Crimes against humanity and international legality in legal theory after Nuremberg

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Abstract

L’étude de la littérature anglo-saxonne et continentale ayant immédiatement suivi le jugement de Nuremberg met en lumière deux stratégies différentes, visant à réfuter l’argument fort connu selon lequel le Statut du Tribunal heurte le principe de légalité pénale : soit les auteurs admettent, en écho au raisonnement des juges, la fiction selon laquelle le Statut n’est que l’expression de normes préexistantes de droit international et donc que le droit de Nuremberg est conforme au principe de légalité – mais en taisant la question de la nouvelle incrimination de crime contre l’humanité ; soit ils reconnaissent que le Statut est créateur de droit nouveau rétroactif, et donc que le droit de Nuremberg n’est a priori pas (ou n’est que partiellement) conforme au principe de légalité – mais en justifiant alors, dans un second temps, cette entrave au principe. Quelle que soit la stratégie adoptée par la doctrine, elle vise à démontrer que le problème de compatibilité du droit de Nuremberg avec les exigences légalistes est un faux problème. Dans les deux cas de figure, cette expérience […]

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Introduction
The question most often raised about the trial of the major war criminals before the International Military Tribunal (IMT) at Nuremberg \(^1\) seems, at first sight, to turn on the nature of the judgment. Traditional doctrine distinguishes legal from political disputes, maintaining that international law applies only to the former. In the present paper, however, we shall be following the reasoning of the legal theorist Hans Kelsen, who has sharply criticized this “hypocritical,” “dangerous” view.\(^2\) According to Kelsen, legal disputes are disputes settled through the application of legal norms found in pre-existing positive law. Political disputes, on the other hand, are settled through the application of general principles of equity and justice, that is, new norms created by an (international) judge with a view to resolving a particular conflict.\(^3\)

In Kelsen’s estimation, every dispute is “justiciable” and is therefore a legal dispute. Furthermore, international law is always applicable and is applicable in all cases: either the international law in force prohibits and sanctions one or another of the ways of behaving at issue in a dispute, in which case an appropriate condemnation can be pronounced; or it says nothing about the behaviour at issue, in which case no condemnation can be pronounced, on the principle that “whatever is not forbidden is permitted.”\(^4\) It sometimes happens, however, that the application of existing international law, albeit possible from a logical standpoint, is politically or morally unsatisfactory.\(^5\) Resolution of conflict through jurisdictional creation of new general norms is a case in point.\(^6\)

This critique leads us to displace the question. It suggests that the legal or political character of a dispute depends not on its nature—and thus on the nature of the judgment—but on the nature of the norms used to resolve the conflict. Thus the theoretical question posed by the Nuremberg judgment is not “what is the nature of this judgment?” but “what is the nature of the norms brought to bear by the International Military Tribunal?”
The interest of the question as to the nature of the norms contained in the Charter of the IMT resides in the fact that it ultimately requires us to consider both the fundamental problem facing the actors at Nuremberg, and also the main objection raised by the IMT’s adversaries, particularly the defence lawyers: the incompatibility of the law of Nuremberg, especially Article 6 (c), which defines “crimes against humanity” for the first time, with the principle of the legality of the delicts and sanctions and its corollary, the principle of non-retroactivity.

According to these principles, every punishable act and every sanction must be foreseen by a written text prior to the commission of the acts involved. But the defence at Nuremberg pointed out that the concept of “crimes against humanity” and the principle of individual responsibility for international crimes did not exist in the international legal order at the time the acts were committed. Consequently, judging agents of a state for a crime against humanity amounted to breaching the principle of legality. This is the main argument (derived from the classic positivist theory on which the discourse of the IMT’s detractors was premised) that the doctrine developed in the years 1945–1950 sought to refute.

A close reading and a reexamination of the European and Anglo-American literature produced immediately after the Nuremberg judgment, on the occasion of the IMT’s 60th anniversary, is particularly interesting in regard of its influence in international criminal law concerning the significance of legality. This literature reveals that two different strategies were used to refute claims to the effect that the Charter of the Tribunal is incompatible with the principle of legality. Either the scholars grant, echoing the judges’ reasoning, the fiction according to which the Charter is merely the expression of pre-existing norms of international law, making the law of Nuremberg compatible with the principle of legality, in which case they ignore the question of the new charge of crimes against humanity; or they admit that the Charter, especially Article 6 (c), about crimes against humanity, creates new, retroactive law, thus conceding that the law of Nuremberg is incompatible a priori (or is only partially compatible) with the principle of legality. In the second case, they go on to justify the breach of the principle of legality.

Whichever strategy is adopted—denial or justification—the doctrine examined here sets out to show that the problem of the compatibility of the law of Nuremberg with legalistic requirements is a false problem. In both cases, we are confronted with the difficult problem of the standard of legality in the international legal order, a question to which neither the authors of the London Agreement nor the international judges at Nuremberg can be said to have responded. Any such response would presuppose taking a position on the nature and specificity of international law, and the limits on the principle of legality in this juridical order. Once this is grasped, it will readily be seen that the real problem thrown up by the punishment of crimes against humanity stems from the Nuremberg actors’ reluctance to interfere in Germany’s internal affairs out of respect for the principle of state sovereignty.

For obvious reasons, the present study ignores scholars for whom the question of the requirements of legality in international law is irrelevant. Three kinds of
scholars are involved. There are, first, those who, even if they acknowledge, as
some do, that the law of Nuremberg can be criticized from a strictly legalistic
point of view, nevertheless regard the Charter of the IMT as the incarnation of
a superior natural law, in the Grotian tradition. ¹⁷ Others, in the classical positivist
tradition, consider the law of Nuremberg to be not law, but political action. ¹⁸
Finally, a third group of scholars sets out from the premise that the principle of
legality, a principle of national law, does not apply in the international legal
order (contrary to what was at least implicitly admitted by all the actors at
Nuremberg: those who drafted the Charter as well as the accusation, the
defence, and the court). ¹⁹

The nature and specificity of international law

Whether those who have written about the Nuremberg Charter regard this text as
an expression of pre-existing international law or a creation of new, retroactive
law, they all agree that international law is in its early stages and has a decentra-
лизed structure, from which its customary nature derives. Differences of opinion
emerge, however, when it comes to drawing conclusions about the nature of the
norms contained in the Charter of the IMT. Whether or not commentators take
a position as to the limits of the principle of legality in the previously established
international legal order is decisive here.

International law: a primitive, decentralized legal order

In the opinion of all the authorities examined here, international law constitutes a
legal order that may be called primitive in the sense that it tends to evolve a poster-
iori: the norms of international law arise in response to needs, rather than antici-
pating them. International law is said to be “at the stage at which national legal
orders found themselves at the beginning of their development.” ²⁰ Comparisons
with the slow evolution of national legal orders are often drawn to illustrate the
technical imperfection and “dynamic” (that is, evolving) nature of the inter-
national legal order, which is said to be in a phase of rapid expansion. ²¹

Again, one of the particular characteristics of international law, precisely
because it is primitive, is that it is decentralized: “in contrast to technically
well developed legal orders, it does not possess central organs specializing in
making and executing law.” ²² In 1945, the international legal order was not
endowed with any permanent legislative and judiciary organs, even if the creation
of the League of Nations and, subsequently, the United Nations represented unde-
niable advances in the centralization process. ²³ It was the decentralized nature of
international law which brought Kelsen to the conclusion, as early as 1934, that it
was an illusion to think (following traditional voluntarist doctrine) that inter-
national law might be based solely on the good will of states and the public
opinion of the world’s peoples. This could only lead, according to Kelsen, to
“inter-state anarchy” in the true sense of the word: as national legal orders are
based on the will of sovereign states, so international law should be based on the will of an international community.  

State sovereignty should accordingly be understood in a relative sense, as “sovereign equality.” In question is a basic principle of public international law; it stipulates the independence, not the omnipotence, of states, codified in Article 2 (1) of the United Nations Charter and recognized as such by the Nuremberg judges as well as by the doctrine that sprang up around the IMT. According to this principle, every state is sovereign to the extent that it is subjected, directly and immediately, to international law alone, not to the domestic law of any other state. With regard to the particular question of Germany’s status at the end of World War II, majority opinion has it that Germany ceased to exist as a sovereign state with the Berlin Declaration of June 5, 1945. Since the unconditional surrender had effectively confirmed the disappearance of the German state, sovereignty was vested in the four powers that were the Reich’s successors, and the London Agreement was binding on Germany as well, even if Germany was not one of the signatories.

Finally, as in the process (taken as a model) by which national legal orders evolve, the technical development of international law, it is argued, should begin with the judiciary process, even before a central legislative body is established or international law is codified, as it must eventually be: “this state of complete decentralization . . . is followed by the emergence of the first central organs, which are not law-making organs, as might be supposed, but organs of jurisdiction.” International law is the imperfect result of “the instincts of justice and humanity that are the common heritage of all civilized nations.”

International law: a legal order of a customary nature

Both primitive and decentralized, international law is, first and foremost, customary law. Anglo-American scholars often draw parallels with common law in order to illustrate the importance, in the international legal order, of “what is indicated by reason,” as opposed to “what is commanded by sovereign authority.”

More concretely, it may be observed that Article 38 (1) of the Charter of the International Court of Justice (ICJ) is cited by a large majority of writers when what is in question is the formal sources of international public law. These sources are: particular or general international conventions (38(1)(a)); international custom, as evidence of a general practice accepted as law (b); the general principles of law recognized by civilized nations (c); and, lastly, judicial decisions and opinions, considered as subsidiary means for determining the rules of law (d).

Consequently, some scholars (Anglo-Americans, as a rule), endorsing the judges’ reasoning, hold that the Nuremberg Charter is an expression of pre-existing norms of international law. The law of Nuremberg is thus held to be in conformity with the requirements of legality. To rebut legalistic critiques, these writers present the Charter of the IMT as the codification of a customary international law whose ultimate basis is the “conscience of the international
community,” which alone makes it possible to determine what is permitted and what is forbidden. Thus the Nuremberg Charter is deemed to have assembled pre-existing norms that had previously been scattered; they are said to justify considering the acts of the Nazis as constituting criminal behaviour at the time of their commission.

Those who defend this opinion specify the pre-existing norms involved. They are, in the first instance, treaties (especially the Hague Conventions of 1899 and 1907, the Treaty of Versailles and the League of Nations Covenant of 1919, the Pact of Paris of 1928 and the Declaration of Moscow of 1943), but also, more vaguely, the customs and general principles of justice, although these customs and principles are never defined or spelled out. It is noteworthy that the Allies’ political declarations about, and condemnations of, Nazi crimes from 1941 on are cited as illustrations of the practice of states that goes to make up international custom, or as an expression of general principles accepted by all civilized nations. According to these writers, the points evoked all make it possible to affirm that the Nazis were aware of the criminal nature of their acts at the moment of commission — the more so, some add, as the acts incriminated in the Charter of the Nuremberg Tribunal already constituted crimes as defined by the criminal codes of the four powers and all civilized states.

Thus, in the view of some writers, the judgment of Nuremberg is not based on new, retroactive law; the Charter of the IMT constitutes “the repository of the crystallized conscience of mankind.” A very few mention, furtively, the specific criticisms directed against Article 6 (c) of the Charter, only to reject them without lengthy discussion; all the others refrain from taking a position on the legality of the new charge of crimes against humanity, absent from most commentaries on the Charter. In the opinion of these scholars, moreover, silence is the rule when it comes to the question of the significance of, and limits on, the principle of legality in international law. When this principle is mentioned at all, it is in order to affirm that it should not be accorded too much importance in the international legal order, or, again, that it is in any case not binding where war crimes are concerned.

Generally speaking, the conclusive idea expressed in this part of the doctrine is that the law of Nuremberg, even if it is imperfect or sometimes imprecise, is not new, retroactive law, and is sufficiently complete to serve as a model for the future. One question, however, remains unanswered: just how precise does the principle of legality require the norms of international criminal law to be?

The limits of the principle of legality in international criminal law

In international criminal law, the question as to what legality means is both particularly interesting and particularly thorny. It had never been raised before Nuremberg. The situation in 1945 was a very special one: whereas the provisions of international law had been applied, as a rule, by national jurisdictions operating in conformity with principles defined by national legal orders, involved here were international norms that were to be applied directly. The authors of the Nuremberg Charter opted for the monist approach, which, giving precedence to international
law, recognized the direct application of the law of Nuremberg, the criminal responsibility of individuals as subjects of international law, and international law’s independence of national laws. In this case, therefore, the question of legality has to be apprehended in the framework of an international criminal law applied directly to the accused. But, at the time, there existed not a single international text treating this principle.

What is more, the multidisciplinary (combining comparative criminal law and public international law) and customary nature of international criminal law considerably complicated the task of determining the standard of legality. Finally, although the principle of legality has, since the Enlightenment, been a fundamental principle of most national legal orders, its meaning varies with the legal theory a given legal order presupposes. It was nevertheless observed, in 1945, that the criminal law of most states, whether Anglo-American or European, was structured around three major common axes: the prohibition (relative or absolute) of retroactive criminal law; and the principles of the legality of, first, delicts and, second, punishments, with resort to reasoning by analogy tolerated within certain limits.

Neither the actors at Nuremburg (including those who drew up the Charter of the IMT) nor the authors of the doctrine which contends that the Charter was the expression of pre-existing norms of international law take a clear-cut position on the meaning and requirements of international legality. One can, however, find certain indications as to how this question might be broached in the writings of the more critical commentators who begin by affirming that the Charter contains new, retroactive law in order then to justify this state of affairs by appealing to the “elasticity” and/or the limits of the principle of legality.

Because of the inclusion, in the absence of any real debate on principles, of the concept of crimes against humanity in the Nuremberg Charter, it would appear that the Charter’s defenders have looked for ways to increase its credibility or legal value by a process of a posteriori justification. They have tried, as it were, to determine the “minimum quantity” of positive law sufficient to produce a valid norm in international criminal law.

“Elastic” legality in international law

Whereas legalistic criticisms of the law of Nuremburg set out from the premise that legality always means the same thing in national legal orders and the international legal order, the scholars examined in the present paper usually begin by taking a more finely shaded position on this question.

Of course, the principle of the legality of delicts and sanctions, with its corollary, the principle of the non-retroactivity of criminal law, is, according to most commentators, recognized by the national law of all civilized nations. Cited by way of example are, notably, Articles 5 to 8 of the 1789 Declaration of the Rights of Man and of the Citizen, Article 4 of the French Criminal Code of 1810, Section 2 of the German Criminal Code of 1871, Article 116 of the Constitution of the Weimar Republic, and, in very general fashion, the prohibition on
retroactive rules in Anglo-American law (“ex post facto rules,” or, in the sense given the term in the US Constitution, “retroactive law”).

Yet the foregoing does not imply that, on the one hand, this principle is absolute, or, on the other, that it is interpreted in exactly the same way in Roman and Anglo-American law. Nor does it imply that it can be applied “as is” in the international legal order. In addressing the first two points, Kelsen, for example, begins by recalling that the principle of legality admits several exceptions: it applies only in the field of criminal law, and does not apply when the retroactive criminal law is advantageous to the accused. Kelsen goes on to note that in certain systems, such as the system of common law, this principle has never been construed as constituting a limit on sovereign legislative power. Finally, he adds that the principle of non-retroactivity, in particular, is valid only for legislation, to the exclusion of customary and/or judicial creation of law, which is retroactive by definition.

As far as the third point is concerned—the application of the principle of legality in the international legal order—Kelsen’s position is categorical: no general norm of international law prevailing at the time guaranteed the principle of legality or prohibited concluding treaties that establish retroactive norms. To maintain, for instance, that retroactivity is prohibited in the international legal order is to presuppose two conditions which, according to Kelsen, are probably not fulfilled: first, that “the general principles of law recognized by civilized nations” (Article 38 (1) (c) of the Charter of the ICJ) constitute positive international law, and second, that the principle of non-retroactivity is one of these general principles. To treat these principles as coming under positive international law amounts, Kelsen argues, to abandoning positivist doctrine.

We find less cut-and-dry discussions of this point in most other writers, who obviously prefer to centre their justification of the relativity of the principle of legality in international law on the customary, evolving nature of this principle. It must, they argue, be applied in flexible, “elastic” fashion in international criminal law, in conformity with the non-codified, dynamic character of the international legal order. Henri Donnedieu de Vabres observes further that, according to the Nuremberg judges, the principle *nullum crimen sine lege* does not limit state sovereignty: it merely formulates a widely observed rule.

A legality restricted by the superior principle of morality

Regardless of its relative character in international law, the doctrine we are examining here affirms that the principle of legality should, as a general rule, be interpreted as restrictively as possible. Furthermore, whether or not it is acknowledged in the international legal order, it does not apply, the contention is, to the London Agreement. The arguments used to justify this conclusion rest on the premise that the principle of legality is, above all, a *principle of justice* flowing from natural law doctrine; this premise is invoked against that adopted by the IMT’s detractors in the name of classical positivism.

The interest of this premise resides in the fact that it grounds a line of reasoning, worked out with greatest precision by Kelsen, which manages to elude the Law vs.
Morality dilemma that confronted, notably, the IMT’s judges, \(^{68}\) while simultaneously eschewing any form of compromise, theoretical or juridical. It resolves the question of the legality of the law of Nuremberg by positioning itself on the terrain of a conflict between two principles of justice. \(^{69}\)

When two principles of justice conflict, the higher of the two prevails. \(^{70}\) For example, the well known principle of justice (which admits of no exception) according to which “ignorance of the law is no excuse” \(^{71}\) prevails, Kelsen argues, over the principle of justice according to which “the law must be known in order to be applicable.” \(^{72}\) At Nuremberg, he goes on, the Tribunal rightly condemned the accused Nazi leaders for acts that were manifestly immoral, even if these acts were not subject to punishment under positive international law at the time of their commission. The principle of legality is not applicable here, because the retroactivity of the new norms created by the London Agreement is fully justified by a higher principle of justice widely acknowledged by the civilized world: \(^{73}\) condemning individuals “morally responsible” for the international crimes of World War II, says Kelsen, certainly has to be considered much more important than strictly respecting the altogether relative principle of non-retroactivity. \(^{74}\)

We must, Kelsen points out, distinguish a retroactive norm that makes punishable an act which was “indifferent” or “innocent” when it was committed (in this case, the retroactivity of the norm would be unjustified) from one that makes punishable an act considered “immoral” or “in conflict with a higher norm” at the moment of its commission. The acts committed by the accused Nazi leaders certainly fall into the second category. \(^{75}\) Hence retroactivity is here justified, in Kelsen’s view, because the behaviour that the Nuremberg Charter subjected to punishment undeniably constituted a violation of the higher principles of morality. \(^{76}\) The Charter of 1945 simply transformed a patent moral responsibility into a legal one.

Scholars such as Goodhart, Donnedieu de Vabres, Genton, Ehard and Merle come to the same conclusion, although they are less precise. All concede that the principle of legality can, in this case, be restricted by higher general principles such as justice or equity. \(^{77}\) The idea on which they agree is the affirmation that, in certain limit cases, a solution resulting from the positive law in force at the time of commission may be morally unsatisfactory, so that, in such cases, one is entitled to choose “the lesser of two evils”: in other words, accept the creation of retroactive norms rather than allow immoral, abhorrent acts to go unpunished. This idea, be it noted in passing, became the subject of a 1958 debate on the condemnation of Germans who “informed” under the Nazi regime. \(^{78}\)

Generally speaking, the determining factor in such circumstances is not, on this line of reasoning, the subject’s concrete knowledge of the law at a given time, but, rather, whether it was possible for him to know the abhorrent nature of his conduct. \(^{79}\) Moreover, as far as the standard of legality applicable to delicts and sanctions in international law is concerned, it would appear that, given the nature and specificity of this legal order, a strict definition of the infraction and/or a precise formulation of the sanction risked by the agent of the infraction are by no means required.
Thus the doctrinal analysis that seeks to show that the problem of the legality of
the Nuremberg Charter is a false problem also enables us to bring out the most
important constraint put on the Tribunal: respect for the “sacrosanct” principle
of state sovereignty, which implies non-interference in the internal affairs of
other states. While such interference was deemed acceptable in the case of
war crimes, it was still, in 1945, a source of embarrassment and uneasiness
when the issue was interference for the purpose of repressing crimes committed
in peacetime, such as the crimes against humanity perpetrated by the Nazis
before 1939. Nuremberg left the question of crimes against humanity in the
strict sense “unresolved”, the Tribunal consistently linked such crimes to war
crimes. In Elizabeth Zoller’s estimation, there is a simple explanation for this:
the concept of a crime against humanity and the juridical regime that follows
from it “virtually abolish the international legal order and the sovereignty that
founds it.”

Coming immediately after the Second World War, the law of Nuremberg was
ultimately only one stage in a process. Although it was imperfect, it nevertheless had the advantage, in the opinion of some people, of lending truly
concrete form to the emergence of “international society as a legal community.”
It also had the merit of exposing the major shortcomings of nascent international
criminal law and of making it possible to draw conclusions for the future.

Conclusion

The doctrine examined here suggests that it is, to begin with, necessary to
“generalize” the law of Nuremberg in order to make “the law of a moment” a
“moment of the law.” A first step in this direction was taken with the adoption
by the United Nations General Assembly on February 13 and December 11, 1946
of, respectively, Resolutions 3 (I) and 95 (I), which contributed to the recognition
of the law of Nuremberg as customary law. The intent nevertheless was, as the
text of Resolution 95 (I) makes clear, “the gradual development and codification of
international law” in the form of a general codification of offences against the
peace and security of mankind.

Second, with regard to crimes against humanity in particular—“the key to
universal criminal law”—the doctrine in question suggests that the definition
of them should be expanded, and the punishment of these crimes based on the protection of human rights, in order to ensure that the question of human rights can be
treated beyond the context of armed conflict. Although Article 1 of the United
Nations Charter of June 16, 1945 declares this to be one of the purposes of the
United Nations, the Charter also guarantees the preeminence of the sovereignty
and independence of states (Article 2 (7)). Thus the precondition for the
proper definition and effective repression of crimes against humanity is the pro-
mulgation of an international Declaration of Human Rights requiring all states
to guarantee their citizens or subjects certain basic civil and political rights,
and, further, assigning political and juridical organs of the international community the task of seeing to it that these obligations are met. Any crime against
humanity would then constitute a violation of human rights, in times of peace as well as in times of war, an approach that has lately found its expression in the case law of the International Criminal Tribunals (ICT) for the Former Yugoslavia and for Rwanda.

Finally, the post-Nuremberg doctrine emphasizes that a permanent international criminal jurisdiction must eventually be created, making it possible to judge clearly defined international infractions constituting a breach of the international public order. As far back as the 1930s, Kelsen pointed out that this was a technical sine qua non for genuine progress in international public law and a first step toward the centralization of this legal order. Many different texts on doctrine written in the wake of the Nuremberg experience are based on the same idea, which was also the focus of the debates leading up to the December 9, 1948 Convention on the Prevention and Punishment of the Crime of Genocide and, more recently, the July 17, 1998 Statute of the International Criminal Court (ICC).

The general conclusion to be drawn after Nuremberg might be summed up as follows. The international criminal law and the effective punishment of crimes against humanity presuppose “a struggle to create and consolidate a democratic international sovereignty, that is, an international public order that will put an end to criminal sovereignties and protect the Rights of all Human Beings.” The shortcomings of the law of Nuremberg confirm that the punishment of crimes against humanity—which have been since then recognized and legally defined as international crimes—is indissolubly bound up with the preservation of peace and the protection of human rights. The law of the ICT for the Former Yugoslavia and for Rwanda, like the Statute of the 1998 ICC, fully reveals this essential bond, while finally disconnecting the concept of crime against humanity from war. Also, if the Nuremberg precedent raised for the first time the question as to what legality means in international criminal law, the examined literature indicates both the importance and “elasticity” of international legality regarding the nature and specificity of this legal order. This concern with the international requirement of the principle of legality has been recently confirmed and specified, as evidenced in the UN Secretary General recommendations, the ICT’s case law, and the Statute of the ICC—which expressly guaranties, for the first time in international criminal law, strict respect for this “general principle of international law.”

Notes and References
1 The Nuremberg IMT is the first ad hoc international criminal jurisdiction. It was created by the August 8, 1945 London Agreement signed between the United States of America, the Provisional Government of the French Republic, the Government of the United Kingdom of Great Britain and Northern Ireland, and the Government of the Union of Soviet Socialist Republics. The trials took place from November 20, 1945 to August 31, 1946. The judgments were pronounced on September 30 and October 1, of 1946.
2 He explains that the purpose of the doctrine that there are non-legal, or political, disputes “is not to interpret the law in an objective way but to justify the attempt to exclude the application of existing law . . . The doctrine thus is not a scientific theory, but an instrument of politics”: Hans Kelsen, “Science and politics,” The American Political Science Review, Vol XLV, No 3, 1951, pp 659–661.

5. This would of course be “a value judgment of a highly subjective character” referring to a “value different from the legal value”: Hans Kelsen, “Science and politics,” ibid.


7. The Charter of the IMT was annexed to the August 8, 1945 London Agreement.

8. Article 6 (c) of the Nuremberg Charter reads: “Crimes Against Humanity: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.” The others crimes falling under the jurisdiction of the Nuremberg Tribunal were *crimes against peace* (Article 6 (a)) and *war crimes* (Article 6 (c)).

9. The concept of crime against humanity originated in 1915, but was not legally defined prior to Nuremberg. In reaction to the massacres and systematic extermination of Armenians by the Turks, France, Great Britain and Russia denounced, on May 24, of 1915, these “new crimes against humanity and civilization” in a joint Declaration, warning that all members of the Ottoman Government as well as its agents implicated in the massacres would be held responsible for their acts. After World War I, in 1919, the Allies established a Commission to investigate war crimes, which came to the conclusion that the killing of Armenians in the Ottoman Empire constituted “crimes against the laws of humanity.” Thereafter the Treaty of Sèvres (Peace Treaty between the Allied Powers and Turkey, August 10, 1920) stipulating that those responsible for such crimes be judged by an international jurisdiction (Article 230 of the Treaty) was cancelled by the Treaty of Lausanne (Peace Treaty between the Allied Powers and Turkey, July 24, 1923), which included no such provision and amnesties the Turks responsible for the crimes. The Armenian Question was thus buried, as was the hope of implementing the newborn concept of crime against humanity. On this subject, see Cherif Bassiouni, *Crimes Against Humanity in International Criminal Law*, 2nd edn (The Hague, London and Boston: Kluwer Law International, 1999), p 62 ff, and Sévane Garibian, “Génocide arménien et conceptualisation du crime contre l’humanité. De l’intervention pour cause d’humanité à l’intervention pour violation des lois de l’humanité,” in *Ailleurs, hier, autrement: connaissance et reconnaissance du génocide des Arméniens* (numéro spécial de la *Revue d’Histoire de la Shoah*) (Paris: Centre de Documentation Juive Contemporaine, 2003), pp 274–294.

10. Grounding its arguments on classical positivism, the defence at Nuremberg invoked respect for the principle of non-retroactivity, derived from the principle of legality. This principle constituted, the argument ran, the logical limit on the Tribunal’s competence to apply the Nuremberg Charter. The defence lawyers considered the principle of non-retroactivity to be a corollary of the Austrian principle of law as the command of the sovereign [see J. Austin, *The Province of Jurisprudence Determined* (Cambridge: Cambridge University Press, 1995/1832), p 18 ff], using classical positivist theory as their implicit justification. See, on this point, the detailed study by Stanley L. Paulson, “Classical legal positivism at Nuremberg,” *Philosophy & Public Affairs*, Vol 4, No 2, 1975, pp 132–158. Let us further note that classical legal positivism “à la Austin” is the less applicable to the Nuremberg Tribunal in that it does not recognize existing international law as law properly speaking (Austin calls it “law in the improper sense”). Bassiouni makes an interesting observation in this connection. He points out that, while the Nuremberg Charter is generally perceived as the Charter, they say, resulted from the victory of might over right: “The Law of the Charter can, however, also be described as the embodiment of might makes right because it enacted a new law based on the power derived from victory” (Cherif Bassiouni, *Crimes Against Humanity*, p 114).

11. For convenience’ sake, we shall hereafter use this generic term to refer to all the various principles of legality (legality of delicts, legality of sanctions, and non-retroactivity).


13. On this point, see Hans Kelsen’s opinion, for whom the *fiction* according to which the Charter is merely the expression of pre-existing norms of international law is a “typical fiction of the problematical doctrine whose purpose is to veil the arbitrary character of the acts of a sovereign law-maker.” Hans Kelsen, “Will the judgment in the Nuremberg trial constitute a precedent in international law?,” *International Law Quarterly*, Vol 153, 1947, pp 161–162.

14. The authors met at the London Conference (June 26–August 8, 1945). For the preliminary documents, see *Report of Robert H. Jackson United States Representative to the International Conference on Military Trials,*


According to this fundamental principle, the basis for international law, there can be no restriction of the state by, or subordination of the state to, any other power, since the sovereign state depends only on its own will and is alone competent to judge the individuals on its territory. It follows that to sanction those state acts which constitute crimes, whether committed outside a war context, or in such a context but against citizens of the state that commits them, amounts to interference in the internal affairs of a sovereign state and thus constitutes a violation of the principle of sovereignty (see also infra, note 25). Note that, at the 1919 Paris Peace Conference, respect for the principles of legality and sovereignty was identified, particularly by the Americans, as an obstacle to the application of international criminal sanctions to crimes committed during World War I. See

These scholars acknowledge the IMT judges’ naturalist approach (see Sévane Garibian, “Souveraineté et légalité en droit pénal international,” p 2, and Cherif Bassiouni, ibid, p 12).


For example, Robert B. Walkinshaw, “The Nuremberg and Tokyo trials: another step toward international justice,” American Bar Association Journal, Vol 299, 1949, p 363: “International criminal law, in comparison with national criminal law, is still in its early stages. As the idea of civil wrongs and remedies came early into the national consciousness and the idea of crimes and punishments much later, so have these ideas come into the international consciousness.”


See notably Hans Kelsen, “The legal process and international order,” p 18 and R. A. W. Wright, “War crimes under international law,” p 40. On the importance of the concept of international community (or community of nations), within the framework of Nuremberg, see R. A. W. Wright, ibid, pp 41, 48: “International Law represents the imperfect endeavour to develop a body of rules and principles which will go towards establishing a rule of law among the nations, not dissimilar in character from the rule of law which is established in greater or lesser degree inside each separate sovereign nation”; “[The concept of community of nations] is, it

London 1945 (Washington, DC: Department of State, Division of Publications Office of Public Affairs, 1949). In Bassiouni’s opinion, the authors were fully conscious of the weakness of their task on this point (Cherif Bassiouni, Crimes Against Humanity, p 137).
is true, an ideal, but, though it may seem to have merely an inchoate and imperfect realization, the concept itself is vital and has a definite reality.”


26 The scholars for whom classical positivism remained a theoretical premise even after World War II are exceptions here. Such scholars regard the concept of state sovereignty as absolute. They are therefore highly critical of the August 8, 1945 London Agreement; it was ill founded, in their view, because it was a unilateral act on the part of the victorious powers. Hence Germany, in their estimation, was in so sense bound by the Agreement, which gave rise, in its turn, to the Nuremberg Charter. See notably Nathan April, “An inquiry into the juridical basis for the Nuremberg war crimes trial,” p 316 ff; F. B. Schick, “The Nuremberg trial and the development of an international criminal law,” p 203 ff and “The Nuremberg trial and the international law of the future,” p 778 ff; Ilhan Latem, “Some controversial aspects of war crimes,” p 151 ff.


30 Judge Robert H. Jackson (United States representative at the London Conference and Chief of Counsel for the United States at Nuremberg) also published an article in 1949 on “continental concept of criminal trial versus common law concept”: “The fallacy of the idea that law is found only in [law embraced in a sovereign command] appears from the fact that crimes were punished by courts under our common law philosophy long before there were legislatures. … The common law judge is less text-bound. Common law depends less on what is commanded by authority and more on what is indicated by reason. … [The judge] applies what has sometimes been called a natural law that binds each man to refrain from acts so inherently wrong and injurious to others that he must know they will be treated as criminal. Unless International law is to be deprived of this common law method of birth and growth, and confined wholly to progression by authoritarian command, then the judges at Nuremberg were fully warranted in reaching a judicial judgment of criminal guilt.” Robert H. Jackson, “Nuremberg in retrospect: legal answer to international lawlessness,” *American Bar Association Journal*, Vol 813, No 35, 1949, p 885. See also James T. Brand, “Crimes against humanity and the Nurnberg trials,” p 108; Robert B. Walkinshaw, “The Nuremberg and Tokyo trials: another step toward international justice,” p 299 ff.

31 While it is true that this essay cites only those sources to which the ICJ appeals for its authority, it is nevertheless granted that, because the Court was the expression of a general consensus, its sources are also those of international law in general. See Bruno Simma and Andreas Paulus, “Le rôle relatif des différentes sources du droit international pénal (dont les principes généraux de droit),” in Hervé Ascencio, Emmanuel Decaux and Alain Pellet, eds, *Droit international pénal* (Paris: Pedone, 2000), p 55 ff. It should be recalled that there exists no general hierarchy among the sources of international law; the only hierarchy is that which subordinates certain concrete norms to others.


33 See note 12.

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36 Conventions for the Pacific Settlement of International Disputes.

37 Peace Treaty between the Allied and Associated Powers and Germany.


39 Declaration signed by President Roosevelt, Marshal Stalin and Prime Minister Churchill. This Declaration is considered, politically speaking, the most important instrument prior to the 1945 London Agreement.


41 M. C. Bernays, “Legal basis of the Nuremberg trials,” Survey Graphic, January 1946, pp 5–9; Mégalos A. Caloyanni, “Le procès de Nuremberg et l’avenir de la justice pénale internationale,” ibid, p 175; Robert H. Jackson, “Nuremberg in retrospect: legal answer to international lawlessness,” ibid, p 886. Quincy Wright suggests the following definition of a crime against international law: “A crime against international law is an act committed with intent to violate a fundamental interest protected by international law or with knowledge that the act will probably violate such an interest, and which may not be adequately punished by the exercise of the normal criminal jurisdiction of any state.” Quincy Wright, “The law of the Nuremberg trial,” p 56.


43 William Eldred Jackson, “Putting the law of Nuremberg to work,” p 564: “That document is the repository of the crystallized conscience of mankind.”

44 R. A. W. Wright, “War crimes under international law,” p 49: “I cannot agree that crimes against humanity are too vague to be the subject of penal action. International Law does not deal with border-line cases or with subtle distinctions. What is meant in this context by crime against humanity is sufficiently clear.” Quincy Wright, “The Nuremberg trial,” The Annals of the American Academy, 1946, p 79: “The novelty is not in the crimes but in the setting up of a new jurisdiction to try them”; and “The law of the Nuremberg trial,” p 62: “The Tribunal had no difficulty in assuming that war crimes and crimes against humanity in the narrow sense of the Charter were crimes under customary international at the time the acts were committed and felt it unnecessary to give to this question the elaborate discussion which it devoted to the ‘crimes against peace’”; William Eldred Jackson, “Putting the law of Nuremberg to work,” ibid, p 556: “… the Charter of London was in itself a codification of the treaties, rules and customs of international law previously existing on crimes against peace, war crimes and crimes against humanity.”

45 Louis C. Bial, “The Nurnberg judgment and international law,” Brooklyn Law Review, Vol 23, 1947, p 38: “… the Judgment is not based on ex post facto law, and the dictum that ex post facto law might have been applied should not be given too much weight.”


48 The question of legality had been raised only once before, in 1935, by the Permanent Court of International Justice (Advisory Opinion on the Consistency of Certain Danzig Legislative Decrees with the Constitution of the Free City, December 4, 1935). Nevertheless, the Court at the time did not come to a decision on the meaning of legality in international law. Furthermore, this Court’s case law does not have force of precedent. For further details, see Cherif Bassiouni, Crimes Against Humanity, pp 138–140.


50 On this point, see Cherif Bassiouni, Crimes Against Humanity, p 126.

51 See Cherif Bassiouni, ibid, p 137.

52 According to Bassiouni, the authors were, in particular, confronted with the following dilemma: they could either extend international criminal responsibility to include those guilty of crimes against humanity, thereby
abandoning strict respect for the principle of legality, or else not extend it, thereby leaving unpunished acts that fell within the purview of the new inculpation (Cherif Bassiouni, ibid, p 108). In the end, they sidestepped all considerations of this sort and adopted a pragmatic compromise. The Nuremberg judges, moreover, followed their example, making the same compromise or even “reinforcing” it. See Cherif Bassiouni, ibid, p 122, and Sévane Garibian, “Souveraineté et légalité en droit pénal international,” p 45.


56 It should be pointed out that the Third Reich amended Section 2 of the 1871 Criminal Code with a June 28, 1935 law (which went into effect on September 1, 1935) that replaced the guarantee of the principle of legality with the development of reasoning by analogy (which makes it possible to sanction acts that are not expressly foreseen by existing law). Article 116 of the Weimar Constitution was also repealed. Moreover, the National Socialist regime passed many retroactive laws, among them the March 29, 1933 law on capital punishment and the June 22, 1936 law on kidnapping (Hans Kelsen, “The rule against ex post facto laws and the prosecution of the Axis war criminals,” The Judge Advocate Journal, Vol II, No 3, 1945, p 12). Ultimately, however, all the Nazi laws were in their turn repealed by a 1945 decree of the Allied Control Council that restored the German law in effect before 1935 (on this point, see Cherif Bassiouni, Crimes Against Humanity, p 107 ff).


60 “The doctrine that custom is not a creation of law but merely evidence of a pre-existing law is the same fiction as the doctrine that tries to hide the retroactive character of a precedent by presenting the judicial decision as an interpretation rather than a creation of law.” Hans Kelsen, “The rule against ex post facto laws,” p 9. Also Hans Kelsen, “Will the judgment in the Nuremberg trial,” p 165.


63 Kelsen developed this argument only later. In Théorie générale des normes (1979), he states more clearly the reasons for his doubts as to the validity, in the field of international positive law in general, of the general principles of law recognized by civilized nations. If these general principles constitute norms of international law—inasmuch as they are cited in Article 38 of the ICJ Charter, which further stipulates that the Court shall resolve disputes in accordance with the norms of international law—just which international law is involved here? According to Kelsen, general principles of law became valid international law only after the promulgation of Article 38, cited above, and only in the framework of their application by the ICJ. Hans Kelsen, Théorie générale des normes, trans. Olivier Beaud and Fabrice Malkani (Paris: PUF, 1996/1979), p 160.


65 Henri Donnedieu de Vabres, “Le jugement de Nuremberg et le principe de légalité des délits et des peines,” ibid, p 816.


See Stanley L. Paulson, “Classical legal positivism at Nuremberg,” p 132–158. Paulson, too, holds that the principle of legality is the expression of moral ideas informing the law, which comes down to arguing that this principle is in fact incompatible with classical positivism. Yet, at Nuremberg, the defence invoked this principle on the authority, precisely, of the theory of classical positivism. Paulson explains this by pointing out that the principle of legality was here invoked, not qua moral constraint, but, rather, qua logical limit on the Tribunal’s competence. In other words, it was invoked as a corollary to the Austroinian principle of law as the command of the sovereign (see note 10).

In the opposite case—that is, if Kelsen had not identified the principle of legality as a principle of justice derived from natural law—his line of reasoning would have run as follows: (1) the principle of legality falls within the province of positive law; (2) the Nuremberg Tribunal consequently found itself confronting a conflict between two principles of different provenance (the principle of legality, which falls under international positive law vs. the principle of justice or morality, which falls under natural law); and (3) since, from the standpoint of positive law, morality does not exist, or, more precisely, does not count in a system of valid norms, the IMT judges would have had no choice but not to condemn the accused, out of respect for legality. In this connection, Kelsen illustrates the conflict of norms of different provenance in the framework of positivist procedures with the example of a US Supreme Court decision (The Antilope case, 1825) in which the judges, in the absence of adequate legal norms, declared the slave trade to be be in conformity with international law, although it stood in obvious contradiction to the laws of nature (Hans Kelsen, Principles of International Law, pp 443, 570). Theoretically, another solution might have been considered, according to Kelsen, who admits, generally speaking, that judges may create new general norms when they deem a decision that would result from the positive law existing at the time of commission of the facts to be politically or morally unsatisfactory. But this is not what happened in the case to hand, on Kelsen’s view; the Nuremberg judges created, he argues, only individual norms of international law in applying the IMT Charter. This leads him to the affirmation, be it added, that the Nuremberg judgment does not constitute a precedent (Hans Kelsen, “Will the judgment in the Nuremberg trial,” p 154).

Hans Kelsen, “Will the judgment in the Nuremberg trial,” ibid, p 165.


Ibid.


Ibid, p 11: “... in all cases where the rule against ex post facto laws comes into consideration in the prosecution of war criminals, we must bear in mind that this rule is to be respected as a principle of justice and that, as pointed out, this principle is frequently in competition with another principle of justice, so that the one must be restricted by the other. It stands to reason that the principle which is less important has to give way to the principle which is more important. There can be little doubt that, according to the public opinion of the civilized world, it is more important to bring the war criminals to justice than to respect, in their trial, the rule against ex post facto law, which has merely a relative value and consequently, was never unrestrictedly recognized”; see also Hans Kelsen, “Will the judgment in the Nuremberg trial,” p 165: “... and to punish those who where morally responsible for the international crime of the second world war may certainly be considered as more important than to comply with the rather relative rule against ex post facto laws, open to so many exceptions.”

Although the same acts were not illegal from the Nazi legislation point of view. On Nazi law: James T. Brand, “Crimes against humanity and the Nuremberg trials,” p 103 ff.

Kelsen refers to Blackstone, for whom two conditions are necessary for the application of the principle of non-retroactivity: first, the acts considered should be “innocent” or “indifferent” at the time of their commission and, second, their punishable character should be absolutely unpredictable. Hans Kelsen, “The rule against ex post facto laws,” pp 9–10. On this point, see also Jacques Descheemaeker, “Le Tribunal militaire international des grands criminels de guerre,” p 252. On the positivist use of morality as a means, see Hans Kelsen, “Science and politics,” p 643, and Cherif Bassiouini, Crimes Against Humanity, p 113 (“... the naturalists arguing morality as an end, and the strict positivists advancing morality as a means”).


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78 Here, the underlying question would run as follows: “Should we punish those who committed abominable acts at a time when those acts were permitted by the Nazi law then in effect?” See Gustav Radbruch, “Gesetzliches Unrecht und Übergesetzliches Recht.” 1946, republished in Rechtphilosophie (Stuttgart: K. F. Koehler, 1973), pp 339–350, and the famous controversy opposing H. L. A. Hart, “Positivism and the separation of law and morals,” Harvard Law Review, Vol 71, No 4, 1958, pp 593–629 and Lon L. Fuller, “Positivism and fidelity to law: a reply to Professor Hart.” Harvard Law Review, Vol 71, No 4, 1958, pp 630–672. On Radbruch’s thesis, the Nazi law in effect when the acts took place must be considered null and void, since an immoral law can in no case qualify as right. Hart and Fuller, in contrast, prefer to admit the creation of frankly retroactive laws which make it possible to condemn these acts. They do so, however, on the basis of antithetical theoretical premises and, consequently, antithetical lines of argument (in Hart’s case, a distinction between right and morality; a conflation of right and morality in Fuller’s). See also H. L. A. Hart, Le concept de droit, trans. Michel van de Kerchove (Brussels: Publications des facultés universitaires Saint-Louis, 1976/1961), pp 246–252.


80 See, for example, Henri Donnedieu de Vabres, “Le procès de Nuremberg devant les principes modernes du droit pénal international,” ibid, and Hans Ehard, “The Nuremberg trial against the major war criminals and international law,” p 236. We find similar opinions in later jurisprudence: see esp. Claude Lombois, Droit pénal international, 2nd edn (Paris: Dalloz, 1979), p 51 ff and Cherif Bassiouni, Crimes Against Humanity, p 144.


83 Marcel Merle, Le procès de Nuremberg, p 155.


87 On the ad hoc character of the Nuremberg law, see in particular Georg Schwarzenberger, “The judgment of Nuremberg,” p 337 ff.

88 Marcel Merle, Le procès de Nuremberg, p 170.

89 Claude Lombois, Droit pénal international, p 160.

90 Resolution 3 (I) of February 13, 1946 on the extradition and punishment of war criminals takes note of the definition of these infractions as specified in Article 6 of the Nuremberg Charter. In Resolution 95 (I) of December 11, 1946, the United Nations General Assembly emphasizes that the IMT will serve as an example for the whole world and ratifies “the principles of international law recognized in the Charter of the Nürnberg Tribunal and in the judgment of the Tribunal.” Note that a second resolution was adopted the same day; it proposes that genocide be recognized as “a crime under international law which the civilized world condemns” and invites the United Nations’ member states to enact the necessary legislation for the prevention and punishment of this crime, and also to undertake to draw up a draft Convention on the subject.


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102 Report of the Secretary General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), UN Doc S/25704, May 3, 1993, § 34: “In the view of the Secretary General, the application of the principle *nullum crimen sine lege* requires that the International Tribunal should apply rules of international humanitarian law which are beyond any doubt part of customary law so that the problem of adherence of some but not all States to specific conventions does not arise. This would appear to be particularly important in the context of an international tribunal prosecuting persons responsible for serious violations of international humanitarian law.” According to the Secretary General, the law of Nuremberg is part of conventional international humanitarian law which has “beyond doubt become part of international customary law” (ibid, § 35).


104 Article 22 (“Nullum crimen sine lege: 1. A person shall not be criminally responsible under this Statute unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court; 2. The definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted
or convicted; 3. This article shall not affect the characterization of any conduct as criminal under international law independently of this Statute”), Article 23 (“Nullum poena sine lege: A person convicted by the Court may be punished only in accordance with this Statute”) and Article 24 (“Non-retroactivity ratione personae: 1. No person shall be criminally responsible under this Statute for conduct prior to the entry into force of the Statute: 2. In the event of a change in the law applicable to a given case prior to a final judgment, the law more favourable to the person being investigated, prosecuted or convicted shall apply”). See also Machteled Boot, ibid, p 365 ff. Note that the 1996 Draft Code of Crimes also addresses the issue of legality in Article 13: “[n]o one shall be convicted under the present Code for acts committed before its entry into force.” Draft Code of Crimes Against the Peace and Security of Mankind: Titles and Texts of Articles on the Draft Code of Crimes Against the Peace and Security of Mankind Adopted by the International Law Commission at its Forty-Eighth Session (1996), UN Doc A/CN.4/L.532, 1996.