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Cherif Bassiouni

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## Nuremberg Forty Years After: An Introduction

by *Cherif Bassiouni\**

**O**n August 8, 1945, the London Charter was signed, and it opened the way for the prosecution of the major war criminals before the special international military tribunal at Nuremberg. The following year a similar instrument established a counterpart tribunal for the Far East in Tokyo. The trial of the major war criminals in Europe and in the Far East was expected by many to be the precursor for the establishment of a permanent international criminal court for the prosecution of international crimes — a hope that had been entertained since the end of World War I. However, forty years since Nuremberg and sixty-eight years since Versailles no international criminal court has yet been established, and little progress has been made to codify international crimes. As a result the hopes of many have been disappointed, if not dashed, and the claim of those who saw the Nuremberg and Tokyo trials as an ad hoc expression of the Allies victory over the defeated Axis powers gained credibility. But as with most historical judgments neither one of these conclusions is entirely correct.

The Nuremberg trials of the major war criminals spawned, under Control Council Order No. 10, many more prosecutions in the Allied zones of occupation, and other prosecutions were carried out in various countries that had been occupied by Axis powers. These prosecutions became popularly known as “War Crimes trials” even though the crimes charged were not exclusively within the technical meaning of “War Crimes.” Similarly, but only in a small number of symbolic cases, the U.S. by virtue of the military authority of General Douglas MacArthur, prosecuted, in the Far East some senior Japanese army officers charged with “War Crimes” in the Pacific theater — the most inglorious of these cases being that of General Yamashita.

Also since World War II, a number of countries, among which are the Federal Republic of Germany, Israel and France, have continued to search for “war criminals” and have prosecuted them under their internal laws. Israel’s 1960 *Eichmann* case, and France’s present *Barbie* case are the two most *causes célèbres* ones.

The U.S., however, rather than enacting legislation giving Federal

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\* Professor of Law, DePaul University, Chicago, Illinois; Dean, International Institute of Higher Studies in Criminal Science; Secretary-General, International Association of Criminal Law.

courts jurisdiction to try such cases, elected to seek out such persons for purposes of denaturalization and deportation and only in 1985 did some U.S. courts extradite persons accused of such crimes to Israel and Yugoslavia. To facilitate the prosecutorial processes of interested states the United Nations sponsored a Convention in 1968 on the Nonapplicability of Statutes of Limitations to War Crimes and Crimes Against Humanity, but with few ratifying states, and the Council of Europe followed suit.

Thus the process that commenced at Nuremberg in 1945 did not end then and there but continued beyond it and is still on-going in some respects. But the legacy is more symbolic than substantial.

On a different level the codification of international criminal law has progressed, however so slightly, through the efforts of the International Law Commission first in its elaboration of the Nuremberg Principles and then through the 1954 Draft Code of Offenses Against the Peace and Security of Mankind, but a more positive final outcome is still awaited. In the meantime however a number of international instruments have been elaborated by the United Nations concerning a variety of subject-matters such as Aggression, War Crimes, Genocide, *Apartheid*, Slavery and Slave-related Practices, Torture, Piracy, Hijacking, Kidnapping of Diplomats, Taking of Civilian Hostages to list only some of the twenty-two international crimes. But this ad hoc progressive development of international criminal law, through the means of separate and unrelated instruments has not been propitious for the comprehensive codification of that area of international law. In fact, it may have negatively affected governmental and popular perceptions about the need for an international criminal code. Worse yet, it has drawn the energies of governments and national legislatures in recurring efforts to negotiate, sign and ratify new and disparate international instruments instead of focusing these energies on a single comprehensive Code. The process of multilateral conventions on different subject matters has also been uncoordinated and depends largely on the ebb and flow of popular reactions conditioned by an ever more influential mass media. Thus, increased concerns with individual acts of terror-violence tended to obscure other more serious, and quantitatively more numerous forms of human deprivations such as Genocide. Regretably there has never been any rational policy for the elaboration of specific instruments on international criminal law. Thus no one can explain why there has never been a convention on "Crimes Against Humanity," which was one of the three Nuremberg crimes, the other being "Crimes Against Peace" and "War Crimes." Similarly no one can explain why there is only one convention on Genocide (which covers in part some of the contents of "Crimes Against Humanity" as defined by the Nuremberg Principles) which excludes quasi-Genocidal acts of mass murder as has been witnessed in several conflicts since World World II. Considering all the quasi-Genocidal events that took

place since that convention was signed in 1948, such as Biafra, Bangladesh and Kampuchea, which resulted in an estimated five million persons killed and which do not fall under the provisions of the Genocide Convention it is difficult to find justification let alone reasons for this neglect. Conversely, there have been twelve conventions, with one more in progress, on the international control of drugs. Is international control of drugs a more significant human interest than the control of war and mass killing? The answer is that the *realpolitik* of our world is simply that humanistic concerns are secondary to a variety of other state interests. As a result international cooperation is more likely to be manifested in areas where there are less opportunities for ideological or other conflicting state interests. This explains, in part, why aggression, the international crime *par excellence*, remains embodied in a United Nations General Assembly resolution adopted by consensus in 1974 after twenty years of efforts to reach that result and is not a binding convention. Thus no binding international convention states explicitly that "Aggression" is an international crime, what such acts consist of, and what means should be employed by the world community to prevent such acts and enforce such norms. Instead "Aggression" has been treated, since the adoption of the U.N. Charter in San Francisco in 1946 as a political crime whose determination and sanctions are left to the judgment of a small political club, the Security Council, where the major world powers retain a veto over such decisions. Long gone are the days where the same major powers which as allies during World War II agreed to prosecute at Nuremberg and Tokyo those who committed "Crimes Against Peace." Granted that since then the world has been spared major confrontations resulting in all out wars. But the number of regional and local conflicts producing their ample share of human devastation have flourished with impunity. From Korea in 1951 to the protracted Viet Nam War which lasted two decades, every conceivable form of direct and indirect aggression by states in the Middle East, Asia, Latin America and Eastern Europe has taken place since 1945. But the prospects of more clearly enunciated proscribing norms are as remote as is any reasonable expectation of their objective international enforcement. Nonbinding international pronouncements have and will continue to abound, but such expressions will hardly take the place of an effective system of prevention and control. To that extent Nuremberg and Tokyo have left a memory and not a precedent.

So as the world community may recall in 1986, the fortieth anniversary of Nuremberg and Tokyo, stock-taking is as appropriate as it is disturbing. Some progress has been made, but too little that took too long in the face of so much that is needed mars that progress. We must reassess the three major categories of criminal charges established at Nuremberg, "Crimes Against Peace," "War Crimes" and "Crimes Against

Humanity." The first category, "Crimes Against Peace," is more defined than it was but it is still not comprehensive and the enforceability of the 1974 Resolution defining aggression is as questionable as is the effectiveness of the Security Council as a mechanism of prevention and control. The second category, "War Crimes," has seen much more progress in codification and implementation. In 1949, four Geneva Conventions were passed which codified with great detail the regulation of armed conflicts. This was followed by two Additional Protocols in 1977. In the interim there have been a number of conventions covering a variety of aspects concerning armed conflicts. The third category, "Crimes Against Humanity," has yet to be the subject of a convention save for the Genocide Convention, which though broadly defining Genocide does not encompass mass-killings of quasi-genocidal proportions, and does not include all that "Crimes Against Humanity" was said to contain under the Nuremberg Principles. In part, some of these violations are incorporated in the Conventions on *Apartheid*, Slavery and Slave-Related Practices and Torture. But such a piecemeal normative approach leaves many voids and loopholes, not to speak of other aspects that are still not covered by adequate normative proscriptions, such as human experimentation and other serious violations of fundamental human rights affecting life, physical integrity and personal liberty.

Concerning the establishment of an international criminal court, the two U.N. Draft Statutes of 1951-1953 have been tabled, and the 1980 Draft Statute for Implementation of the *Apartheid* Convention establishing an international criminal jurisdiction (drafted by the writer as a consultant to the U.N.) have all remained dead-letter with no discernible hope of their adoption.

The U.N. and other regional organizations such as the Council of Europe and the Organization of American States have however developed a large number of human rights Conventions. These Conventions and their implementation, particularly within the European context by virtue of the authority of the European Commission of Human Rights and of the European Court of Human Rights, must be deemed a significant progress toward the humanization of the world community. In some respects this too is an outgrowth of, or part of the legacy of Nuremberg, and it is a positive one. As such it has to be placed in the scales of the balance along with all the missed opportunities discussed above.

In "Aggression Against Authority: The Crime of Oppression and Other Crimes Against Human Rights," Professor Jordan Paust, a most prolific publicist whose contributions to the literature of international law has enriched this field, aptly focuses the readers' attention on the weaknesses of the international normative prescriptive scheme of controlling Aggression and protecting human rights. He retraces the history of Aggression, efforts to codify it, and critically assesses results and out-

comes. His contribution also encompasses considerations on Genocide and "Crimes Against Humanity." There too he stresses historical background and contemporary weaknesses. His overall thesis assesses sanctioning strategies in response to these violations, pointing to the weaknesses, but also to some potential modalities of domestic enforcement in the U.S. in order to engender greater compliance. Professor Paust's article is not an exhaustive study of Aggression, Genocide, "Crimes Against Humanity" and other serious violations of fundamental human rights. Instead it is a brief introduction to these transgressions, though expressed with no lesser appropriate commitment to the values he seeks to uphold. The title does not necessarily reflect what the article contains, but as with his other writings this distinguished author appeals to the intellectual appetite of the reader, and fully fulfills that portion of it that feeds on references.

In the article "Should the U.S. Constitution's Treaty-Making Power Be Used As The Basis for Enactment of Domestic Legislation," Professor Robert Friedlander takes a critical view of the textual formulations of the provisions of the Genocide Convention and expresses reservations and negative views as to its domestic implications. As one who has frequently criticized international criminal conventions for their technically inappropriate terminology that does not satisfy the rigors of a penalist's analysis, I can only but share some of his misgivings. Professor Friedlander is also a prolific and distinguished author who has contributed much to the literature on international criminal law. I disagree with the tone and spirit of this article, however. Shocking as it may seem to some, the U.S., ostensibly the champion of human rights, the principal power that defeated the Axis forces, the principal force behind the Nuremberg and Tokyo Trials, and the instigator and influential participant in the drafting of the Genocide Convention, had opposed its ratification from 1948 to 1985, and then ratified it with reservations which reflect the United States' reluctance to subject itself to international scrutiny. Professor Friedlander articulates some of the arguments employed by those who opposed and then supported ratification of the Genocide Convention with such reservations. Some of the issues he raises in the article are, however, meritorious. The provisions on conspiracy and complicity are too far reaching, but then they were put in the convention in response to the U.S. After all, most of the world in 1948, save for a few countries which follow the common law, did not, and still do not, know conspiracy as a crime. Indeed it was at the U.S.'s insistence that conspiracy was made part of the Nuremberg Charter and prosecution. Other allies like France and the U.S.S.R. had opposed it because that type of inchoate crime is not known to their legal systems, and even England was hesitant about it. Now the U.S. finds fault with the Convention because of that! The same surprised reaction will surely come at the U.S. reservation to

the provision in the Convention concerning jurisdiction of an eventual international criminal court. Was it not the U.S. that championed Nuremberg and Tokyo? Or is it because this administration suddenly found it unpleasant to defend its actions before the International Court of Justice in the Nicaragua case that the idea of an eventual international criminal court has become so unfathomable! Surprisingly however no one has voiced, let alone decried the great loophole in the Convention. There is no crime of Genocide under the Convention if the group intended to be destroyed in whole or in part is a social or political group. Similarly no one decries the absence of provisions on quasi-Genocidal acts of mass killings that are not accompanied with the intent to destroy in whole or in part a given ethnic or social group. Thus the killing of one person when performed with such intent is Genocide, but the killing of a million people or more without such intent is not Genocide, and for that matter may not even be an international crime at all.

For a nation built on the Rule of Law, with such a strong legal tradition, and such a historic record for supporting and promoting international law, these and some other manifestations of its foreign policy since World War II are a blot on the tradition, the record and the values of this great nation.

These contributions are fittingly part of an issue of this *Journal* dedicated in part to the fortieth Anniversary of Nuremberg. More specifically focused articles exploring more questions relating to this legacy would have also been appropriate for this issue. We have all too few occasions to remind and be reminded of how thin is the veneer of our human civilization and how much we still have to do to thicken it in the face of so many, so constant and so far-reaching violations of basic and fundamental human rights occurring on every continent. Otherwise, as Santayana once said: "Those who forget the mistakes of the past are condemned to repeat them."