Claus Kress

Germany and International Criminal Law: Continuity or Change?

“Comedy, scandal and parody of justice!” – These are the words used by the French Prime Minister Briand in 1921 during the National Assembly on the Leipzig Trials concerning German war crimes against the French.

“What lesson can we learn from Versailles and Leipzig? – First, the United Nations must not again trust the Germans to do justice in the case of German war criminals. For them they are heroes.” – This is Sheldon Glueck’s evaluation of the Leipzig trials as contained in his monograph on “War Criminals” from 1944.

In 1953 the American State Department came to a very similar conclusion – now with regard to the German attitude to the Nuremberg trials: “The German position on the trials of war criminals is a problem which has continued to trouble us ever since the trials were held. The Germans have failed to accept the principles on which the trials were based and do not believe that those convicted were guilty. Their attitude is very much sentimental and can not be influenced by arguments or an objective statement of the facts. They adhere to the view that the majority of the war criminals were soldiers who were punished for doing what all soldiers do in war, or indeed were ordered do.”

45 years later, in 1998, Bill Pace, the American convenor of the global coalition of non-governmental organisations for an international criminal court, passed the following verdict on Germany’s international criminal law policy:

“No country can be prouder than Germany of their participation and support for the ICC [the International Criminal Court]. The German refusal to accept what they called ‘an alibi court’, and their resistance to the highly publicised threats from the United States to the German leaders during the Rome conference deserves great appreciation by the world community”.

These four citations demonstrate that it is indeed fascinating to reflect on the German position on international criminal law over the past 100 years. For this reason I can only express my gratitude to the organisers of this most interesting and informative conference for intending me for this topic. I do, of course hope that you are not expecting me to deal with this topic exhaustively, as it is far too extensive for that and, in particular, my competence in the field of legal history is too limited. What follows instead is firstly a very brief and almost certainly very selective review of the German position on international criminal law, from Leipzig and Nuremberg through to the early stages of Germany’s membership of the United Nations. I would then like to contrast this first phase with the more recent development in the German position since the 1990s including, in particular, the Rome negotiations on the ICC Statute.

Leipzig

Following Prof. Reginbogin’s lecture I need say little about the German position on international criminal law before Nuremberg. His report on the Leipzig trials makes Briand’s angry statement from 1921, which I quoted at the beginning of my lecture, easily understandable. The trials concerning war crimes against English soldiers are, though, perhaps deserving of a somewhat less severe verdict overall. After all, in the famous Llandovery Castle case the Reichsgericht rejected the defence of superior orders because of the order’s manifest illegality. In 1944 this principle of “manifest illegality” was incorporated into the leading English treatise on international law by Lauterpacht, with an explicit reference to the judgment of the Reichsgericht. This led to a corresponding amendment to the British “Manual of Military Law” in the same year. However, even in the light of more recent research, little changes in the overall evaluation: The Leipzig trials are a prime example of the lack of will of the nation to undertake a serious, or to employ a term from the modern international criminal law, a “genuine” prosecution of crimes under international law. Suggestions as to why this will was lacking can be seen in a passage taken from memoirs of the then chief Reich public prosecutor, Ebermayer:

“Even today I still find it hard to understand that we took on the obligation in the Versailles treaty to have these war crimes […] prosecuted in Germany and in the German courts. We had lost the war, we
had to submit to the harsh conditions of the enemy, dictated by hate and revenge, and we suffered losses, both of land and money, something which was unavoidable. We should, however, have never ever allowed ourselves to submit to the condition of prosecuting our own people for these so-called war crimes, when no other country involved in the war took it upon them to undertake such an obligation. Such a concession went against our honour.”

Nuremberg

The sense of a damaged national honour in the case of the prosecution of crimes under international law comes up also in respect of the German reaction to the Nuremberg trials, and here particularly as regards the Nuremberg follow-up trials. In a judgment from 1958, the Bundesgerichtshof quoted German Member of Parliament Dr. von Merkatz as saying that the German government’s unwillingness to recognise the Nuremberg judgments reflected “a part of our German dignity”.

After what we heard yesterday from Benjamin Ferencz, Louise Harmon and Harry Reicher about the Einsatzgruppen, the Medical, and the Justice trial, the citation of the German parliamentarian must seem profoundly strange, and yet it is precisely the more recent research findings of Ulrich Brochhagen and Norbert Frei which confirm that a widespread belief among the German population is reflected in the words of that member of parliament. The contemporary historians share the belief contained in the evaluation of the American State Department from 1953 cited at the beginning of my talk, according to which the legal objections to the Nuremberg trials raised by the Germans – particularly the argument of nullum crimen and that against the death penalty – were not the main reasons for their rejection. Indeed the convictions of many defendants in the follow-up trials were ultimately viewed as being unjust. On this point let us consider two original statements. The Foreign Relations Committee of the Bundestag (the German parliament) unanimously declared the following on January 5, 1951:

“Those concerned have been sentenced to death for acts committed in connection with the war. If an execution were now to take place, the recollections of suffering which the war left in its wake across the country would once again be brought to mind. The justice, which has been dispensed in Nuremberg and Dachau, was solely against Germans. This fact has done serious damage to the sense of justice of the German people and has at no time and in no place been approved of by them.”

Perhaps even more unpleasant than this resolution is the pompous demonstration of solidarity with the Landsberg prisoners by the Bavarian protestant bishop Meiser:

“These brothers, who to a large extent must suffer on behalf of our people, can now be more certain than before that they hadn’t been forgotten out there.”

The official Germany of the time formulated its objection against Nuremberg in legal terms and placed it on record when acceding to the European Convention on Human Rights: A so-called reservation was made to the “international criminal law qualification” of the nullum crimen principle as contained in Article 7, paragraph 2 of the latter instrument.

As is well known, in the time which followed, the victorious powers made Germany considerable concessions. These concessions, incidentally, went somewhat further than those granted to Japan. In particular in the 1950’s the three western occupying powers accepted the non-recognition of the Nuremberg judgments by Germany in the Convention on the Settlement of Matters arising out of the War and the Occupation. At the time the British Foreign Office justified these concessions laconically by stating that, in contrast to Japan, an army was expected from Germany. This led journalist Jörg Friedrich, who has been concerned with our topic to some considerable extent, to draw the following, certainly somewhat critical conclusion:

“Nuremberg, as a precedent, which the international law optimists maintain as a positive example, was wrecked by its organisers in just a short time. This served, quite successfully, as a triumph for the free world and a defeat for the law.”
The early years of Germany’s membership in the United Nations

Starting from here it is interesting to see at what point Germany has articulated a future-orientated policy position on international criminal law. An opportunity to take such a position at the international level came in 1978 when the 6th Committee of the General Assembly of the United Nations recommenced its work on the codification of international criminal law, a task it had abandoned in 1954. Germany, however, spoke out against the continuation of the codification efforts. The German attitude in 1978 may be seen as a “Post-Nuremberg reflex”. On the other hand, “Nuremberg” was the past and, as we have seen, Germany had done what could be done to dissociate itself with its legal effects. Against this background and with a view to Germany’s foreign policy emphasis on multilateralism and the rule of law in international relations, one could have expected Germany to formulate a more favourable position on international criminal law. Perhaps the main reason for the, initially still negative German attitude towards international criminal law was not so much their own belief, but rather that of the major Western Powers. In 1978, not only Germany, but also the USA, Canada, the United Kingdom, Italy and Japan voted against continuing the codification of international criminal law.

The early position of Germany’s academics

Before I turn to the more recent evolution of the official German international criminal law policy, I would just like to add that Germany’s academics, in their vast majority, did not take a position which would have countered the government’s policy. Among criminal lawyers, the exception confirming the rule was Hans-Heinrich Jescheck who, in 1952, published a landmark study on the Nuremberg trials. But even Jescheck was full of scepticism in 1965 as to whether in fact there was a future for international criminal justice. His words were:

“Both drafts (produced by the International Law Commission on the codification of the international criminal law and on the establishment of an international criminal court) seem today to be the result of a very promising, yet unsuccessful attempt at creating a legal system truly reflecting the idea of the international community.”

In the years following 1965, Otto Triffterer, a disciple of Jescheck, remained for a while the only German criminal lawyer who took an interest in the further development of the international criminal law and participated in the respective academic discussion with a degree of optimism.

As regards Germany’s public international lawyers, the picture is essentially the same: International criminal law commanded at best a very peripheral interest at this time. To the extent that this topic was at all touched upon, the reactions were a mixture of scepticism and rejection. Characteristic of this situation is the plain negative assessment made by the renowned international legal historian, Wilhelm Grewe, in 1989:

“The criminal prosecution of leading individuals for escaping a war of aggression was, as far as the past is concerned, a miscarriage of justice (a victim of which was Rudolf Hess, who, whatever one cares to think about his role in the Third Reich, was jailed for 40 years). As for the future, this was the wrong path to take. In so far as the other crimes listed in the London Statute are concerned, it seems to make little sense to continue to cling to the failed attempts and abandon oneself to the hope that one day there would indeed be a comprehensive international criminal law applied by an international criminal court.”

As we know, the turbulent development since the 1990s caused the realist, Grewe, to be disproved by reality. The fact that this development also led to a notable reorientation of the German position is something I would now like to touch on briefly.

The International Criminal Tribunal for the former Yugoslavia

When it came to the establishment of the two international criminal courts for the former Yugoslavia and Rwanda, Germany took a moderately positive attitude, perhaps one which comes close to some sort of acquiescence, to use this public international law category: Germany may not have been one of the driving forces behind establishing those tribunals, while the United States of America was in
both cases the key player, Germany has supported the work of both courts from the very beginning, particularly as regards the Yugoslavia criminal court, the ICTY. In particular it was Germany that made the groundbreaking international criminal trial against the Serb Dusko Tadic possible in the first place. The Bavarian criminal justice authorities had pursued a case against Tadic up to the point when it was ready to go to trial, when Germany received a request from the Yugoslav Tribunal to hand the case over to it. Germany fulfilled the unusual “vertical” request for cooperation based on the primacy of the international criminal jurisdiction and sent the case to the international level. The relevance of this step must not be underestimated. Let us think back to what route the history of international criminal law would have taken, had the Netherlands not denied the victorious powers’ request in the First World War for the extradition of the former German Kaiser.

At the same time, in the light of the German attitude to the Nuremberg trials, Germany’s position in the Tadic case is everything but a natural consequence: In the early 1950s, the German Minister of Justice had rejected the Nuremberg Tribunals on the basis of their exceptional nature which was said to run counter to a basic principle enshrined in the new German constitution. Following the logic of this argument, it would not seem to have been far-fetched to also criticise the ICTY which had been established ad hoc (and partly ex post facto). What is perhaps even more remarkable in the historical perspective is the German reaction to the jurisdiction of the ICTY in exactly this Tadic case: Even if Tadic’s position within the Serbian regime does not come close to the role of the Nuremberg defendants, the judgments pronounced in the Tadic case most certainly had far-reaching consequences, which come close to those in Nuremberg: With the Tadic judgments, the ICTY paved the way for what I call the “the second generation of international criminal law”, an international criminal law whose field of application extends to crimes in non-international armed conflicts and – moving away from the so-called Nuremberg Junktim clause – to crimes against humanity irrespective of the existence of an armed conflict. In the historical perspective it is particularly remarkable that the Secretary of State of the Federal Ministry of Justice, Hans-Jörg Geiger, has mentioned the Tadic judgment as a positive achievement in his greeting note to this conference. Why is this so remarkable? Because the recognition of war crimes in non-international armed conflicts and their application in the Tadic case could have been challenged for precisely the same reasons that Germany criticised the convictions of the German defendants in Nuremberg, in particular for a war of aggression, namely for reason of an infringement of the prohibition of retroactivity. If we read the case made by the ICTY for recognizing “civil war crimes” as crimes under (customary) international law in its landmark decision of October 2, 1995, the parallels to Nuremberg are particularly evident. Indeed the ICTY expressly establishes them by relying on the Nuremberg precedent at a crucial juncture of its reasoning. An even more critical comparison can be drawn: By looking more closely at the efforts of the Nuremberg tribunal in light of the underlying conduct at the time to establish that each defendant could be held criminally responsible under international law for waging a war of aggression was almost more sensational than the decision by the ICTY in affirming the customary nature of “civil war crimes” in the early 1990s. It is thus hard for a State not to question the Tadic decision, if that State wishes to insist on the prohibition of retroactivity to be applied to the fullest extent to crimes under international law. As already stated, Germany did not raise any objections. This implied a distancing from the ex post facto objection which – as we have seen – Germany officially raised against some parts of the Nuremberg judgments.

The International Criminal Court

From there, let us move to the latest phase of the development in international criminal law, or rather the German position on it. In that phase, Germany’s attitude has evolved towards proactivity – in short: Germany has become a driving force behind what can be called the emerging system of international criminal justice. This can be seen in the particular dedication and commitment shown by Germany when the Rome Statute on the ICC, first permanent criminal court in legal history was being drawn up. The new proactive trait of German international criminal law policy is also shown by the timely passing of an innovative law on the country’s cooperation with the ICC and by the parallel enactment of the Völkerstrafgesetzbuch, the German codification of international criminal law by which
the country’s legal framework to deal with crimes under international law on a national level has been completely revised to allow Germany to effectively play its complementary role in the global endeavours to end impunity.

The question now is, how did we get to this final step in German international criminal law policy? In this final phase, Germany’s position on international criminal law was in no way predestined by previous events. It was more a case of it needing a decisive push in the right direction by an active individual. It may surprise you, but I cannot name one single German politician, who is responsible for this decisive push although it is clear that the move would not have been possible without the very positive actions taken by the then acting Foreign Minister Klaus Kinkel and Justice Minister Edzard Schmidt-Jortzig including German parliamentarians from all other mainstream political parties. As far as I am concerned the person most responsible for shaping Germany’s new approach towards international criminal law is sitting among us: Judge Hans-Peter Kaul.

Judge Kaul’s contribution consists, in my view, of essentially three things: He firstly realised very early on that, contrary to Wilhelm Grewe’s powerful prediction, a window of opportunity for a breakthrough for a permanent international criminal jurisdiction would soon emerge. Secondly, he then came up with a coherent vision of how the ICC should ideally appear. This enabled the German delegation to not only sit on the sidelines while western delegations negotiated as it had so often been the case in the past, but to actually take on an active and decisive role. Thirdly, Kaul worked tirelessly behind the scenes to build up a broad and strong consensus among Germany’s decision makers for the support of such a decisive role. This consensus was of particular relevance because it would soon turn out that Germany would also have to defend positions not supported by its closest friends. I am by no means thinking only of the USA. You may well remember that France’s early position was not especially supportive of the court, and that it was only under Tony Blair, just before the Rome Conference, that England adopted a favourable position towards the establishment of the court.

What then were the key points of the German position during the negotiations? Basically, Germany was in favour of strictly confining the Court’s substantive jurisdiction to crimes under customary international law and it insisted on stringent requirements for the individual responsibility for such crimes. With this rather narrow concept of international criminal law as a starting point, Germany has then argued for the establishment of a collective criminal justice system that fully reflects the peculiarities of crimes under international law, including, in particular, universal jurisdiction, non-immunity up to the position of Heads of States and a stringent regime of vertical cooperation. Of course, Germany was not successful on all those points in the Rome negotiations. It is probably fair to say, though, that Germany has significantly contributed in shaping the final compromises in all those areas of international criminal law.

According to Germany, it was also essential to ensure equality before the international criminal law. This precluded the creation of the ICC as a “permanent ad-hoc tribunal” of the Security Council of the United Nations by making the Court’s exercise of jurisdiction dependent on the referral of a situation or case by the Security Council. Instead, Germany supported the idea of a proprio motu power of the International Prosecutor to trigger international criminal proceedings. At this point, incidentally, with all this change you might well recognise an element of continuity in the German position from Versailles to Rome. The idea of equality before the international criminal law encompasses the demand that even soldiers fighting their aggressor in self-defence must also be subject to a criminal prosecution, if they commit war crimes. Yet, it does perhaps make a difference whether Germany, looking to the future, advocates an international criminal jurisdiction, which does not lend itself to criticisms of a victors’ justice or whether, as in the case of Versailles and Nuremberg, it brings the objection of victors’ justice into play emotively, to discredit the criminal prosecution of the most abject of German crimes by the allies.

Concluding note

Be that as it may, it has certainly been a long way from the times of Briand’s verdict over the Leipzig trials to Germany’s contribution to the establishment of the ICC during the Rome Conference.
On October 5, 2001, Germany has chosen to manifest its changed position by way of a symbolic act: It has formally withdrawn its so-called reservation to Article 7, paragraph 2, of the European Convention on Human Rights. Hereby, Germany has formally joined the international community in its recognition that the evolution of international criminal law is marked by certain points of crystallization, which do not meet the most stringent standards of the principle of non-retroactivity. At the same time, the withdrawal signals that Germany has made its peace with Nuremberg.

Selective Bibliography

Safferling, Christoph J.M., Germany’s Adoption of an International Criminal Code, 1 Annual of German & European Law (2003), p. 365.
Deutschland und das Völkerstrafrecht: Kontinuität oder Wandel?


Zwischenzeitlich hat Deutschland den Vorbehalt zu Art. 7 Abs. 2 EMRK zurückgezogen und damit implizit die Nürnberger Prozesse anerkannt.