



**Speech by Philippe Kirsch,
President of the International Criminal Court**

From Nuremberg to The Hague

**The Nuremberg Heritage: A Series of Events Commemorating the
Beginning of the Nuremberg Trials**

**Court Room 600
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I. Introduction

It is my pleasure to speak to you today. I would like to thank the Lord Mayor, the Minister of Justice, and the City of Nuremberg for this opportunity. I am pleased to see that some of those who were part of the events we commemorate today have joined us.

The events which began in this room sixty years ago are ingrained in our memories and shape how we think of international law and justice today. In my remarks this evening, I would like to speak to you about:

- The historic breakthrough that was the Nuremberg Trials;
- The legacy of these trials in general; and
- Their specific legacy that is the International Criminal Court.

II. The Nuremberg Trials

I turn first to the Nuremberg Trials themselves. In this context, I refer primarily to the International Military Tribunal which opened here sixty years ago. But, we should not forget the subsequent trials which occurred here or in the military and civilian courts of different nations within the umbrella of the Nuremberg proceedings.

As a first matter, it is remarkable that the Nuremberg Trials happened at all. These trials were not entirely without precedent. Before Nuremberg, there was an established law of war, and military courts had conducted war crimes trials. However, the scope of the proceedings conducted in this Court Room was unlike anything which had come before. The few previous war crimes trials by national courts-martial had focused on minor defendants for isolated and well-established violations of the law governing the conduct of hostilities. At Nuremberg, not only military leaders, but also high-level officials and even private citizens faced trial for some of the most serious crimes known to humanity.

The Nuremberg Trials were by no means inevitable. Many argued that the best response to the Nazi regime was the summary execution of Nazi officials. Others argued that international law

was concerned only with States and not the actions of individuals. Faced with serious violations of international law, the creators of the Nuremberg Trials decided differently. They concluded:

- First, individuals can and should be held accountable for crimes which constitute violations of international law. As was famously declared by the Tribunal in its judgment, “Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.”
- Second, individuals should only be punished through a fair trial which safeguards the rights of the accused.

In a world in which international law paid little regard to individuals, the International Military Tribunal and subsequent trials were remarkable developments.

Agreeing that there would be a Tribunal and other trials was only a first step. Considerably more had to be done to make the trials possible. Representatives of four countries with very different legal systems had to agree on substantive and procedural law. The entire structure of a court had to be put in place. Having gone through a similar experience with the International Criminal Court, I can tell you that this is no small feat.

Despite all obstacles, the Tribunal and its staff persevered. On 20 November 1945, this Tribunal opened its proceedings. A little under a year later, on 1 October 1946, it handed down its judgment acquitting three defendants, sentencing twelve to death by hanging and the remaining seven to imprisonment of various terms. After this, twelve more trials were conducted here. Other trials were held under the Control Council and national courts.

III. The Legacy of the Nuremberg Trials

Much has been written and said about the trials themselves. I would like to turn however to the legacy of the Nuremberg Trials. While the trial was ongoing before the International Military

Tribunal, Norman Birkett, one of the alternate judges, wrote “The thing that sustains me is the knowledge that this trial can be a very great landmark in the history of International Law.”¹

The Nuremberg trials did indeed have wide-ranging effects throughout the field of international law. In 1950, the United Nations’ International Law Commission adopted a text setting out the Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and the Judgment of the Tribunal. The core principles taken from the Nuremberg Trials include: the responsibility of individuals for international crimes; the right of each accused to a fair trial; and the historic pronouncement that one’s position as a Head of State or responsible Government official does not relieve one of criminal responsibility. These principles have been widely cited by international lawyers ever since, and are at the core of international criminal law today. The influence of Nuremberg was also particularly influential on the development of the law of war, including the Geneva Conventions, and international human rights law.

As significant as they were, these developments represented only a partial fulfilment of the possible legacy of Nuremberg. I think it is useful to reflect on what the participants in the Nuremberg Trials wished to be their legacy. Shortly after the Tribunal judgment, an alternate judge on the tribunal John Parker spoke about the possible legacy for the Tribunal. He said:

- “What of the future? Does the value of the trial end with the vindication of the law in the punishment of the defendants, or does it have value for the Future? I think that it does have such value. For the future peace of the world, it is important that those who have committed crimes of such magnitude be punished and that their personal accountability therefore be established; it is important that this be done judicially; and it is important that it be done by the cooperation of a number of nations acting in behalf of the world community whose laws have been violated.”²

¹ As cited in TELFORD TAYLOR, *THE ANATOMY OF THE NUREMBERG TRIALS: A PERSONAL MEMOIR* 226 (1993).

² John J. Parker, *The Nuernberg Trial: Address delivered at the annual meeting of the American Judicature Society*, 30 J. AM. JUD. SOC. 109, 115 (1946).

- Judge Parker continued: “It is not too much to hope that what we have done may have laid the foundation for the building of a permanent court with a code defining crimes of an international character and providing for their punishment.”³

If we look back to the years immediately following the Trials, we can see efforts to make this hope for a permanent international court a reality. For example, the UN’s International Law Commission took up the issue of creating a Statute for a permanent court among its first tasks. The Genocide Convention adopted in 1948 envisioned that genocide could one day be punished by an international court.

Yet, even as proceedings were being conducted before the International Military Tribunal, Winston Churchill delivered his famous speech declaring that an “iron curtain” had fallen across Europe. With the onset of the Cold War, a permanent international court ceased to be a realistic possibility. It appeared that the Nuremberg Trials would live on only in the principles adopted by the International Law Commission and in its effect on different areas of law. Atrocities continued to be committed without any possibility of punishment for the perpetrators. The Nuremberg legacy was unfulfilled.

This would all change in 1989. With the fall of the Berlin Wall and the end of the Cold War, international criminal justice once again became a realistic possibility. Ad hoc tribunals were established in response to atrocities first in the Former Yugoslavia, and then in Rwanda.

These tribunals were great strides forward in international law. But still something was missing. We must ask why did Judge Parker and others put stress on the need for a *permanent* international court. The reason is that, notwithstanding their accomplishments, *ad hoc* tribunals face several limitations:

- As we have seen throughout history, establishing such tribunals is difficult. Their creation depends on the political will of the international community of the day. As a result, such tribunals have been the exception, not the rule.

³ John J. Parker, *The Nuernberg Trial: Address delivered at the annual meeting of the American Judicature Society*, 30 J. AM. JUD. SOC. 109, 115 (1946).

- Even when tribunals can be set up, they face several limitations:
 - Their establishment may involve substantial costs and delays.
 - Such tribunals are geographically limited.
 - They respond primarily to events in the past.
 - As a consequence, their deterrent function may also be limited.

A permanent international court was needed to effectively address serious international crimes and to overcome the limitations of *ad hoc* tribunals.

IV. The International Criminal Court

Beginning in 1989, the UN began the process of establishing such a permanent court. In the mid-1990s, following the events in the former Yugoslavia and Rwanda, these efforts picked up speed. An Ad Hoc Committee was created which was then succeeded by a Preparatory Committee on the International Criminal Court. In the summer of 1998, this crucial element of the Nuremberg legacy was finally accomplished as the United Nations Diplomatic Conference of Plenipotentiaries meeting in Rome adopted the Statute of the permanent International Criminal Court or ICC. I would now like to turn to the ICC and its relationship to the Nuremberg legacy.

The experiences at Nuremberg and later with the *ad hoc* tribunals had a profound effect on the establishment of the ICC. Many aspects of the ICC were first found in the Nuremberg Trials. There are also several key differences where the creators of the ICC sought to improve upon the Nuremberg model.

The impact of the Nuremberg Trials is directly evident in the crimes within the jurisdiction of the ICC. The International Military Tribunal had jurisdiction over three categories of crimes: crimes against peace, crimes against humanity, and war crimes. The ICC similarly has jurisdiction over crimes against humanity and war crimes. In addition, the ICC will exercise jurisdiction over the crime of aggression once a definition can be agreed upon. The crime of

aggression is a direct descendant of the Nuremberg Tribunal's crimes against peace. Even though no definition of aggression could be agreed upon in Rome, the legacy of Nuremberg was so strong that most States insisted it be provisionally included in the Statute.

The crimes within the jurisdiction of the ICC differ in two important ways from the Charter of the International Military Tribunal.

- First, the definitions in the ICC Statute and the supplementary Elements of Crimes are far more detailed than the definitions in the Nuremberg Charter or the statutes of the recent *ad hoc* tribunals.
- Second, the ICC Statute reflects developments in conventional and customary law since Nuremberg. The most obvious example is that the ICC has jurisdiction over the crime of genocide, separate from the other crimes. This reflects the 1948 Genocide Convention.

Other developments since Nuremberg can be seen throughout the ICC Statute. This is particularly so in the area of human rights. For example, the Nuremberg Tribunal was criticized, even at its time, for trying Martin Bormann *in absentia*. Following developments in international law, the ICC may not conduct trials *in absentia*. Another difference from Nuremberg is in the area of capital punishment. At Nuremberg, twelve defendants were sentenced to death. The ICC cannot impose the death penalty.

There is a fundamental difference between Nuremberg and the ICC in the method of their creation. The Charter of the International Military Tribunal was established by the four Allied powers. Some criticized this as rendering the Nuremberg Tribunal a form of "victor's justice." The Tribunal did its best to dispel these criticisms, but it was to a certain extent inevitable that they were raised.

Those establishing the ICC sought to avoid this challenge. The ICC was established through a treaty. I must underscore the importance of this. All States were able to participate in the drafting of the Statute and subsidiary texts. States are also free to join or not join the ICC as they see fit. All States were invited to participate in the Rome Conference which adopted the Statute. The vast majority – 160 in all – participated. In negotiating the Statute, States sought

wide agreement, without compromising the key values and objectives behind a fair and impartial Court. Efforts towards universal acceptance were largely achieved, and on 17 July 1998, the Statute was approved by the Conference.

Following the Rome Conference, a Preparatory Commission met over 3 ½ years. The Preparatory Commission was charged with developing the Court's subsidiary instruments – the Rules of Procedures and Evidence and the Elements of Crimes. These texts provide more detail to and supplement what was agreed in the Statute. Like the Rome Conference, the Preparatory Commission was driven by States. All States were invited to participate in the Preparatory Commission. All decisions in the Preparatory Commission were taken by consensus. By building consensus around the Court's essential texts, the Preparatory Commission contributed significantly to international support for the Court. 139 States signed the Statute before the deadline for signature expired at the end of 2000. 4 other States who did not sign have since acceded to the Statute. In just seven years since the adoption of the Rome Statute, 100 countries – representing broad geographical diversity – have become full parties to the Statute. This is a remarkable pace for a treaty establishing an international institution.

The potential criticism of victors' justice is also dispelled by the jurisdictional scheme of the Court. The Court only has jurisdiction over events after its Statute entered into force on 1 July 2002. It does not apply retroactively to past events. In addition, the States which have ratified the Statute accept that the Court may exercise jurisdiction over their nationals, or over crimes committed on their territory.

Of course, not all aspects of the ICC are related to Nuremberg. The ICC also contains some novel features. I would highlight in this regard the principle of complementarity. Under this principle, national courts have the primary responsibility for punishing international crimes. The ICC is a court of last resort. A case will be inadmissible if it is being or has been investigated or prosecuted by a State with jurisdiction. There is an exception for when the State is unwilling or unable genuinely to carry out the investigation or prosecution. For example:

- If the proceedings were undertaken solely to shield the person from criminal responsibility,

- Or if the proceedings were carried out in a manner inconsistent with an intent to bring the person to justice.

In addition, a case will be inadmissible if it is not of sufficient gravity to justify action by the Court.

Like Nuremberg, much work had to be done to make the ICC a functioning reality. This has now largely been completed and the Court is well into the judicial phase of its activities. Three States Parties have referred situations occurring on their territories to the Court. In addition, the United Nations Security Council has referred the situation in Darfur, Sudan – a non-State Party. After analyzing the referrals for jurisdiction and admissibility, the Prosecutor began investigations in three situations – Uganda, Democratic Republic of the Congo, and Darfur, Sudan.

On 8 July of this year, the Court issued the first arrest warrants in the situation in northern Uganda. Arrest warrants have been issued for five members of the Lord's Resistance Army. The alleged crimes against humanity and war crimes contained in the warrants include sexual enslavement, rape, intentionally attacking civilians, and the forced enlistment of child soldiers. The arrest warrants were initially issued under seal because of concerns about the security of victims and witnesses. The warrants were only made public on 13 October, after the Pre-Trial Chamber, which issued the warrants, was satisfied that the Court had taken adequate measures to ensure security. As soon as the wanted persons are arrested and surrendered to the Court, a hearing will be held to confirm the charges. If the charges are confirmed, trials will then commence.

One must keep in mind that the Court is operating in a very different atmosphere than the Nuremberg Tribunal. At Nuremberg, the defendants were already in custody, some of them for several years. The occupying armies had taken control, and had ready access to documents. The Court, on the other hand, is active in situations of ongoing conflict. The Court does not have its own police force, much less an army. Cooperation of States will be absolutely crucial in obtaining the arrest and surrender of persons wanted by the Court. Cooperation will also be

essential in other areas, such as in providing evidence, relocating witnesses, and enforcing the sentences of the Court.

IV. Conclusion

In my remarks, I have emphasized how history, in this case the Nuremberg Trials, shapes subsequent developments. At the same time, subsequent developments also affect how we view history.

In explaining why he waited over forty years to write his memoirs on the Nuremberg Trials, the American prosecutor Telford Taylor wrote that he thought “[his] sense and assessment of Nuremberg as a whole would benefit from the passage of time, opportunity for reflection, and the illumination that subsequent events might shed upon the past of which Nuremberg was a part.”⁴

If you had asked me even ten years ago about the Nuremberg Trials, I would have said they were a significant, historic event, but that their legacy was not fulfilled. Now, however, the ICC stands as a direct descendant of those trials. “Nuremberg” has taken on added meaning as the beginning of a system of international criminal justice.

History will continue to unfold, and as it does it will continue to shape how we view the past. How we view Nuremberg will also depend in part on what happens with the ICC. The ICC is well-placed to be a credible and effective institution, but it cannot succeed without support. If we ensure that the ICC has the support to succeed, “Nuremberg” will be forever remembered as the necessary and historic breakthrough which made this possible. The world has come too far and the consequences are too great for us to fail. We must continue to carry forward the legacy of Nuremberg and to make an effective, permanent international court a lasting reality.

Thank you.

⁴ TELFORD TAYLOR, THE ANATOMY OF THE NUREMBERG TRIALS: A PERSONAL MEMOIR 3 (1993).