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The Legacy of Nuremberg

My paper asks, what are Nuremberg’s lessons and what has become of them? My response is that the legacy of Nuremberg has largely been squandered and the only chance of recovery lies in an honest, though uncomfortable assessment of the unfortunate state of international human rights law today.

The legacy of Nuremberg is often understood to be primarily the lesson of international individual responsibility for violations of human rights. On this line of thinking the Rwandan and Yugoslav tribunals, and now the ICC, are the major extensions of a movement that began in Nuremberg.

Nuremberg, however, had a more primordial message – the definition of a human right itself. The evidence of the Holocaust presented at Nuremberg, ought therefore to be a bulwark against the scepticism and cynicism of each new generation. And yet sixty years later the moral compass that was then missing in millions of people in this country, and others, is matched by the moral relativism of our time.

Nuremberg was intended to define and apply universal human rights, to all people, for all time. But today, the concept of universality is challenged once again. The Universal Declaration of Human Rights, the 1948 centerpiece of the UN’s human rights framework, could no longer be adopted by consensus.

The core lesson of Nuremberg – of universal rights – lies at the foundation of any international system for the protection of human rights. Nevertheless, it has been corroded by international actors, both non-democratic and democratic. Most believed that the end of the Cold War would mean a giant leap forward for international law, and in particular, for the international protection of human rights. Instead, the assault on universality gained credence in the June 1993 UN world conference on human rights held in Vienna, which produced the Vienna Declaration and Programme of Action. It reads in part “while the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of states ... to promote and protect all human rights...”. This move to modify the commitment to universality by historical or cultural or religious particularities was further entrenched in three more UN world conferences in the 1990’s – on population, development and women’s rights in Cairo, Copenhagen and Beijing respectively. So-called particularities are not benign reminders of contextual considerations, or appeals for sensitivity or accommodation of difference. The same states that push such particularities also insist on non-interference in domestic affairs and the insulation of national legal systems from international rebuke.

Liberal democracies also bear responsibility for these developments. For example, liberal democratic states in Vienna accepted limitations on freedom from religious intolerance and a free media based on peculiarities of any national legal system. For all the criticism of a monolithic, pathological, western ideological imperialism, in international fora, liberal democratic state actors are often confused and defensive. Their behaviour manifests deep moral scepticism. On a philosophical level, such relativism claims that even in similar situations what is right or good for one individual or society is not necessarily right or good for another. The standpoint of relativism permits no common critique of the substance of legal or moral rules.

This is not an abstraction: Only a few months ago, Amnesty International, the world’s largest international human rights NGO, released its 2005 annual report. It begins with a message from Irene Khan, Amnesty’s Secretary-General. She writes: “The leadership challenge for the UN and its member states is clear: Listen to the voices of the victims...” These are the same words she used at the 2001 UN World Conference Against Racism in Durban, South Africa. The final NGO document adopted at Durban said “Zionism is racism,” accused Israel of crimes against humanity and genocide, and called for the total isolation of the Jewish state. Though asked specifically to vote against it, Ms. Khan encouraged the caucus of international NGOs as a group to abstain. The only voices which were deleted from that final document were those of the Jewish caucus, representing Jewish NGOs from all over the world. They had proposed a statement objecting to a new form of anti-Semitism directed at Jews because of their support of Israel. When it came time to vote on the motion to delete the voices of...
Jewish victims, Amnesty, along with all other international NGOs, again abstained. And yet at a news conference held two days later, Ms. Khan said: “this document is a collection of the voices of the victims. We don’t believe it was appropriate to vote... The angry voices of the victims at this conference have been heard.” Anti-Semitism was everywhere at Durban, where handouts read “what if Hitler had won? The good things: there would be no Israel.” But instead of judging voices against universal standards, the world’s leading human rights NGOs encouraged and supported what amounts to mob rule.

The particular legacy of Nuremberg – the equal rights of the Jewish people – has also been subverted by what is supposed to be the centerpiece of international law, the UN. Since the creation of the UN in 1945 there has never been a single resolution of the General Assembly dedicated to anti-Semitism. At the moment there are three minor references to the subject buried in resolutions, divorced from any concrete requirement of producing a report or taking action on this still lethal and widespread phenomenon. There has also never been a single report devoted to anti-Semitism mandated by a UN body in UN history. By contrast, the UN Commission on Human Rights adopts annual resolutions which focus on the defamation of Islam, and mandates an annual report on discrimination against Moslems and Arabs. This year the UN Special Rapporteur on racism, Doudou Diène from Senegal, produced on his own initiative, a report which among other things considered anti-Semitism. He used the occasion to maintain that anti-Zionism need not be considered a form of anti-Semitism. On the contrary, while anti-Semitism is discrimination against individual Jews, anti-Zionism is discrimination against the Jewish people by seeking to deny Jews an equal right to self-determination. Far from contributing to the fight against anti-Semitism, the UN rapporteur fueled it.

Failing to combat anti-Semitism is not the only manner in which the Nuremberg legacy of recognizing human rights for Jews has been frustrated by the UN. The UN Charter, in its words, was founded on the equality of men and women and of all nations large and small. But nowhere is the inequality of nations so manifest than in the UN’s treatment of the member state of Israel. To name just a few examples: Only Israel is refused full admission to one of the UN’s five regional groups, which determine electoral slates for UN bodies and conduct vital information-sharing or negotiating sessions during various UN meetings, such as those of the UN Commission on Human Rights. Six of the ten emergency sessions ever held by the General Assembly have been on Israel. The 10th emergency session is actually a permanent tribunal on Israel – reconvened 13 times since 1997. By contrast, no emergency session was ever held on the Rwandan genocide, estimated to have killed a million people, or the ethnic cleansing of tens of thousands in the former Yugoslavia, or the death of millions over the past two decades of atrocities in Sudan. The basis of the International Court of Justice decision declaring Israel’s security fence to be a violation of international law was a November 2003 report of Secretary-General Kofi Annan. It detailed the alleged harm to Palestinians from the fence without describing one terrorist act against Israelis which preceded the fence’s construction. When Israel successfully targets Hamas terrorists – even with no civilian casualties, such as was the case with mastermind Abdel Aziz Rantissi, the secretary-general denounced Israel for an “extrajudicial” killing. But when faced with the 2004 report of the UN Special Rapporteur on extrajudicial executions detailing the murder of more than 3,000 Brazilian civilians shot at close range by police, Mr. Annan said nothing. In fact, Brazil along with three other states including Germany, apparently believes it is entitled to a permanent seat on the UN Security Council. More than one quarter of the resolutions condemning a state’s human rights violations adopted by the UN Commission on Human Rights over 40 years have been directed at Israel. But there has never been a single resolution about the decades-long repression of the civil and political rights of 1.3 billion people in China, or the million female migrant workers in Saudi Arabia kept as virtual slaves, or the virulent racism which has brought hundreds of thousands to the brink of starvation in Zimbabwe. Every year, UN bodies are required to produce at least 25 reports on alleged human rights violations by Israel, but not one on an Iranian criminal justice system which mandates punishments like crucifixion, stoning and cross-amputation of right hand and left foot. At last fall’s General Assembly there were eight resolutions adopted condemning Israel on the very same day that an attempt to adopt a single resolution on Sudan was defeated. This is not legitimate critique of states with equal or worse human rights records. It is demonization of the Jewish state.
The real perversion of the legacy of Nuremberg is that this egregious discrimination takes place in the name of human rights. This is the face of modern anti-Semitism and it indicates how profoundly astray the international community has gone from the recognition of Jew-hatred so essential to the proceedings and outcome of Nuremberg.

Nevertheless, it is not a condition that is beyond repair. And it is Germany that can and should play a leadership role in taking back the language and the intent of international human rights. Germany, for example, is ideally suited to table a resolution on anti-Semitism at the forthcoming General Assembly – which would be a first in UN history. Last year, Germany demurred from taking such an action because the 56 members of the Organization of the Islamic Conference threatened to obtain a permanent seat on the UN Security Council. But the moral responsibility ought to outweigh the exigencies of the blackmail. Secondly, it is the European Union that is standing in the way of Israel’s full membership in the Western European and Others regional group – in violation of the UN Charter. Germany can and should insist that the EU immediately accept Israel’s full admission into the Western regional group.

There is one other major front in which the Nuremberg vision has sadly been undermined – in the name of justice. It is the International Criminal Court. The United States and Israel are deeply opposed to the International Criminal Court in its current form. In the case of Israel, this is despite the state having been a leading advocate of international legal accountability. In Europe in particular, US and Israeli opposition is cast as one of arrogance, double-standards and isolationism. In fact, however, the ICC statute as it is currently formulated was clearly intended to trump the legitimate interests of the US and Israel – and not merely by puritanical notions of justice.

The definition of war crimes, for example, includes “the transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies...” Obviously, those words were meant for Israel. The ICC statute is therefore a global treaty of general application with a central provision written for a party of one. Such a tactic is incompatible with the rule of law. Furthermore, as a matter of substance the transfer of a civilian population to occupied – in Israel’s case ‘disputed’ – territories does not belong in the company of heinous offences, like actual attacks on civilian population centres or mass murder, which the statute was intended to address. The insertion of an inappropriate substantive provision in the midst of a purported statement of principle about what offends the conscience of mankind, or “the most serious crimes of concern to the international community as a whole”, undercuts the stature of the statement and the document as a whole.

There is no doubt that the creation of a Palestinian state will one day mean the use of the ICC as a vehicle to threaten Israel and any of its citizens who venture beyond its borders. European states will likely be drawn into the attempted detention and trial of Israelis of all kinds – since every young Israeli man and woman is bound to participate in the defense of the country from enemies sworn to its destruction. The ICC Prosecutor has indicated he has already received communications concerning the Israeli-Palestinian conflict, although jurisdictional considerations preclude investigation at this time. There is a long list of those threatening to make as early possible use of the ICC in relation to Israel, including UN delegates from the Palestinian Authority, Syria, Lebanon and Egypt. The potential for ad-hoc jurisdiction through some of these actors cannot be dismissed.

There are various other elements of the ICC statute that bear the scars of politicization. The crime of aggression was included but left undefined, in the context of various General Assembly resolutions which condemn Israel for aggression, (while ignoring the existential threat the country has faced since 1948). Although unlikely to succeed, there is now pressure to define elements of the crime of aggression written for an Israeli defendant.

In contrast, definitional issues precluded the statute from including terrorism, though it purports to include the most serious crimes of concern to the international community as a whole. The UN has no definition of terrorism and the definitional impasse has prevented the UN from adopting a comprehensive convention against terrorism. The roadblock is the effort of the Organization of the Islamic Conference to repeat the substance of the Arab Terrorism Convention, namely, that “all cases of struggle by whatever means” for various approved causes should be exempt. Consequently, Israeli acts of self-defense against terrorism will be covered by the ICC statute, while the terrorism itself may not.
In the context of the politicization of the substantive elements of the statute, and attempts to increase it even further, certain procedural elements of the statute become of greater concern. For example, the ability of the Prosecutor and the Court to act in relation to nationals of states not party to the statute. The statute conceptually adds another dimension to the realm of international jurisdiction since it empowers an international body to assume jurisdiction over a state’s nationals without that state’s consent in certain circumstances. The statute’s creation of a network of state parties with reciprocal and collective obligations also means that the implications of perpetrating an offence outside one’s state are much greater. The ad-hoc provisions also undercut traditional notions of reciprocity through extradition treaties by permitting a state to accept the jurisdiction of the court where its national is the victim, but refuse jurisdiction where its national is the perpetrator.

Secondly, of particular concern are the extensive powers of the Prosecutor to initiate proceedings. It is naïve to believe that the prosecutors, whoever they may be, live in a vacuum and that the double-standard now applied to Israel in contrast to other nations in global human rights fora might not have an impact. Bear in mind, that the misinformation is of such proportions that a 2004 EU poll found that a majority of the Europeans surveyed believed that the state which is the greatest threat to world peace is Israel. Though Israel is a democratic state with all the checks and balances of an independent judiciary, active parliament and flourishing conditions for freedom of expression, the poll results placed Israel above Iran or Syria, totalitarian states which fund and sponsor international terrorism. To suggest that one should simply assume that the prosecutor will prove wiser or insulated from the pressures (or ignorance) of popular opinion, does not inspire confidence. Such concern is magnified by the fact that even the process of requesting an investigation from the Pre-Trial Chamber, with its possible representation of victims, can have serious political consequences.

The irony involved in the ICC laying claim to be the ideal progeny of Nuremberg is also evident from the early case of Sudan. Reports estimate that more than two million people have been killed in Sudan over two decades of conflict, 200,000 have been murdered in the Darfur region in the past two years, and another 1.85 million persons are currently displaced. The toll from disease and malnutrition is now over 200,000 with a mortality rate estimated to be 15,000 per month. Instead of holding an emergency session of the General Assembly, last fall the UN sent a commission of inquiry to Sudan to “determine whether or not acts of genocide have occurred or are still occurring.” Four months later the commission reported in January that it could not figure out whether genocide had occurred. A commission, in which the executive director from the Office of the UN High Commissioner for Human Rights was Palestinian, claimed it was impossible to tell whether Darfur was an ethnically-motivated conflict perpetrated by Moslem Arabs against Moslem Africans. But they did have in mind a strategy which would simultaneously avoid actually stopping the atrocities while embarrassing the United States – the UN state at the forefront of efforts to label Darfur events as genocide: Sending the subject to the ICC.

Here we are, another seven months later, claiming criminal law – an ex post facto tool – is the leading preventative mechanism of international human rights law. Says the Prosecutor in his first report to the Security Council at the end of June: “...we are...vigilant to the on-going commission of serious crimes in Darfur and the devastating impact they have on the civilian population. The Office will closely monitor these ongoing crimes... The commencement of investigation marks an opportunity for all parties to take all possible steps to prevent the continuation of such offences.” Closer to reality, the investigation is an opportunity for the perpetrators and their allies to insist that potential interveners keep their distance.

Current trends in international law also stress universal criminal jurisdiction, alongside the ICC, as primary implementation tools. Under this banner there have already been attempts to prosecute Israeli Prime Minister Ariel Sharon in Belgium and Minister of Defense Shaul Mofaz in the United Kingdom – a strategy which will continue to gather steam in various forms across Europe.

In the 21st century international criminal law, a key legacy of Nuremberg rooted in bringing to justice those who sought to destroy the Jewish people, has been turned against those responsible for the defence of the Jewish state. Israel, as a democracy with a vibrant independent judiciary, is committed to ensuring that none is above the law. But it is disingenuous to claim that such international manoeuvres
are motivated by the same spirit or proffer the same guarantees of independence, fairness and non-discrimination.

The resources and attention devoted to international criminal law, has also had a broader impact on the implementation of international human rights standards generally. Seven major international human rights treaties have been adopted over the past four decades, one or more of which has been ratified by all 191 UN members. Four of those treaties permit individuals to complain to independent treaty bodies of violations of a wide range of rights – from the right to life, to non-discrimination on any ground. The potential remedies for violations include changing or repealing laws and practices, and hence can affect very large numbers of people. At the moment almost two and a half billion people live in the 121 states which have agreed to this power of international petition. But the cases sent to the UN human rights treaty bodies are handled by a staff of less than a dozen, from a handful of countries, and little is done to educate or encourage victims and their advocates to bring forward many more cases than the 200 currently registered each year. By contrast, the ICC, with 99 states parties, has 311 staff members from 57 countries.

The comparison is indicative of another general trend in international law, in which criminal law is saddled with preventative expectations beyond its capacity, manipulated to target unpopular rather than the most deserved of acts or actors, and used to direct attention from the implementation of a vast array of international standards that apply to all 191 UN members and their governments.

The message of Nuremberg was unqualified universality of human rights, equality of the Jew, the responsibility to prevent genocide, and the paramountcy of turning human rights standards from hollow phrases to political imperatives. On each of these counts, the Nuremberg legacy is under siege. We have an obligation to redeem it.
Das Vermächtnis von Nürnberg

Anne Bayefsky

Für viele besteht die wichtigste Erkenntnis aus den Nürnberger Prozessen in der internationalen Verantwortung für Menschenrechtsverletzungen und in den internationalen Gerichtshöfen für Ruanda und Jugoslawien einschließlich des IStGH als die wohl bedeutsamste Weiterführung einer Entwicklung, die in Nürnberg ihren Ursprung fand.

Doch das IStGH-Statut in seiner derzeitigen Fassung zielt eindeutig darauf ab, die legitimen Interessen der Vereinigten Staaten und Israels zu attackieren, indem kultureller Relativismus die Universalität der Menschenrechte in Frage stellt. Das Vermächtnis von Nürnberg ist unter Beschuss.

Nürnberg hatte eine viel grundsätzlichere Botschaft – die Definition eines Menschenrechts an sich. Diese Kernlehre von Nürnberg – universale Rechte –, die jedem internationalen System zum Schutz der Menschenrechte zu Grunde liegt, ist durch internationale Akteure sowohl demokratischer als auch nicht-demokratischer Provenienz untergraben worden. Durch ständige Kritik eines angeblich monolithischen, pathologischen und ideologischen Imperialismus des Westens verhalten sich Vertreter demokratischer Staaten oft konfus und defensiv. Ihr Verhalten offenbart eine tiefe moralische Skepsis. Auf einer philosophischen Ebene betrachtet, behauptet ein derartiger Relativismus, dass selbst in gleichartigen Situationen das, was richtig oder gut für ein Individuum oder eine Gesellschaft ist, nicht notwendigerweise richtig oder gut für eine andere ist. Der relativistische Standpunkt erlaubt keine allgemeingültige substantielle Kritik an rechtlichen oder moralischen Regeln.


Die so genannten Besonderheiten sind nicht als freundliche Erinnerung an kontextuelle Umstände, als Appelle für größere Feinfühligkeit oder als Ausgleich unterschiedlicher Meinungen gemeint. Dieselben Staaten, die solche Sondervünsche fördern, bestehen auch auf Nicht-Einmischung in innenpolitische Angelegenheiten und auf Immunität des nationalen Rechtssystems gegenüber internationaler Kritik.