory and indicting body. In this regard, there has been a significant transformation in our understanding of the meaning of international jurisdiction that builds upon the greatest legacy of the postwar precedents: that accountability would never again be confined within national borders, but, instead, constitute a matter of international concern. Indeed, as time has passed, more and more, an international humanitarian legal discourse has developed that transcends international and domestic law to constitute a global rule of law.

#### D. *Developments in International Humanitarian Law*

Beyond reconceptualizing accountability, the postwar precedents set the bar for the rethinking of the law of armed conflict, and its relation to the protection of human rights. This Part turns to the substantive charges at Nuremberg, to explore the ways these have defined our present understanding of the conceptions of injustice and persecution in global politics, and how they continue to shape what is currently conceived to be the rule of law.

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<sup>30</sup> See TEITEL, *supra* note 15, at 69-117 (reviewing various forms of official and unofficial record-making as pursuit of "historical justice").

At Nuremberg, postwar trials were intended to send a message about unjust war and designed to vindicate Allied military policy regarding the war. Indeed, the charges reflect this concept of the unjust war. At the time, the idea of such war related to the way it was initiated and waged; therefore, at Nuremberg, the central offense was "aggression" or "crimes against the peace," centering on the injustice of the war's initiation. Aggression exists where there is no provocation or military necessity for invasion. Aggressive war was considered the "supreme" crime because of its "totality," as the unjust war's initiation was considered to lay the predicate of all other violations in the waging of that war.<sup>31</sup>

While the charge of aggressive war was the central and most controversial aspect of the Nuremberg judgment over time, it turned out to have lesser precedential force. The offense of aggressive war had rarely been enforced prior to the trials; therefore, the notion of prosecuting individuals for waging aggressive war was novel, and considered a challenge to the rule of law. Insofar as aggression could be separated out from other war crimes prosecuted at Nuremberg, this dimension of the tribunal's judgment would be generally considered to present an issue of political justice, distinctive in its various political ramifications from that of an ordinary court. Therefore, this aspect of the precedent has hardly taken hold. In the subsequent Control Council Law No. 10 trials, individuals were tried for waging aggressive war, but war crimes trials grounded upon this offense have been rare. Despite numerous instances of aggression recognized as such by the United Nations Security Council, military intervention has not been followed by legal action as at Nuremberg. Moreover, with technological advances, the line between aggressive wars and wars of self-defense is increasingly blurred.<sup>32</sup> Perhaps, not surprisingly, with the end of the cold war there has been a return to the project of judgment of aggression and of discerning between exercises of the use of force.<sup>33</sup>

Still, the idea of the unjust war underlies all the offenses prosecuted at Nuremberg. The charter's second charge, violations of the "laws and customs of war," referred back to war crimes codified since the Hague Convention. Violations of the laws of war, including genocide, were considered to be related to armed conflict. As such, at Nuremberg, genocide was prosecuted as a violation of customary international law. After the war, the precedential impact of the Nuremberg concept is seen in the Genocide Convention, aimed at codifying the Nuremberg ideas. Similarly, war crimes—"willful killing, torture or inhuman treatment"—were codified as "grave breaches" of

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<sup>31</sup> See TAYLOR, *supra* note 12, at 575.

<sup>32</sup> See MICHAEL WALZER, JUST AND UNJUST WARS 74-85 (1977).

<sup>33</sup> See *supra* note 6.

the Geneva Convention of 1949, and included mistreatment of prisoners of war and civilians.

In the contemporary International Criminal Tribunal for serious violations of humanitarian law in the former Yugoslavia, the trials' policy is being directed beyond the war to foster ethnic reconciliation. Furthermore, genocide is being prosecuted for the first time since Nuremberg in an international tribunal, along the lines of the postwar convention, as an "act[] committed with intent to destroy, in whole or in part, a . . . group."<sup>34</sup> This imposes a difficult burden of specific intent; moreover, as at Nuremberg, the Hague Tribunal also considers the perpetration of the offense of genocide within the context of armed conflict. Nuremberg continues to cast a long shadow. Needless to say, true to the postwar precedents, the definition still excludes political genocide, a limit which, with the cold war's end, ought to be revisited.

Perhaps the greatest influence of the Nuremberg categories over time is seen in the contemporary convergence of humanitarian law applicable in times of armed conflict with human rights law applicable in peacetime. Many norms relating to the law of armed conflict have been extended to internal conflict and to peacetime.<sup>35</sup> Transitional justice appears to be more and more normalized and aimed at advancing the ongoing goals of global rule of law.

Consider the developments in humanitarian law in conditions from war to peace, in particular, as concerns the "crime against humanity," an independent charge in the charter and a statement of new positive law at Nuremberg. Though the Nuremberg Charter would have allowed prosecution of offenses occurring "before the war," the Tribunal nevertheless limited its enforcement powers to crimes against humanity committed during the war.<sup>36</sup> Preserving the nexus to the war was done as a prudential matter to avoid *ex post facto* challenges because of the sense that crimes against humanity constituted a new charge before the Tribunal.<sup>37</sup> Thus, despite a broader charter conceptualization, the precedent appeared to insist that crimes against humanity required a nexus to war.

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<sup>34</sup> International Criminal Tribunal for the Former Yugoslavia art. 4, *supra* note 3, at 1193.

<sup>35</sup> Consider that the International Tribunal for the former Yugoslavia was convened during, and not after, the conflict, raising difficult questions about the relationship of law to the use of force. See generally Theodor Meron, *International Criminalization of Internal Atrocities*, 89 AM. J. INT'L L. 554 (1995).

<sup>36</sup> Compare the following language within Article 6(c) of the Nuremberg Charter. Article 6(c) provided that persecution was punishable only if perpetrated "in connection with any crime within the jurisdiction of the Tribunal," but also refers to acts committed "before or during the war." Charter of the International Military Tribunal, *supra* note 9, art. 6(c), 59 Stat. at 1547, 82 U.N.T.S. at 288.

<sup>37</sup> See Judgment of the International Military Tribunal for the Trial of German Major War Criminals 41 (1946). For discussion, see TAYLOR, *supra* note 12, at 583 (citing to Nuremberg Tribunal's Judgment).

Consider the ongoing guiding influence of the postwar precedent more than half a century later. In contemporary war crimes trials before the International Criminal Tribunal for the former Yugoslavia, the offense of “crimes against humanity” is still predicated upon a nexus to conflict. The statute regarding Yugoslavia specifically contemplates “armed conflict,” either “international” or “internal” in character.

Finally, perhaps the most significant feature of the conceptualization of crimes against humanity codified at Nuremberg was their definition as crimes that could be committed by a state against its *own* citizens. These violations were defined as “murder, extermination, enslavement, deportation and other inhumane acts committed against *any civilian* population” or persecutions on political, racial or religious grounds “whether or not in violation of the domestic law of the country where perpetrated.”<sup>38</sup>

While apparently unremarkable today, the central change after Nuremberg was the rethinking of the offense of state persecution, rendering a state’s treatment of its own citizens an international matter. This transformed conception would spur subsequent prosecutions in other countries by successor regimes for attacks committed by the prior regime against its own civilians. A concerted effort is now underway to expand and normalize the postwar understandings of state persecution. Contemporary developments in international humanitarian law reflect an understanding that the offense of wartime persecution extends beyond the international response to actions within the state.<sup>39</sup> These developments are also reflected in the jurisdiction assumed of the ad hoc international war crimes tribunals regarding the former Yugoslavia and the genocide in Rwanda. In these contemporary instances, a dynamic understanding of “crimes against humanity” moves beyond the predicated nexus to armed conflict to become virtually synonymous with persecution whether at war or at peace.<sup>40</sup>

Most significant was that pursuant to this legacy, the law of humanity would penetrate internal sovereignty, imposing a limit—even if honored more in the breach—upon the behavior of states towards their citizens, standing for a principle against persecution. This understanding of global rights protection at the level of the human would become a significant part of the normative understanding of liberalization at the century’s turn.

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<sup>38</sup> See Charter of the International Military Tribunal, *supra* note 9, art. 6(c), 59 Stat. at 1547, 82 U.N.T.S. at 288 (emphasis added).

<sup>39</sup> See Prosecutor v. Tadic, Case No. IT-94-1-A, Judgment in Sentencing Appeals, ¶ 65-66 (Jan. 26, 2000).

<sup>40</sup> See Rome Statute, *supra* note 6, art. 7, at 1004 (crimes against humanity).

## CONCLUSION

For decades, Nuremberg's precedent has been honored largely in its breach. Until the last decade, no similar war crimes tribunals had been convened. After more than sixty years, a permanent international criminal court has been established. Yet the impact of Nuremberg extends far beyond its facts to the way we think of accounting for state injustice. The force of the legacy can be seen in the many ways the Nuremberg ideas have constructed our understanding of and responses to state wrongdoing in this century. The Nuremberg paradigm created fundamental changes in the relation of law to politics; in our view of the rule of law as accountability; in the reconceptualization and shift of responsibility from the collective to the individual; in the reconceptualization of sovereignty and jurisdiction; and, finally, in the reconceptualization of international humanitarian law, from a law of war to an ongoing rule of law for war and for peacetime. One might say that, over time, the force of the Nuremberg legacy has only increased, transcending its particular engendering circumstances to play a constitutive role in contemporary international human rights. Nuremberg has had a powerful influence on the human rights regime, giving us nothing less than a new discourse for thinking and talking about responsibility for state wrongdoing. Perhaps its greatest legacy is that the question of accountability for atrocities and persecution within a state would never again be confined within national borders, but would reach beyond such boundaries to become a matter of international human rights import. The challenges for the future are the dilemmas raised by the conceptualization of the humanitarian law scheme as global rule of law.

