

Christoph Safferling: The Powerlessness of International Law – The Return of War and Crimes Against Humanity

- Hot topic: The book traces the developments from 1945 to now and calls out the double standards and blind corners
- The author is an expert on international law and how its violations are currently handled



Christoph Safferling
The Powerlessness of International Law – The
Return of War and Crimes Against Humanity
320 pages
October 2025

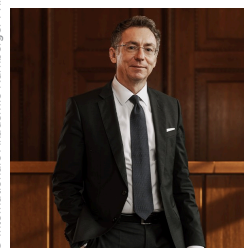
Genre: Non-Fiction, Society / Politics

Syria, Ukraine, Gaza: Is international law in tatters? Does the law of the jungle hold sway?

With the Nuremberg Trials, a new chapter in the history of international law began after the Second World War. And after the Cold War, a rule-based world order appeared realistic. However, this is not the reality of the early 21st century – international law appears to be in ruins, brute force seems to prevail, and the global community seems to be settling into cynicism or resignation. Safferling's treatise is concise, competent, personal, and passionate. Despite its seemingly somber title, the book ultimately offers an optimistic outlook: Safferling argues convincingly that international law should not be written off as a regulatory framework for global relations. In the author's firm belief, it will ultimately assert its relevance and force. As readers move through the book, it becomes increasingly clear that there are compelling reasons to share this hope.

»An impressive and at the same time disturbing book about the possibilities and limitations of the international legal system. [...] It is equally an analysis, a diagnosis and a warning.« Peggy Fiebig, *Deutschlandfunk*

© Internationale Akademie Nürnberg/Prinzipien/LÉRÖT



Christoph Safferling, born in 1971, is Professor of Criminal Law, Criminal Procedure Law, International Criminal Law and International Law at the University of Erlangen-Nuremberg. He is the director of the International Nuremberg Principles Academy.

Christoph Safferling:

The Powerlessness of International Law

The return of wars and crimes against humanity

Sample excerpts

Translated by the author

Table of Contents

I The Promise of Nuremberg: Reason Governs Power

What characterises international law?

The Peace of Westphalia

How does international law “come into being/existence”?

Immunities under international law

Rights for the individual: beginnings of the international law of armed conflict

Reorganisation after the First World War

The League of Nations: the world as a better place

Of just and unjust wars

Aggression and the Holocaust

War criminals in the dock

What did the Nuremberg Trials accomplish?

Subsequent Nuremberg proceedings

The state of international law in 1949

II Great Expectations: The Peacemaking Power of the Law

The vision of peace and security

The Universal Declaration of Human Rights

The United Nations Organisation: mirroring the balance of power in 1944

The system of collective security

Judicial dispute resolution

The role of criminal jurisdiction

Efforts to reform the United Nations

East-West Conflict I: human rights covenants and international humanitarian law

The prelude to the “golden decade” of international law

The United Nations’ ability to act

Somalia, the former Yugoslavia, Rwanda

The International Criminal Court

Unified Germany and the new responsibility

The European Union as a peacemaker

Shattered illusions

The end of the story?

III Dashed Hopes: The Return of Power Politics

9/11 – The War on Terror

Unsolved problems

East-West Conflict II: old and new rifts

The law of new armed conflicts: the helplessness of the law

Nuremberg revisited: a just international legal order

“Lawfare”: law as a means of warfare

Disrespect for the law is intolerable – and now?

THE PROMISE OF NUREMBERG

What characterises international law?

International law is the law which states establish in order to regulate the relations amongst themselves. The actors or subjects of international law are, according to the traditional interpretation, exclusively states. Besides the states, there are only three original subjects of international law: the International Committee of the Red Cross, the Holy See and the Sovereign Military Order of Malta. However, this no longer plays a significant role today.

Is the law of nations the same as natural law? Do nations live in a state of nature with one another in which there is a war of ‘each against all’ in which nothing is just or unjust? This is what Thomas Hobbes (1588–1679) hypothesised in his work *Leviathan*.¹ Georg Wilhelm Friedrich Hegel (1770–1831) also does not consider international law to be a real instrument of power which is binding upon states; it is merely the will of the states that counts.² The reason for these statements lies in the premise of state sovereignty: states are sovereign and, as such, absolute. They are not subjected to any foreign power, are only bound by rules to which they have acceded and are free to decide internally how they shape societal life.

However, if international law is arbitrary, then what value does it have as law? Does it even possess any legal character at all? Or is it, as the contemporary American academics Jack L. Goldsmith and Eric A. Posner assert, merely rhetoric in the nexus of international relations?³

The great Enlightenment philosopher, Immanuel Kant (1724–1804), contrasts his concept of reason with the state of lawlessness and in his draft treaty *Perpetual Peace*, he sees states as being in the position to settle disputes and to avoid wars through alliances.⁴ Kant also adopts state sovereignty as the basis of international law. However, he considers an opportunity therein for states to behave morally and to bind themselves legally.

¹ Thomas Hobbes: *Leviathan, or The Matter, Form and Power of a Commonwealth, Ecclesiastical and Civil*, 1651, Berlin 2011, chap. XXX, pp. 1, 13.

² Georg Wilhelm Friedrich Hegel: *Grundlinien der Philosophie des Rechts (Elements of the Philosophy of Right)*, 1821, in: Eva Moldenhauer and Karl Markus Michel (eds.): *G. W. F. Hegel, Works in 20 Volumes*, Vol. 7, 13th ed., Frankfurt am Main 2013, § 333, pp. 498 f.

³ Jack L. Goldsmith and Eric A. Posner: *The Limits of International Law*, Oxford 2005.

⁴ Immanuel Kant: *Perpetual Peace*, 1796. Commentary by Oliver Eberl and Peter Niesen, 3rd ed., Berlin 2024.

Thus, the key to understanding international law lies precisely here: in the notion of state sovereignty. What, though, does “sovereignty” actually mean here? Where does this concept emanate from and how is it legitimised?

Sovereignty also exists in the interpersonal context and in this sense we refer to it as personality rights.⁵ The rationale for the right of personality ultimately lies in human dignity. The protection of human dignity is the overriding precept in our constitution which is why it stands at the very beginning: human dignity shall be inviolable (Art. 1 (1) of the Basic Law). In this formulation, Article 1 seizes upon what invariably precedes the constitution whilst, at the same time, demanding that everyone must acknowledge the fact that the dignity of others is inviolable.

However, we do not conceive personal rights as being absolute. The freedom of the individual is always constrained by the freedom of others and of the community.⁶ One may well specifically debate the legitimisation of these limitations, nevertheless, there is a fundamental consensus among democratic states under the rule of law that the freedom of the individual is understood relative to the freedom of others. To this end, there are institutions, authorities and courts which monitor this equilibrium between the legal positions of individuals and the interests of the community and which, if necessary, will enforce with coercive measures.

Why, then, does this relativity not apply in equal measure to states and their sovereignty? Where does this claim to absolutism staked out by the states emanate from? Why are there no general institutions which strike this balance between the interests of states and the international community? Why are states only bound when they explicitly relinquish their sovereignty? Is war the only means of enforcing interests deriving from international law? In order to be able to answer these questions, we need to take a much broader view. However, before doing so, I would first like to cast a glance back to the birth of the modern era of international law in the aftermath of the Thirty Years’ War.

The Peace of Westphalia

The modern concept of state sovereignty dates back to the early modern period. The French political philosopher, Jean Bodin (1529–1596), defined it as the state’s right to make final decisions.⁷

⁵ Frauke Brosius-Gersdorf and Horst Dreier (eds.): Grundgesetz. Commentary / Tristan Barczak, 4th ed., Tübingen 2023, GG Art. 2 (1) Rn. 27; Peter M. Huber and Andreas Voßkuhle (eds.): Basic Law. Commentary / Michael Eichberger, 8th ed., Munich 2024, GG Art. 2 margin note 146.

⁶ Frauke Brosius-Gersdorf and Horst Dreier (eds.): Basic Law. Commentary / Tristan Barczak, 4th ed., Tübingen 2023, GG Art. 2 (1) margin note 100 ff.

⁷ Jean Bodin: Six Books on the State, Book I, Chapter 8; Bodin further elaborates on his concept in Chapter 10. The passages cited can be found in the 1981 edition of the work published by Mayer-Tasch: Peter Cornelius Mayer-Tasch (ed.): Bodin, Six Books on the State, Books I–III, 1981, pp. 205, 292.

Bodin's aim was to guarantee security and peace in France, as the country had been severely ravaged by religious civil wars. The unlimited concentration of state power in the hands of the monarch was intended to guarantee an end to internal conflicts. Today, we speak of the state's monopoly on the use of force or internal sovereignty. The legitimate ruler is the sovereign. The exact nature of this rule – whether it is an absolute monarch appointed by divine right or the people who have elected a government in democratic elections – is irrelevant. In international law, sovereignty functions independently from the form of government.

Initially, it follows consistently that this sovereign does not have to tolerate any external influences. The consequence of the monopoly on the use of force within the state is external sovereignty. Perhaps today we can understand this need for demarcation better. In a time where we have become all too familiar with Russian and Chinese trolls who, via social media, influence politics and election campaigns in foreign countries, the attempts to exert external influence are blatant. In the Middle Ages, external influence on domestic politics was very much the order of the day or even part of the system. One need only recall the influence of the Pope and the ecclesiastical rulers.⁸

Nevertheless, how does one deal with this external sovereignty reciprocally? Is it in any way limited or limitable? Is it subject to any form of scrutiny, possibly even judicial scrutiny? How does the sovereignty of one state relate to that of another?

Since 1618, a belligerent conflict between various kings and princes had been raging in Europe, bringing terrible suffering, famine and epidemics to large swathes of the Holy Roman Empire. Acts of murder, depredation and robbery in the name of the right religion held Europe firmly in their grip for thirty years. However, religion itself soon ceased to be the principal focus of attention and the territorial interests of the powerful became the main issue. At that time, though, war was not so much part of the state system and it was not the case that those in power had large standing armies at their disposal which were now being deployed. Instead, mercenary armies, who were expected to be largely self-sufficient, were hired. Very much in keeping with the phrase coined by Friedrich Schiller (1759–1805) – “war feeds war”⁹ – the plundering and bleeding dry of entire regions was approved in order to sustain the soldiers and to keep them satisfied.¹⁰

It was not until 1648 that a pan-European peace congress was finally able to bring an end to the wars. However, by then the situation had become so deadlocked that it was not even possible to agree upon a common venue for negotiations. For the five years during which the negotiations

⁸ Wilhelm Grewe: *The Epochs of Modern International Law History*, in: *Journal for the Entire Science of State*, 1943 (vol. 103), p. 38, pp. 43 ff.

⁹ Friedrich Schiller: *Wallenstein. A dramatic poem. Part Two: The Piccolomini, Act 1, Scene 2, General Isolani's speech*, in: Friedrich Schiller, *Complete Works, Volume 2*, Munich 1962.

¹⁰ See, for example, Francisco de Vitoria: *Relectio de iure belli*, 1539, No. 17; English: *On the Right of the Spaniards to War Against the Barbarians*, edited by Walter Schätzel, Latin text with English translation, Tübingen 1952, p. 133.

continued, the city of Münster became the location for the peace negotiations on the Catholic side, whilst the Protestant negotiators convened in Osnabrück. In 1649 and 1650, in a series of follow-up conferences in Nuremberg which were known as the *Nürnberger Exekutionstag* – “Peace Implementation Congress” – details of the troop withdrawals and compensation issues were clarified. The Peace of Westphalia, which was signed in Münster and Osnabrück on October 24, 1648, redefined the balance of power in Europe and still forms the basis of modern international law to this day.

It is the following three principles that constitute the “Westphalian system”, as it is often referred to among scholars of international law. First: every state is sovereign. Second: every state has clear territorial boundaries within which it has a monopoly on the use of force. Third: states are equal among themselves.

War as a means of achieving political goals is not explicitly excluded in the treaties. On the contrary, war continues to be the norm within this system of states based on sovereignty and equality.

The Peace of Westphalia should however not be misconstrued as being the sole event which led to the establishment of the European nation state or an overall system of international law. That would contradict historical developments. Notwithstanding, 1648 marks a significant milestone in this long history of development.¹¹ Moreover, in international relations and international law, the Peace of Westphalia is still regularly held aloft as a monstrosity alongside the premises of sovereignty and the equality of states, and further developments are repeatedly gauged and evaluated against it. In doing this, it is imperative to see the Peace of Münster and Osnabrück for what it historically was: the end of several decades of raging wars through the establishment of territorial borders, the payment of compensation and provisions on the practice of religion, all of which guaranteed a certain period of peace within Europe. To derive claims from the Peace of Westphalia today therefore seems more than a little questionable, but despite this, these treaties are often used as arguments in the fields of political science and international law. The most recent developments in world history clearly demonstrate that this leads to an incrustation or rigidification of structures and impedes necessary change.

Narrowing the focus to one single event also fundamentally contradicts the development of international law. International law is, in fact, highly dynamic. It develops on a case-by-case basis. International law is also always the history of international law. New challenges give rise to new solutions, which subsequently may, or may not, be adopted. It is like a house that is constantly

¹¹ See Heinz Duchhardt: “Westphalian System.” On the Problematic Nature of a Concept, in: *Historische Zeitschrift*, 1999 (vol. 269), pp. 305, 306.

being worked on, whereby some parts are being dismantled and others added elsewhere, a house in which unfinished elements abut magnificently decorated banquet halls.

This image illustrates how greatly international law differs from a national legal system. In a national context, we expect a stable house built on solid foundations, namely the constitution, with a roof that ensures no one gets wet feet and with insulation that keeps everyone warm. Of course, there will be additions and renovations, and individual rooms will be bedecked more or less elaborately or stripped of their decorations. Nevertheless, the basic structure of a safe home remains intact.

In the house of international law, there is no roof covering the entire building. At best, individual parts are protected from rain and snow, but a strong storm could also cause part of the house to collapse. The only truly stable element is the foundations, consisting of the sovereignty and equality of states as the natural subjects of international law.

[...]

p. 62–83

War criminals in the dock

On August 8, 1945, the Charter of the International Military Tribunal was adopted as an annex to the London Agreement. The four victorious powers, the USA, the United Kingdom, France and the Soviet Union, supported by seventeen other states, had agreed on a course of action to resurrect the political guidelines of the 1943 Moscow Declaration and to conduct criminal proceedings. This was preceded by, at times, heated debates, as the Moscow Declaration was interpreted differently. For Stalin, bringing the perpetrators to justice would have been accomplished by court-martialling and summarily executing 50,000 German officers by firing squad. Churchill was enraged by this proposal.¹² However, he too had reservations about whether ordinary criminal proceedings were the appropriate response to war crimes, after all, such proceedings would always have borne the risk of an acquittal if the defendant's guilt could not be proven. The treatment of Germany was also contentious in the US. US Secretary of the Treasury, Henry Morgenthau, ultimately failed to persuade President Roosevelt to accept his plan to deindustrialise Germany and shoot the "German arch-villains". Secretary of War, Henry L. Stimson, had argued against this, saying that the Germans should not be subjected to the same crimes as those they had committed against their victims. Instead, the leading Nazis should be brought before an "international tribunal" with at least a modicum of procedural rights.¹³

For a long time, it was assumed that there would be a trial against Adolf Hitler and Joseph Goebbels which would be completed within three weeks.¹⁴ It is common knowledge though that the two Nazi leaders evaded trial in April 1945 by committing suicide. The criminal proceedings against 24 defendants – the dock did not have enough room for more – which were then held in the Nuremberg Palace of Justice, ultimately lasted almost a year. Compared with today's international criminal trials, which last an average of 7½ years, this is little more than the blink of an eye.

Churchill's scepticism and Stalin's insistence were countered only by the persistence of the United States in its determination to bring the Nazi leadership to trial under the rule of law. Robert H. Jackson, a confidant of Roosevelt, proved to be particularly influential in the spring of 1945. Jackson had been appointed to the US Supreme Court in 1940, thus reaching the apex of the legal profession at the age of 48 in Washington. Previously, without ever having graduated from law

¹² Franziska Augstein: Winston Churchill, Munich 2024, p. 416.

¹³ Whitney R. Harris: Tyrants on Trial. The Trial of the German Major War Criminals after World War II in Nuremberg 1945–1946, Berlin 2008, p. 7 f.

¹⁴ *Ibid.*, p. 14.

school, he had pursued an impressive career first as a lawyer in New York and then at the Department of Justice in Washington. The brilliant legal thinker was committed to following his clear inner moral compass, he believed firmly in the rule of law and, at the same time, possessed a sense of pragmatism and a willingness to compromise. On April 13, 1945, Jackson gave a speech to the American Society of International Law entitled “The Rule of Law Among Nations”, which would prove to be decisive for the fate of the Nuremberg Trials. On the night his patron, President Roosevelt, died, Jackson declared that only a trial protected by all the safeguards of criminal procedure could be considered an option for prosecuting the major war criminals. The only alternative, he stated, would be a purely military or a purely diplomatic solution. In a legal response to the crimes, he expounded, it was necessary to pay close attention to the presumption of innocence, fairness and the rights of the defence.¹⁵

Detailed and specific preparations for the trial were made in London in July 1945. Delegations from the four victorious powers prepared an agreement based upon the Yalta Declaration as well as a set of procedural rules for an international court.¹⁶

The US delegation was led by the aforementioned Robert H. Jackson and his deputy, Brigadier General Telford Taylor. Sir David Maxwell Fyfe represented the United Kingdom and, as Lord Chancellor, he also hosted and chaired the negotiations. After the Churchill government had been voted out of office in the summer of 1945, the new Attorney General, Sir Hartley Shawcross, took over, but kept on his friend and experienced barrister Maxwell Fyfe as his deputy.

General I. T. Nikitchenko, Vice President of the Supreme Court of the Soviet Union, was the Soviet negotiator. France was represented by Robert Falco, a judge at the *Cour de Cassation*.

All the delegations were accompanied and advised by renowned scholars in the field of international law. A. N. Trainin, for example, was a professor of international law from St. Petersburg and a member of the Soviet Academy of Sciences. He had written a comprehensive textbook on international law which Jackson had had translated in its entirety in preparation for the trial. Professor André Gros was part of the French delegation. He was not only an academic teacher but also worked as a diplomat, among other places at the French embassy in London during the war.

The arduous negotiations in London not only required the reconciling of different notions of procedural law, but also agreement had to be reached on the elements of the criminal offences

¹⁵ Robert H. Jackson: Rule of Law Among Nations. Speech delivered on April 13, 1945, at the annual meeting of the American Society of International Law; a transcript of the speech is available at: <https://www.roberthjackson.org/speech-and-writing/rule-of-law-among-nations/> (last accessed on March 16, 2025).

¹⁶ See the detailed collection of documents in the Jackson Report, which describes the course of the negotiations: Report of Robert H. Jackson. United States Representative to the International Conference on Military Trials, Washington 1949 (the report, which Jackson had already submitted in 1945, was not published until 1949).

themselves. Until then, there had been no catalogue of international crimes, and questions of attribution were largely undetermined. Lastly, there were intense discussions in London between Nikitchenko and Jackson as to the actual point and purpose of the proceedings.¹⁷

Criminal proceedings in the US or England differ greatly from trials in France or Russia. Therefore, it was necessary to agree upon proceedings that would be understood and accepted by both groups and, ideally, also by the German defendants who were more acquainted with the French system than the American one. In the end, the trial was essentially conducted in accordance with US law, albeit with some recognisable concessions made to continental European procedural law.

Three categories of crimes were agreed upon: war crimes, crimes against humanity and crimes against peace. A fourth point was the criminal liability for conspiracy to commit these offences, however, this deals with a form of commission rather than a separate criminal offence.¹⁸

The judges and prosecutors were, of course, the same people who had been involved in planning the trial. Jackson acted as chief prosecutor, Shawcross and Fyfe represented the prosecution for the United Kingdom, Nikitchenko sat on the bench and Falco was deputy judge for France. One might raise concerns with regard to the separation of powers, since no distinction is made here between legislators, executive representatives and judges, however, one must admit that this was the only solution that had any chance of being implemented.

The trial opened on October 18, 1945, in Berlin in the large hall of the *Kammergericht*, an appeal court in Berlin. Here, in the absence of the defendants, the indictment was handed over by the prosecutors to the four judges and four deputy judges of the Military Tribunal. The trial then began on November 20, 1945, in the converted courtroom of the Nuremberg Regional Court in the highly secure Palace of Justice on *Fürther Straße*. On November 21, 1945, in front of a packed courtroom and 600 cameras, the US chief prosecutor, Robert H. Jackson, opened the proceedings with the indictment:

“The privilege of opening the first trial in history for crimes against the peace of the world, as is being held here for the first time in history, imposes a grave responsibility. The wrongs which we seek to condemn and punish have been so calculated, so malignant, and so devastating that civilisation cannot tolerate their being ignored because it cannot survive their being repeated. That four great nations, flushed with victory and stung with injury,

¹⁷ Whitney R. Harris: *Tyrants on Trial. The Trial of the German Major War Criminals after World War II in Nuremberg 1945–1946*, Berlin 2008, p. 16 ff.

¹⁸ Christoph Safferling: Criminal liability for “conspiracy” in Nuremberg and its significance for the present, in: *Kritische Vierteljahresschrift für Gesetzgebung und Rechtswissenschaft*, 2010 (vol. 93), p. 65.

stay the hand of vengeance and voluntarily submit their captive enemies to the judgment of the law is one of the most significant tributes that Power ever has paid to Reason”.¹⁹

Jackson’s opening address was enormously powerful and uncompromising and is still worth reading today. In it, he clearly states the categorical shift in international law that was instigated on that Wednesday afternoon in the city of Nuremberg, a city which had been severely scarred by the ravages of war. It was not only a matter of delegitimising National Socialism and punishing the twenty “broken men” in the dock; it was also a matter of criminalising wars of aggression and mass crimes for all time to come. It was about applying criminal law not only to the “little people” but also to the “great men” who had seized and abused power within a state. It was about holding individuals accountable so that they could no longer hide behind the state for which they acted.

For Jackson, criminal prosecution was a dictate of reason and an absolute necessity in order to save civilisation from ultimate destruction.

Of course, during the course of the trials in Nuremberg numerous problems of international law arose, but what else could be expected, given the fact that such criminal proceedings in international law were a complete novelty?

On the one hand, there was the problem of “conspiracy”.²⁰ The prosecution strategy behind this concept was to include crimes committed by the Nazis against the German population prior to the war commencing. This, for example, would have meant that a criminal prosecution for the *Reichspogromnacht* – the Pogrom Night – on November 9, 1938, could have ensued. However, there was a particular problem here regarding state sovereignty under international law. The treatment of one’s own population is fundamentally a purely domestic matter in which international law cannot interfere. International law can only be applied once war has broken out.

This was ultimately the view taken by the judges in Nuremberg, who only allowed the charge of “conspiracy” for crimes against peace, but not for crimes against humanity.²¹ With regard to the trial’s approval, that might well have been too high a hurdle. For the ensuing national trials based on Control Council Law No. 10, including the Subsequent Nuremberg Trials, the Allied representatives in Berlin clarified in December 1945 that the inclusion of mass crimes committed prior to the outbreak of war was admissible.²²

¹⁹ IMG (The Trial of the Major War Criminals before the International Military Tribunal, Nuremberg, November 14, 1945–October 1, 1946) Volume II, p. 114.

²⁰ Christoph Safferling: The criminal liability for “conspiracy” in Nuremberg and its significance for the present, *Critical Quarterly Journal for Legislation and Jurisprudence*, 2010, p. 65.

²¹ IMG (The Trial of the Major War Criminals before the International Military Tribunal, Nuremberg, November 14, 1945–October 1, 1946) Volume I, p. 253.

²² By omitting the explicit reference to war of aggression and war crimes in the relevant provision of Control Council Law No. 10, which transposed the provisions of the IMG Statute into law applicable to the individual occupying powers, see Art. II 1. (c) KRG No. 10.

Behind this, however, lies the more general problem: upon what basis in international law can such an international criminal court be established? This question is anything but trivial. At the beginning of the trial, the defence in Nuremberg launched a full-frontal attack on the indictment and questioned the legitimacy of its approach. This culminated in a motion being filed to obtain expert opinions on these very questions from internationally renowned scholars in the field of international law.²³ Incidentally, this joint defence strategy quickly petered out; the interests of the defendants were simply too diverse. The question of legitimacy can be answered from various perspectives. The notion that jurisdiction was transferred to the four occupying powers after Germany's total surrender is convincing. In the London Agreement, the four powers agreed, in the case of the principal war criminals, to combine their respective jurisdictions and to conduct the proceedings jointly. This is also reflected in the Court's designation as a military tribunal. The occupation is a military and not a civilian one. Ultimately, of course, the *Lotus* formula also applies here: anything that is not explicitly prohibited under international law is permitted. Only interference in purely internal affairs would be prohibited owing to the absolute nature of state sovereignty. In this case, the court was cautious and differentiated.

A second problem with respect to international law lay in the reciprocity of the laws of armed conflict. As already explained above, mutual compliance with the laws of armed conflict is of the utmost importance for their legitimacy. Humanitarian law is respected by one warring party precisely when, and insofar as, it is adhered to by the opposing warring faction. Accordingly, prior to criminal enforcement, repressive measures were the means of choice employed to induce opponents to comply with the laws and the customs of war. The content of the regulations also depends on this reciprocity. In the case against Karl Dönitz, Grand Admiral and Hitler's successor as Reich President, Dönitz' defence attorney, former military judge Otto Kranzbühler,²⁴ had argued that the Allies had waged submarine warfare with the same intensity as the *Wehrmacht*. Sinking ships without any warning was also common practice on the US side. Kranzbühler, who was allowed to appear in court in his naval uniform, was, in particular, taken seriously by the American military lawyers. He was well versed in military matters. He had succeeded in obtaining a statement to this effect from US General Chester W. Nimitz and introducing it into the trial in an affidavit.²⁵ The court did indeed follow the German defence counsel's argument, but only on this one occasion.

²³ See the submission of the joint defence of November 19, 1945, IMG (The Trial of the Major War Criminals before the International Military Tribunal, Nuremberg, November 14, 1945–October 1, 1946) Volume I, p. 185 ff. On November 21, 1945, the Court decided not to deal with the submission because objections to the jurisdiction of the Court pursuant to Art. 3 of the Charter were not admissible.

²⁴ See Hubert Seliger: *Politische Anwälte? Die Verteidiger der Nürnberger Prozesse* (Political Lawyers? The Defence Attorneys at the Nuremberg Trials), Baden-Baden 2016, p. 313 ff. and passim.

²⁵ Whitney Harris: *Tyrannen vor Gericht* (Tyrants on Trial). The Trial of the German Major War Criminals after World War II in Nuremberg 1945–1946, Berlin 2009, p. 489 f.; Christoph Safferling and Philipp Graebke: *Criminal Defence in the Nuremberg Main War Criminals Trial. Strategies and Effects*, in: ZStW 2011, p. 47 ff., p. 63.

The third problem under international law also related to a kind of reciprocity: the *tu quoque* principle.²⁶ Its argument can be described in very general terms as follows: the war crimes committed by the Germans are compensated for by the war crimes perpetrated by the Allies. The attacks on civilian cities by the German Air Force are offset by the destruction of Dresden, Nuremberg, Würzburg and other cities. This argument was not put forward in such general terms, however, it was submitted in one respect: The Hitler-Stalin Pact, along with its secret additional protocol, was introduced into the trial by Alfred Seidl, Rudolf Hess' defence attorney, with the argument that the Soviet Union had been equally guilty of the crime of waging a war of aggression. Therefore, it could not, for its part, prosecute Germany for crimes against peace.²⁷ The attempt failed and the court did not accept the evidence.

In addition to the problems pertaining to international law, a whole host of criminal law problems also arose in these novel and unprecedented hybrid proceedings. At this juncture, only a few important ones will be briefly discussed, those that are essential to the general acceptance of the trial in its 80-year history of reception. Even though the Nuremberg Tribunal was essentially based upon Anglo-American procedural law, the trial was conducted by diverse protagonists with vastly differing preconceptions of a criminal trial. The proceedings were doubtlessly dominated by the English Lord Justice Geoffrey Lawrence, the US American judge Francis Biddle and Justice Robert H. Jackson as the US chief prosecutor. Nevertheless, the German defence attorneys, who were almost forgotten by the drafters of the statute, should not be overlooked as significant players in this trial.²⁸ Even though Göring maintained that he did not require a defence attorney, merely an interpreter, each and every defendant was assigned a defence attorney. Under American criminal procedure law, this is not actually a requirement and anyone who wishes to defend themselves can do so. This, though, was something the Nuremberg Trials wanted to avoid. A defence attorney was also sought in Nuremberg for Martin Bormann, who was charged *in absentia*, and a dedicated lawyer was found in Friedrich Bergold. Bergold also remained active in the Subsequent Trials.²⁹ It should be noted in passing that a great deal was undertaken in Nuremberg to facilitate linguistic communication. For the first time in human history, simultaneous translation was employed.³⁰ What is nowadays standard practice was successfully tried and tested in Nuremberg using

²⁶ Christoph Safferling: International Criminal Law, Heidelberg 2011, p. 124; cf. on the *tu quoque* principle in general international law: Alfred Verdross and Bruno Simma: Universal International Law. Theory and Practice, 3rd ed., Berlin 1984, § 67, p. 50 f.

²⁷ See Christoph Safferling and Philipp Graebke, in: ZStW 2011, p. 47 ff., p. 75.

²⁸ Thomas Darnstädt: Nuremberg. Crimes against humanity on trial in 1945, Munich 2015, p. 105.

²⁹ Benedikt Salleck: Criminal Defense in the Nuremberg Trials. Trial Procedures and Defense Strategies Illustrated by the Work of Defense Attorney Dr. Friedrich Bergold, Berlin 2016. For information on the Nuremberg defence attorneys as a whole, see Christoph Safferling and Philipp Graebke, in: ZStW 2011, p. 47 ff.

³⁰ Siegfried Ramler: The Nuremberg Trials, Frankfurt a. M. 2010, p. 75 ff.

innovative equipment from IBM. Every simultaneous interpreter today knows that their profession was born and baptised in Nuremberg.

When it came to selecting the defence attorneys, the defendants were freely allowed to choose their own lawyers, partly so as not to arouse any suspicion that the defence attorneys would want to negatively influence the proceedings. As a result, in addition to experienced lawyers from the Weimar period, younger lawyers with close ties to the NSDAP were also admitted.³¹ The lawyers were also provided with comparatively generous financial resources, and after some argumentative skirmishes before the bench, they were granted access to the files of evidence in order for them to be able to prepare their defence.³² All of the defence lawyers were from Germany and none of the defendants ever considered having themselves represented by a lawyer from the USA. Perhaps it would have been difficult to find one. As such, the defendants then had legal representatives who were inexperienced in the procedural law which had been agreed upon here. The inexperience of these lawyers has often been cited as an argument against the legitimacy of the Nuremberg Trials and there are certainly documented cases in which one or other of the defence attorneys did not perform particularly deftly, after all, German criminal defence attorneys had never practiced cross-examination before. Nevertheless, one should also not disregard the fact that the prosecution also included two countries, France and the Soviet Union, which likewise did not follow the Anglo-Saxon tradition of legal proceedings. This was also evident in the trial. In addition, the learning curve for the German defence attorneys was steep and this became even more apparent in the Subsequent Trials, in which many of the defence attorneys from the main war crimes trial were once again active.

A competent defence is absolutely essential for the fairness of the proceedings. This is particularly true of the adversarial criminal proceedings in Nuremberg. “If we hand the defendants a poisoned chalice, we put it to our own lips”, Jackson wrote in his opening statement. In doing so, he drew upon the image of Socrates’ chalice of hemlock to explain that the rule of law demands that the fairness of the proceedings is heeded. The presiding judge also made this unmistakably clear and regularly put the prosecution in its place when there was a risk of curtailing the rights of the defence. He emphasised this once again very clearly at the end of the trial:

“The Tribunal is now about to adjourn for the consideration of its judgment. Before doing so, the Tribunal wishes to express its appreciation of the way in which Counsel for the Prosecution and- Counsel for the Defense have performed their duties. The Tribunal have been informed that

³¹ Hubert Seliger: *Political Lawyers? The Defense Attorneys at the Nuremberg Trials*, Baden-Baden 2016, p. 106 ff. and p. 82 ff.

³² Cf. Lars Büngener: *Disclosure of Evidence in International Criminal Trials. An Historical Overview*, Marburg 2010, p. 81 ff.

the defendants' counsel have been receiving letters from Germans improperly criticizing their conduct as counsel in these proceedings. The Tribunal will protect counsel insofar as it is necessary so long as the Tribunal is in session, and it has no doubt that the Control Council will protect them thereafter against such attacks. In the opinion of the Tribunal, Defense Counsel have performed an important public duty in accordance with the high traditions of the legal profession, and the Tribunal thanks them for their assistance."³³

However, the defence attorneys did not need protection. Many of the defence attorneys in the main war crimes trial remained in Nuremberg and, as already mentioned, also took on briefs in the Subsequent Trials. This is, of course, hardly surprising as they now possessed unique expertise. Robert Servatius and Hans Laternser later demonstrated this expertise in the Eichmann trial in Jerusalem and the Auschwitz trial in Frankfurt.³⁴ A number of them achieved a high degree of fame, such as Alfred Seidl and Richard von Weizsäcker, even though the latter only assisted as a trainee lawyer in the defence of his father in the *Wilhelmstraße* Trial. Several others became involved in the Heidelberg Lawyers' Circle and actively and successfully lobbied for the early release of the war criminals who had been convicted in Nuremberg and imprisoned in Landsberg am Lech and also – initially less successfully – for a comprehensive amnesty for war criminals.³⁵

International criminal law follows the classic criminal law orientation towards individual guilt. This is also what is revolutionary about the transfer of this fundamental criminal law condition into international law, in that the veil of sovereignty is breached, and the individual is directly targeted. Nevertheless, the macro-crimes dealt with in Nuremberg were not committed by individuals, but required the involvement of dozens, if not thousands of others. How should this be dealt with? In Nuremberg, six organizations of the Nazi state were also indicted alongside the 24 individuals. These were to be condemned as criminal organisations. To ensure that everything was in order, a defence attorney was appointed for each group of individuals. The members of these organisations could then be held criminally responsible and punished in later trials solely on the basis of their membership and, in principle, this worked. However, the judges were exceedingly restrictive in their sentencing of these organisations. Only the leadership corps of the NSDAP, the Gestapo, the SS and the SD were classified as criminal organisations. Mass organisations such as

³³ IMT (The Trial of the Major War Criminals before the International Military Tribunal, Nuremberg, November 14, 1945–October 1, 1946) Volume XXII, p. 410.

³⁴ On Servatius' role in the Eichmann trial, see Philipp Graebke: *Die Verteidigung im Verfahren gegen Adolf Eichmann*, in: Mayeul Hiéramente and Patricia Schneider (eds.): *The Defense in International Criminal Trials. Observations on the Role of the Defence at the ICTY, ICTR and ICC*, Baden-Baden 2016. On Laternser's role in the Auschwitz trial, see Hubert Seliger: *Politische Anwälte? Die Verteidiger der Nürnberger Prozesse*, Baden-Baden 2016, p. 496 ff.; Devin O. Pendas: *Der Auschwitz-Prozess. Völkermord vor Gericht*, Munich 2013, p. 97 ff.

³⁵ Philipp Glahé: *Amnesty Lobbying for Nazi Criminals. The Heidelberg Lawyers' Circle and Allied Justice 1949–1955*, Göttingen 2024.

the SA were not declared criminal, nor was the High Command of the *Wehrmacht*. This, naturally, curtailed the intended effect.

A fundamental principle of criminal law is *nullum crimen sine lege*: there is no crime without law. A criminal offence must therefore be defined as such by law before it is committed, otherwise there is a violation of the prohibition on retroactivity. Until well into the 1990s, the Nuremberg Trials were alleged, particularly in the Federal Republic of Germany, to have disregarded this principle. First of all, it cannot be denied that there was no codification of international crimes before the outbreak of the war. The defence pointed this out in a joint statement.³⁶ However, as already explained, there were a number of regulations pertaining to the area of war crimes, such as the Hague Convention on Land Warfare and the Geneva Conventions. Although these did not explicitly threaten criminal sanctions, they did contain clear prohibitions. With regard to crimes against humanity, too, it could be pointed out that the criminal liability for the acts as such was not really in question. Crimes against humanity refer to acts that are punishable in every country in the world, offences such as murder, abduction, torture, deprivation of liberty and rape. These acts only become crimes against humanity once they are systematically linked to a general attack on a civilian population.

However, with regard to the indictment of “crimes of war of aggression”, it becomes more difficult. Here, as we have already seen, the prosecutors in Nuremberg could only refer to the Kellogg-Briand Pact of 1928, which remained so vague in its wording that it did not directly give rise to criminal liability. A written prohibition was therefore not found. As to the question of whether such a prohibition was necessary, there are differing views within the European legal sphere, which is based on written, codified law, and in Anglo-American common law, in which the law develops through precedents. For US lawyers, criminal liability for the war of aggression simply resulted from the fact that the aggressor had violated the sovereignty of another state and thus the fundamental normative principle of international relations. In any event, the International Military Tribunal regarded the indictment for “crimes against peace” as an expression of existing international law and not as newly created criminal law.³⁷

Dealing with the evidence also proved to be challenging and ambitious. The evidence itself was collected by the United Nations War Crimes Commission. The vast number of documents and interrogations had to be summarised, systematised, evaluated and assigned to the various cases, all without the aid of computers. One could question whether they should have taken a little more time, particularly since by the end of the main war crimes trial, fourteen months after the

³⁶ IMG (The Trial of the Major War Criminals before the International Military Tribunal, Nuremberg, November 14, 1945–October 1, 1946) Volume I, p. 187.

³⁷ Whitney R. Harris: *Tyrants on Trial. The Prosecution of German Major War Criminals after World War II in Nuremberg 1945–1946*, Berlin 2009, p. 501.

capitulation, the overall picture of Nazi crimes was still incomplete. Details of the horrors of the Holocaust in an extermination camp such as Auschwitz found their way into the trial rather by chance. Rudolf Höß, the commander of Auschwitz from 1940 to 1943, had been brought to Nuremberg to act as a witness for the defendant Ernst Kaltenbrunner. His sober statistics on the genocide were met with incredulous silence. The minutes of the Wannsee Conference, at which the so-called Final Solution to the Jewish Question was decided, were not found until 1947.³⁸ So should they have waited longer?

Then the momentum would have been lost. In the late summer of 1945, the profound impact was still fresh and the will to implement the Moscow Declaration unbroken. Had they waited longer, the strong impetus to respond with criminal law would probably have dissipated.

After 403 days of hearings from November 1945 to July 1946, the four judges and their four deputies retired for their deliberations. On September 30 and October 1, 1946, the verdict was announced and the defendants were informed of their sentences. Twelve defendants were sentenced to death by hanging,³⁹ nine to long terms of imprisonment⁴⁰ and three were acquitted.⁴¹ A very mixed picture. The Soviet judges formulated a dissenting opinion and argued for the death penalty for all the defendants, however, they were unable to prevail. The three acquittals in particular demonstrate that the Court was not fundamentally biased and was not convinced of the defendants' guilt before the trial even began.

Ten death sentences were carried out on October 16, 1946. Bormann was sentenced to death *in absentia* and, as it later transpired, was in fact already dead. Göring succeeded in escaping the noose. He killed himself with cyanide a few hours before the execution. To this day, it remains unclear as to how he obtained the poison.

What did the Nuremberg Trials achieve?

The Nuremberg Trials primarily determined the individual guilt of nineteen high-ranking representatives of the Nazi regime and punished them severely. This met with general approval,

³⁸ See first the memoirs of Robert Kempner, whose colleagues found the minutes while preparing for the so-called Wilhelmstrasse Trial, the eleventh of the twelve Nuremberg follow-up trials: Robert Kempner: Prosecutor of an Era. Memoirs. In collaboration with Jörg Friedrich, Frankfurt am Main 1983, pp. 310–313; see also Christian Mentel: Das Protokoll der Wannsee-Konferenz. Überlieferung, Veröffentlichung und revisionistische Infragestellung, in: Norbert Kampe and Peter Klein (eds.): Die Wannseekonferenz am 20. Januar 1942, Cologne 2013, pp. 116 ff., pp. 122 f. A facsimile of the minutes can be found *ibid.*, pp. 40 ff.

³⁹ Göring, von Ribbentrop, Keitel, Kaltenbrunner, Rosenberg, Frank, Frick, Streicher, Sauckel, Jodl, Seyß-Inquart, Bormann.

⁴⁰ Hess, Funk, Dönitz, Raeder, von Schirach, Speer, von Neurath.

⁴¹ Fritzsche, Schacht, von Papen.

even among the German population. By virtue of the Nuremberg verdicts, the rest of the population felt acquitted of their own guilt. Some believed that the verdicts, especially the acquittals, were too lenient. In October 1946, the verdicts were seen as a liberation and a just punishment for those who had not only spread terror and death throughout Europe but had also reduced Germany to rubble and ashes. Resistance to the denazification of Germany, including the criminal prosecution of Nazi war criminals, only developed later.⁴²

By also “convicting” a number of criminal organisations, the verdict also made it clear that membership in the SS and SD was in itself a Nazi incrimination. The verdict was relatively cautious in this assessment, too. NSDAP membership, as such, is a procedural incrimination, but not a substantive one, and certainly not a criminal offence.

The trial ensured that the evidence was comprehensively documented. The history of National Socialism would probably not have been so well researched to this day had it not been for the vast quantities of evidence gathered and the numerous people interviewed for the Trials. The evidence was not simply garnered; it was also examined in the criminal proceedings for its integrity and authenticity and subsequently preserved for posterity.

Another significant effect was the delegitimisation of National Socialism. The bodies of the ten hanged men and the corpse of Hermann Göring, who had committed suicide, were photographed and put on display, some still with the noose around their necks. Images that would no longer be shown today for reasons of protecting personality rights, contributed to making the end of Hitler’s regime irreversible. The bodies were then burned in the crematorium in Munich and the ashes scattered in the *Wenzbach*, a tributary of the River Isar near *Großbesseloh*.⁴³ This prevented the site from becoming a place of pilgrimage.

The legitimacy of criminal proceedings also depends on uniform application.⁴⁴ Arbitrary punishment fundamentally contradicts the principle of the rule of law. After Nuremberg, international criminal law found itself in precisely this situation. Cries of “victor’s justice” were heard from the German side. However, the Cold War made it politically impossible to implement the United Nations’ attempts to establish a permanent international criminal court. Any efforts of this kind were officially discontinued in the early 1950s.⁴⁵

The United Nations, which had been founded in the meantime, was extremely satisfied with the achievements of the Nuremberg Trials. On December 9, 1946, the General Assembly

⁴² Annette Weinke: *Die Nürnberger Prozesse (The Nuremberg Trials)*, Munich 2019, p. 99 ff.

⁴³ Whitney Harris: *Tyrannen vor Gericht (Tyrants on Trial)*, Berlin 2008, p. 468.

⁴⁴ See also Ronen Steinke: *The Politics of International Criminal Justice*, Oxford et al. 2012, p. 12 ff.; as well as Peer Stolle and Tobias Singelnstein: *On the Aims and Actual Consequences of International Prosecution of Human Rights Crimes*, in: Wolfgang Kaleck et al. (eds.): *International Prosecution of Human Rights Crimes*, Heidelberg et al. 2007, p. 37.

⁴⁵ See Eckart Conze: *Völkerstrafrecht und Völkerstrafrechtspolitik*, in: Jost Dülffer and Wilfried Loth (eds.): *Dimensionen internationaler Geschichte*, Munich 2012, p. 189.

recognised the essential achievements of the Nuremberg Trials in the so-called Nuremberg Principles. Declaration 95 (I) emphasised in particular that international crimes, crimes against peace, war crimes and crimes against humanity should not go unpunished and that there should be no appeal to immunity.

At the same time, the General Assembly adopted the Genocide Declaration 96 (I). This recognised what had not been possible in the Nuremberg trials: a separate crime for the extermination of a national, ethnic, racial or religious group. The name of the crime: genocide. It was a new category of crime, associated above all with one name: Raphael Lemkin.

The crime of genocide, which today must be considered perhaps the most important criminal offence under international law, did not exist in law in 1945. It was not until three years later, on December 8, 1948, that a resolution of the United Nations General Assembly succeeded in adopting the Convention on the Prevention and Punishment of Genocide.⁴⁶ This criminal offence specifically emphasises the destruction of a particular distinct group defined by national, ethnic, racial or religious characteristics. We owe the Convention, and thus the criminal offence of genocide, to the tireless commitment of the Polish lawyer Raphael Lemkin. Lemkin himself had succeeded in fleeing the Third Reich via Scandinavia to the United States. However, he lost almost his entire family in the Holocaust.⁴⁷ After the end of the war, he temporarily advised Robert H. Jackson's US prosecution team and attempted to introduce his idea of genocide. The word 'genocide', composed of the Greek term *genos* (race, offspring) and the Latin verb *caedere* (to kill), was also a conceptual innovation. However, Lemkin was unable to prevail with this approach.⁴⁸ Jackson's team of lawyers saw this as a violation of the prohibition on retroactivity as the collective approach to the crime of genocide – unlike, for example, crimes against humanity, which were primarily defined by the British international lawyer Hersch Lauterpacht – was completely new. Today, genocide is listed in Article 6 of the Rome Statute of the International Criminal Court as the most serious of the core international crimes. Although genocide has its historical origins in the crimes committed by the Nazis against Jewish and other minorities, and it was in fact modelled on these events, it was not applied in the criminal prosecution of the immediate consequences of the war.

The Genocide Convention has an additional component, too: it is also linked to obligations on the part of states. They not only have to punish genocide but also prevent it. The Convention

⁴⁶ William Schabas: Genocide in International Law and International Relations Prior to 1948, in: Christoph Safferling and Eckart Conze (eds.): *The Genocide Convention Sixty Years after its Adoption*, The Hague 2010, pp. 19–34.

⁴⁷ For Raphael Lemkin's biography, see John Cooper: *Raphael Lemkin and the Struggle for the Genocide Convention*, New York 2008.

⁴⁸ See John Q. Barrett: Lemkin and 'Genocide' during the Nuremberg trial, November 1945–September 1946, in: Christoph Safferling and Eckart Conze (eds.): *The Genocide Convention Sixty Years After its Adoption*, The Hague 2010, pp. 35–54.

also contains a clause on the jurisdiction of the International Court of Justice in disputes over its interpretation. This has made it possible in recent years to initiate numerous proceedings before the UN court, and this will be discussed later.

There were also other trials in the wake of Nuremberg. However, only one trial can be considered an international trial: the Tokyo Trial.

The war crimes committed by Japan during World War II were tried in a separate tribunal, the International Military Tribunal for the Far East (IMTFE).⁴⁹ This court never attained the same significance as its Nuremberg counterpart.⁵⁰ Structurally, the two institutions are closely related, nevertheless they also exhibit considerable differences. For example, the Tokyo Trial was not based upon an international treaty such as the London Agreement, but merely on a “Special Proclamation” issued by the commander-in-chief of the Allied forces, General MacArthur. A total of eleven judges sat on the bench, not only from the four victorious powers but also from Australia, China, India, Canada, New Zealand, the Netherlands and the Philippines. A total of 28 people were indicted, including leading military and political figures as well as the Japanese Prime Minister, Tōjō Hideki. The trials began on May 3, 1946, and the verdicts were announced on November 12, 1948. All the defendants were convicted.⁵¹ Trials were also held against other Japanese nationals in domestic courts or by the respective occupying powers, a fact that is not commonly known and has not yet been researched.

[...]

⁴⁹ Neil Boister and Robert Cryer: *The Tokyo International Military Tribunal. A Reappraisal*, Oxford 2008.

⁵⁰ See, in context and on the reception of the trial in Japan: Madoka Futamura: *War Crimes Tribunals and Transitional Justice*, London 2008. On its reception in jurisprudence, see Philipp Osten: *The Tokyo War Crimes Trial and Japanese Legal Scholarship*, Berlin 2003.

⁵¹ Except for Okawa Shumei, who was committed to a psychiatric institution but released as a free man in 1948, and Matsuoka Yosuke, Japan’s foreign minister, who died before the trial began.

p. 127–141

The beginning of the “golden decade” of international law

On November 9, 1989, the Berlin Wall fell and, more or less at the same time, communist rule in Eastern Europe came to an end. In the early 1980s, Mikhail Gorbachev, Chairman of the Central Committee of the Communist Party of the Soviet Union, had begun to soften the dictatorial socialist system through openness (*glasnost*) and restructuring (*perestroika*) in order to establish more humane social conditions. On October 11 and 12, 1986, Mikhail Gorbachev and US President Ronald Reagan met in the Icelandic capital Reykjavik to negotiate disarmament and peace between their two countries. This had been preceded by an escalation in the arms race. Since the 1970s, the Soviet Union had been threatening Western Europe with SS-20 medium-range nuclear missiles. NATO had responded with the so-called ‘Double-Track Decision’ and announced that it would increase its nuclear deterrent in Europe by deploying medium-range missiles and cruise missiles. In the Federal Republic of Germany and other Western European countries, this NATO Double-Track Decision had led to considerable political disputes and, *inter alia*, hastened the end of the social-liberal coalition under Chancellor Helmut Schmidt thereby bringing Helmut Kohl to power.

The talks in Reykjavik failed. The American space research programme SDI, which was intended to provide a defence shield against Soviet nuclear missiles, was a bone of contention for Gorbachev. The Soviet Union was on the brink of financial ruin, and arms spending had to be cut back. Even though the delegations left the white wooden house on the outskirts of Reykjavik, where the negotiations had taken place, without a final declaration, Gorbachev announced to the surprised journalists before his flight back to Moscow that a huge breakthrough had been achieved in the negotiations. Ronald Reagan had no choice but to announce that the positive talks would continue. On December 8, 1987, a disarmament treaty was finally signed in Washington, putting an end to the arms race with regard to of short- and medium-range missiles. Further summit meetings followed in Moscow in May and in New York in December 1988.

Since the early 1980s, the Polish trade union *Solidarność* had revolted against the communist regime with strikes. The movement gained international attention, not least through its connection with the Polish Pope, John Paul II, who had been the head of the Catholic Church since 1978. Nevertheless, after martial law had been declared in 1981, the movement had been operating underground and was only able to gain official recognition in the spring of 1989, in the wake of *glasnost* and *perestroika*.

In the GDR, too, sustained resistance began to stir in the spring and summer of 1989. Civil rights groups, which had been meeting regularly on Mondays in Leipzig’s St. Nicholas Church for

peace prayers since the early 1980s, gained more and more support until, on September 4, 1989, for the first time, 1,000 people loudly but peacefully demanded after the prayer an end to the Stasi surveillance regime and “freedom of travel instead of mass exodus”. A few weeks later, over 250,000 people chanted “We are the people!” Secretary General Erich Honecker was forced to resign shortly after the celebrations marking the 40th anniversary of the founding of the GDR and Egon Krenz took over and announced reforms.

A wave of emigration by GDR citizens had already begun in the summer of 1989. Numerous East German citizens had taken advantage of the opportunity to travel to neighbouring socialist states in order to obtain permission at the embassies of the Federal Republic of Germany in Warsaw, Prague and Budapest to continue their journey to West Germany. The Federal Republic negotiated their departure or return to the GDR in exchange for cash payments, immunity from prosecution and official departure procedures. In late summer 1989, the situation in the embassy buildings reached crisis point. At times, more than 4,000 people camped on the embassy grounds at the Lobkowitz Palace in Prague. On the sidelines of the UN General Assembly in New York, the West German Foreign Minister, Hans-Dietrich Genscher, spoke with his GDR counterpart Oskar Fischer and Soviet chief diplomat Eduard Shevardnadze to negotiate a face-saving solution to the crisis. Finally, the GDR leadership conceded, and on September 30, 1989, Genscher was able to announce to those camping outside the embassy that they could leave Prague on special trains which would not stop in the GDR. This broke the dam and sealed Erich Honecker’s fate. The new GDR leadership under Egon Krenz then devised new travel regulations. The announcement of these new regulations by Politburo member Günter Schabowski at 6 p.m. on November 9, 1989, at a press conference on *Mohrenstraße* in Berlin led to the opening of the Wall that same night. The overwhelmed border guards were ultimately powerless against the flood of people and opened the barriers at the *Bornholmer Strasse* border crossing shortly before midnight and all other border crossings shortly thereafter. The SED regime had succumbed to the East German citizens’ desire for freedom. The hunger for fundamental rights, freedom and democracy had prevailed.

As a consequence, the socialist systems in other Eastern European countries also collapsed. Even the Soviet Union fell apart shortly afterwards. The map of Europe was redrawn, constitutions based on democratic values were enacted and oppressed peoples breathed freedom.

Now was the hour of international law on several levels. There had never been a peace treaty between Germany and the Allies after the Second World War. Now the Allies of 1945 and the two German states could come together at one table and negotiate German unity. The result was the “Treaty on the Final Settlement with Respect to Germany” better known as the “Two Plus Four Treaty”. The signing of the treaty in Moscow on September 12, 1990, marked the end of the

postwar period. The fact that the treaty came about and that German unity could be achieved was certainly not a matter of course. Not only did British Prime Minister, Margaret Thatcher, express her concern about a “fourth Reich” but also French President François Mitterrand demanded concessions, in particular Germany’s irrevocable renunciation of its former territories in the East. Mikhail Gorbachev, head of state of the Soviet Union, which was already in the process of disintegration, did not want to see a united Germany in NATO. In a diplomatic tour de force, these issues were resolved and, ultimately, all the heads of state agreed. Soviet Foreign Minister, Shevardnadze, summed it up: “We are unable to stop Germany’s unification, except by force”.⁵² The whole of Germany was granted full sovereignty, but in return it had to accept the Oder-Neisse line as being final, renounce ABC weapons and limit the strength of the *Bundeswehr* to 370,000 troops, which, from today’s perspective, is still a large army. The withdrawal of its troops from the territory of the former GDR was made palatable to the Soviet Union with billions in Deutschmark loans.

The Two Plus Four Treaty is a treaty under international law. It governs the relations of Germany – which has been united since October 3, 1990, when the eastern German federal states acceded to the Basic Law – to all other states, even if these are not signatory states. This may sound insignificant; however, it is certainly not. The fact that “only” the four Allied victorious powers were signatories to the treaty can be explained by the occupation law after 1945. However, other states that had suffered under German occupation have since been unsuccessful in their claims for reparations against Germany, even though the question of reparations was explicitly left open during the negotiations and the Two Plus Four Treaty was intended to settle the situation once and for all. Nevertheless, the treaty was not called a “peace treaty”, even though its effect is comparable. Conceptually, any association with Versailles after the First World War was intentionally avoided. The participation of other states was also not considered appropriate due to the immense delay that this would have entailed. After all, the guns had been silent in Europe since 1945, so there was *de facto* peace, and peace does not require a *de jure* “peace treaty”. On March 15, 1991, the Soviet Union, as the last treaty partner, handed over the instrument of ratification, and the Two Plus Four Treaty came into force.

While Germany was unifying, elsewhere in Europe the blocs and multi-ethnic states were disintegrating. In most cases, diplomacy and international law ensured a peaceful transition. Between March 1990 and December 1991, a total of fourteen former Soviet republics declared their independence. The courage of the “singing revolution” in the Baltic republics of Estonia, Lithuania and Latvia since the summer of 1988 was hereby decisive. With their independence, the

⁵² Manfred Görtemaker: History of the Federal Republic of Germany. From its founding to the present day, Munich 1999, p. 765.

Baltic states also eliminated the consequences of the additional protocol to the Hitler-Stalin Pact of 1939. The West had largely stayed out of this disintegration process. George Bush Sr., the US president at the time, recognised the emergence of a “free, independent and democratic Russia” shortly before Christmas 1991, paving the way for the Russian Federation to take over the USSR’s permanent seat on the UN Security Council under its democratically elected president, Boris Yeltsin.⁵³

However, the former Soviet Union’s nuclear arsenal, which was located not only in Russia but also in Belarus, Kazakhstan and Ukraine, was causing security concerns. Although only the Russian president had the launch codes, there were fears in both the West and Russia that nuclear material could “disappear” and then reappear in the hands of terrorist groups, or that sloppy maintenance could lead to an accident like the one in Chernobyl. US Secretary of State James Baker was tasked with negotiating that nuclear weapons could only be stationed in Russia. Finally, Leonid Kravchuk, the then Ukrainian president, who had the world’s third-largest nuclear arsenal at his disposal, also handed over the warheads. In return, the US and Russia had declared in the Budapest Memorandum on December 5, 1994, that they would respect the territorial integrity and sovereignty of Ukraine and promised the country economic support. Ukraine, whose fate did not attract much interest in the West, thus relinquished what was probably its most valuable guarantee of attention. US President Bush valued the nuclear weapons at \$175 million in economic aid for disarmament so that the START disarmament treaty could continue.⁵⁴ His successor, Bill Clinton, now regrets having brokered the handover of the weapons.⁵⁵ Since Russia’s annexation of Crimea in 2014 and the invasion of Ukraine in 2022, there have been repeated references to the security guarantees in the Budapest Memorandum. However, a memorandum is *not* a treaty under international law. It is an expression of a government’s will and if it is not ratified, it remains non-binding.

A United Nations capable of acting

In many of the old and new states of the former Eastern Bloc, an unprecedented wave of democratisation began after the Soviet hegemony had been overcome. In Poland, the Baltic republics, Hungary, Romania, the separate states of Czechia and Slovakia, even in Russia.

⁵³ See George Bush, speech on December 25, 1991: <https://bush41library.tamu.edu/archives/public-papers/3791> (last accessed on March 8, 2025).

⁵⁴ Mariana Budjeryn: *Inheriting the Bomb: The Collapse of the USSR and the Nuclear Disarmament of Ukraine*, Baltimore 2023, p. 109 ff.

⁵⁵ See <https://www.spiegel.de/ausland/bill-clinton-ueber-die-ukraine-ich-fuehle-mich-mitverantwortlich-weil-ich-sie-davon-ueberzeugt-habe-ihre-atomwaffen-aufzugeben-a-ac738bce-b87c-4b6f-9f8f-9628d19663d2> (last accessed on March 8, 2025).

Everywhere, constitutions were adopted, fundamental rights were formulated, the separation of powers was introduced and free elections were held. Soon afterwards, these countries joined the Council of Europe and acceded to the European Convention on Human Rights. The willingness to submit to the jurisprudence of the European Court of Human Rights was also unanimously professed. Finally, the European Union also opened up to the new democracies.

The United Nations initially experienced a significant increase in membership. Between 1991 and 2006, 26 additional states joined and currently 193 states are represented in the United Nations General Assembly.

At the beginning of the 1990s, the hour of human rights also appeared to be striking. From June 14 to 25, 1993, the United Nations convened only its second World Conference on Human Rights. 171 states gathered in Vienna and agreed on a programme of action. The states unanimously committed themselves to their human rights obligations. They declared the realisation of human rights as the supreme goal of the United Nations and accentuated immediately after the preamble that the universal validity of these rights and freedoms is beyond question.⁵⁶ This undermines any attempts to relativise human rights.

One of the most significant outcomes of this world conference was the establishment of the Office of the High Commissioner for Human Rights on December 20, 1993, by the United Nations General Assembly under Resolution 48/141. With the rank of Under-Secretary-General of the United Nations, the High Commissioner is responsible for promoting respect for and the observance of human rights worldwide, identifying violations, coordinating preventive measures and supporting national human rights structures. Since the establishment of this institution, prominent figures have held this position and given a face to the protection of human rights. Mary Robinson of Ireland (1997–2002), the Canadian Louise Arbour (2004–2008), Navanethem Pillay of South Africa (2008–2014), Seid al-Hussein of Jordan (2014–2018) and currently Austrian lawyer, Volker Türk, are among the High Commissioners who have shaped human rights work worldwide and often challenged states.

Even during these important years for international law, it has not been possible to fundamentally reform the United Nations and, in particular, the Security Council. Ultimately, the traditional power structures and geopolitical interests proved too much of a stumbling block.⁵⁷ In the years after 1990, reform also no longer seemed quite so urgent, as the Security Council's ability to act had suddenly been restored.

⁵⁶ Text of the declaration: <https://www.ohchr.org/en/instruments-mechanisms/instruments/vienna-declaration-and-programme-action> (last accessed on 08.03.2025).

⁵⁷ Stephen Schlesinger: Can the United Nations Reform? in: *World Policy Journal*, 1997, p. 47 ff.

The emphasis on democracy and human rights led to a palpable standardisation of international law. Absolute sovereignty was no longer considered the unchallenged maxim of action in international law. Values, principles and rules were now available to determine action under international law. Respecting human rights is one of these paradigms and it had an impact on the entire security architecture of the United Nations. Joint action in cases of serious violations of international law was suddenly possible.

The first test case came in 1990: on August 2, 1990, Iraqi dictator Saddam Hussein's 100,000-strong armed forces crossed the border into neighbouring Kuwait, occupied the desert state, and finally annexed it on August 28, 1990. Iraq was heavily in debt at the time as a consequence of many years of war with Iran. Saddam Hussein had previously failed to persuade the OPEC states to cut oil production, which would have driven up the price of oil. Iraq's debts to Kuwait had thus grown to around US\$80 billion. Iraq cited border disputes and the violation of oil production quotas as reasons for the annexation. Militarily, tiny Kuwait did not stand a chance against Iraq, which was equipped with Western weapons. Under international law, Iraq's actions were a clear violation of Article 2 (4) of the UN Charter, which triggered the right to self-defence under Article 51 of the Charter.

The United Nations Security Council reacted immediately. On August 2, just a few hours after the invasion, it unanimously condemned the invasion in Resolution 660 and demanded the immediate withdrawal of Iraqi troops.⁵⁸ The Security Council acted on the basis of Chapter VII, meaning that the resolution was binding. On August 6, 1990, followed Resolution 661 which imposed economic sanctions that brought Iraq's crude oil trade to a standstill. In addition, the highest UN body explicitly reaffirmed the individual and collective right to self-defence under Article 51 of the Charter.⁵⁹ On the basis of this, "Operation Desert Storm" unfurled as the response of the anti-Iraq coalition. The explicit legitimisation can be found in UN Resolution 678 dated November 29, 1990. In it, the Security Council, acting under Chapter VII of the Charter, set Saddam Hussein an ultimatum until January 15, 1991. After that date, all member states cooperating with the Kuwaiti government were authorised to "use all necessary means" to restore world peace and international security. On January 17, 1991, the liberation of Kuwait began, with 34 countries participating under the leadership of the US. By the end of February, the military operation was complete and Kuwait was liberated. In the Security Council, China had, as it often did at that time, abstained. The non-permanent members Cuba and Yemen had voted against the resolution, however this was without consequences.

⁵⁸ S/RES/0660 of 02.08.1990.

⁵⁹ S/RES/0661 of 06.08.1990.

The military operation was preceded by a diplomatic obstacle course. Saddam Hussein had taken foreign nationals hostage as human shields against possible attacks in Baghdad and repeatedly threatened to launch a missile attack on Israel. The UN Security Council reminded Iraq in Resolution 666 of September 13, 1990, of its obligations arising from the 4th Geneva Convention on the Protection of Civilians⁶⁰ and, a few days later, on September 16, demanded the immediate release of foreigners and diplomats.⁶¹ The unified Federal Republic of Germany was not directly involved in the hostilities, even though this had been repeatedly demanded abroad. The Two Plus Four Treaty was not yet in force, which is why participation in combat operations would have been problematic under international law. However, the *Bundeswehr* supported the protection of NATO member Turkey in the event of an emergency and sent a squadron of fighter jets, several rescue helicopters and ABC detection tanks to Erhaç in Turkey. In Germany itself, the *Bundeswehr* medical service was deployed to care for wounded soldiers who had been flown to Germany from the war zone. Lastly, as so often, the Federal Republic supported the alliance financially. A total of DM 18 billion was spent on aid for the military operation.⁶² Under international law, the Kohl government fulfilled its obligations under the UN Charter and the NATO Treaty. Nevertheless, there were protests on the streets. “No blood for oil” was written on the posters. In the media, the war was portrayed as a technical revolution. Images of “smart bombs” were constantly shown, documenting precise air strikes and giving the impression of “clean warfare”. The reporting depended on the US Army. The reporting was dependent on the US Army, and no information was released to the public that had not been approved in advance by the armed forces.

In terms of international law, this incident revealed a completely altered dynamic. The United Nations Security Council provided the legitimacy for economic sanctions and military intervention. The US, as the strongest superpower capable of action, organised the implementation. It was not a UN war, but a war with UN authorisation. In the Security Council itself, the Soviet Union, preoccupied with its own affairs, played no role. Its economic dependence on the US at that time led to constant nodding in agreement with all Western resolution proposals.⁶³ China could be repeatedly convinced that the matters did not affect Chinese interests and thus, in most cases, the People’s Republic abstained. However, the military capabilities of the US-led alliance were very closely scrutinised and analysed.

With regard to the post-war order in Iraq, the Security Council also dominated. Out of respect for the sovereignty of the state of Iraq, troops remained along the border and no regime

⁶⁰ S/RES/0666 of 13.09.1990 (Yemen and Cuba voted against).

⁶¹ S/RES/0667 of 16.09.1990 (unanimous).

⁶² See <https://www.bpb.de/themen/zeit-kulturgeschichte/deutschland-chronik/132541/17-januar-28-februar-1991/> (last accessed on March 10, 2025).

⁶³ Ninan Koshy: The United Nations, the US and Northern Iraq, in: Economic and Political Weekly 1996 (vol. 31) p. 2760 ff.

change was brought about. However, this decision by George Bush Sr. was disregarded a good ten years later by his son George W. Bush. Under international law, though, anything else would have been almost inconceivable in 1991. Nevertheless, pressure on Saddam Hussein was maintained and economic sanctions continued and only eased in 1996. Weapons inspections were also carried out by the UN. Another important step under international law was taken. Within Iraq, uprisings by Shiites and Kurds had been brutally quelled by Hussein's troops. The Security Council then decided to intervene, even though this was, strictly speaking, a purely domestic matter. So, was this not a case for international law? In Resolution 688, the Security Council also referred to Iraq's sovereignty and political independence in this case.⁶⁴ Nevertheless, it cited the oppression of the civilian population which had led to a massive flow of refugees across national borders. This posed a threat to international peace and security in the region, which legitimised the Security Council's intervention. The humanitarian catastrophe, as such, was therefore not (yet) considered sufficient, but the refugee flows to Syria and Turkey were. As a result, the humanitarian aid project Provide Comfort was launched and to protect it, the Anti-Hussein-Alliance established no-fly zones south of the 33rd parallel and north of the 36th parallel. There was, however, no clear UN mandate for this.⁶⁵ The Combined Task Force invoked Resolution 678 and the extension it had acquired through Resolution 688. In accordance with a classical interpretation of international law, this was a barely tenable position.⁶⁶ Resolution 688 was concerned with the situation of the Kurds in Iraq, the flow of refugees and the humanitarian situation. There was no mention whatsoever of the use of military force being employed to enforce the resolution. Deriving from Resolution 678 the legitimacy for unilateral military measures to protect the objectives under Resolution 688 can only be achieved with an altogether rather "dynamic" interpretation that strongly focuses on the effectiveness of international law. Such an interpretation is familiar from European law and the from the case law of the European Court of Justice. In classical international law, an *effet utile* approach, which interprets a provision in such a way that the desired goal is achieved in the best and simplest way possible, is not universally recognised.

The security architecture of the UN Charter has changed as a result of the Iraq War. In fact, for the first time since the Korean War, it functioned as it should do: the Security Council has responsibility for global peace and security. It assumed this responsibility after Saddam Hussein's invasion of Kuwait and initially imposed economic and subsequently military sanctions. However, the Security Council did not enforce these measures itself with its own troops under UN command, but authorised member states to do so.

⁶⁴ S/RES/0688 of 05.04.1991.

⁶⁵ George D. Kramlinger: Sustained Coercive Air Presence, Air University Press, Maxwell 2001, p. 15 ff.

⁶⁶ Ninan Koshy: The United Nations, the US and Northern Iraq, in: Economic and Political Weekly 1996 (Vol. 31) p. 2760 ff.

The question of what constitutes international peace and security was defined somewhat more broadly than before. Although the humanitarian catastrophe itself was not the trigger for the Security Council's action, it legitimised the Security Council's intervention as the humanitarian catastrophe in the form of refugee flows had a cross-border impact.

At the end of the First Iraq War, it appeared that the Security Council's decisions in such cases could be enforced unilaterally without any further specific legitimisation. The establishment as well as the monitoring of the no-fly zone both point in this direction.⁶⁷ This is not without its problems, as will be illustrated below.

[...]

⁶⁷ James Cockayne u. David Malone: Creeping Unilateralism. How Operation Provide Comfort and the No-Fly Zones in 1991 and 1992 Paved the Way for the Iraq Crisis of 2003, in: Security Dialogue 37, 2006, p. 123.

III

DASHED HOPES: THE RETURN OF POWER POLITICS

9/11 – The War on Terror

Republican George W. Bush had replaced Democrat Bill Clinton in the Oval Office in January 2001 when, fewer than nine months later, on September 11, 2001, four planes were hijacked by Islamist terrorists two of which were spectacularly crashed in quick succession into the Twin Towers of the World Trade Center in Manhattan, which collapsed shortly afterwards. Another plane was flown into the Pentagon, the US Department of Defense, while a fourth was brought down by passengers in an open field near Shanksville, Pennsylvania, thus preventing further serious damage.

These meticulously planned attacks, commissioned and financed by Osama bin Laden, the leader of the terrorist organization Al-Qaeda, claimed the lives of around 3,000 people and changed the world forever. The shock of being so vulnerable on its own territory and the memory of the dramatic images dominated US politics for almost twenty years. President Bush subsequently declared a “war on terror” which turned existing standards of international law upside down, and continues to do so today.

The legal responses followed as early as September 12. For the first and only time in its history, the NATO Security Council invoked Article 5 of the North Atlantic Treaty, which was unanimously approved by the member states a few weeks later.

In Resolution 1368, the UN Security Council condemned the attacks as a threat to international peace and emphasised the individual and collective right to self-defence under Article 51 of the UN Charter.⁶⁸ However, this was not entirely clear under international law, after all, this threat to world peace did not emanate directly from a state, but from Al-Qaeda, a private organisation in the sense of international law. Since the terrorist leader bin Laden was believed to be in Afghanistan, which was ruled by the radical Islamic Taliban, attention turned to this country,

⁶⁸ UN SC-RES/1368 of September 12, 2001.

which had been occupied by the Soviet Union until 1989. The Taliban was asked to hand over bin Laden. Since the Taliban government did not comply with this demand, even after political pressure, Operation Enduring Freedom began in October 2001, marking the start of a twenty-year war in Afghanistan. After Kabul and other major cities were taken by the Northern Alliance in December 2001, the UN Security Council mandated the peacekeeping force ISAF, the International Security Assistance Force, which was ultimately led by NATO but must be strictly distinguished from Enduring Freedom.⁶⁹

The UN Security Council took a further step in its development here. Whereas in Somalia, Bosnia and Rwanda, domestic political issues were, on occasions, seen as a threat to international security and peace when massive human rights violations were observed, the problem now was that the attacks could not be directly attributed to any state. Resolution 1368 justified all necessary measures to respond to the attacks of September 11 with reference to the right of self-defense. However, where did the attack on the World Trade Center come from and what could be a proportionate response to it? The Security Council resolutions remained silent on this. The Security Council allowed NATO and the Northern Alliance to bring about a regime change in Afghanistan and only took the helm again once a new government had been installed in Kabul.

Incidentally, German Armed Forces were involved in Afghanistan, and not just as part of the UN mission ISAF. Combat units of the KSK were also deployed, without relatively little public attention or coverage. Officially, the main area of responsibility of the German armed forces was in the comparatively quiet north around Kunduz and Mazar-e Sharif.

This was the largest deployment for the *Bundeswehr* to date and ultimately cost the lives of 59 soldiers. These were the first German soldiers to fall victim to acts of war since the end of World War II. The *Bundeswehr* came of age in the Hindu Kush, according to military historian Sönke Neitzel.⁷⁰ However, these combat missions had unexpected consequences under international law. On September 4, 2009, Georg Klein, then a Colonel in the *Bundeswehr*, ordered an air strike on two fuel tankers which had been captured by the Taliban and were stuck in a riverbed. At least 91 civilians who were in the process of helping themselves to the contents of the tankers were killed in the bombing, which took place without warning. In a modern army, lawyers are, of course, present in the command post and advise the commanding officers. This was also the case with the *Bundeswehr*, and also in Kabul at the beginning of September 2009. However, the lawyer only advised that the authority to give orders remains with the military commander, in this case, Colonel Klein. The number of casualties and the comparatively low level of immediate danger raised

⁶⁹ UN SC-RES/1386 of December 20, 2001.

⁷⁰ Sönke Neitzel: *Deutsche Krieger. Vom Kaiserreich zur Berliner Republik – eine Militärgeschichte* (German Warriors: From the German Empire to the Berlin Republic – A Military History), Berlin 2020, p. 12.

questions. Were these war crimes? The Code of Crimes against International Law, passed by the *Bundestag* in 2002, transfers the core international crimes of genocide, crimes against humanity and war crimes into German law, offences which then naturally also apply to members of the *Bundeswehr* on overseas assignments. The Federal Prosecutor General in Karlsruhe is responsible for investigating such cases. To come to the point: no criminal proceedings were brought against Colonel Klein, however, the question of whether Colonel Klein should be charged was examined very seriously and by all possible authorities. Ultimately, this pertains to the provision in Section 11 of the Code of Crimes against International Law. Pursuant thereto, attacks on civilian objects are prohibited and attacks on military objects must also be refrained from if the expected damage to the civilian population is disproportionate to the military advantage. If this proportionality is observed, civilian collateral damage is acceptable. When weighing up these factors, it is important to remember that this is not a general assessment of proportionality, but rather always a question of the expected military advantage. Colonel Klein also acted to avert a planned attack on German soldiers using tanker trucks.⁷¹ The Federal Prosecutor General discontinued the proceedings pursuant to Section 170 (2) of the Code of Criminal Procedure.⁷² Compulsory prosecution procedures before the Higher Regional Court of Düsseldorf were also unsuccessful.⁷³ The Federal Constitutional Court rejected a constitutional complaint against this, however, the constitutional judges explained in detail, which they were not required to do, that the decision of the Federal Prosecutor General could not be criticised from a constitutional point of view.⁷⁴

The incident was also brought before the civil courts. Relatives of victims asserted claims for damages against the Federal Republic of Germany, which were dismissed by the Regional Court of Cologne. The Federal Court of Justice also ultimately confirmed that there had been no violation of international law, which would have been a prerequisite for a claim for official liability.⁷⁵

This case, as well as the criminal charges against former US Secretary of Defense, Donald Rumsfeld, initially triggered a certain scepticism on the part of the Federal Prosecutor's Office with regard to the still young Code of Crimes against International Law.⁷⁶ This view only changed under

⁷¹ Christoph Safferling and Stefan Kirsch: Die Strafbarkeit von Bundeswehrangehörigen bei Auslandseinsätzen: Afghanistan ist kein rechtsfreier Raum (The Criminal Liability of Members of the German Armed Forces on Foreign Missions: Afghanistan is not a Legal Vacuum), in: Juristische Arbeitsblätter 2010, p. 81.

⁷² Decision of the Federal Prosecutor General at the Federal Court of Justice of October 13, 2010 – 3 BJs 6/10-4.

⁷³ Higher Regional Court of Düsseldorf, decision of March 31, 2011 (Ref.: III-5 StS 6/10).

⁷⁴ Federal Constitutional Court, decision of May 19, 2015 (Ref.: 2 BvR 987/11), https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2015/05/rk20150519_2bvr098711.html (last accessed on March 28, 2025). html (last accessed on March 28, 2025).

⁷⁵ BGH (Federal Court of Justice), judgment of October 6, 2016 (Ref.: III ZR 140/15).

⁷⁶ See GBA, order of February 10, 2005, in: JZ 2005, p. 311 (Rumsfeld); Christian Ritscher: The investigative activities of the Federal Prosecutor General with regard to international criminal law, in: Christoph Safferling and Stefan Kirsch (eds.): International Criminal Law Policy, Berlin and Heidelberg 2014, p. 223; critical: Denis Basak, in: Critical Quarterly Journal for Legislation and Legal Science (KritV), Vol. 90, No. 4, 2007, pp. 333–365, p. 333; cf. Thomas Beck, in: Florian Jeßberger and Julia Geneuss (eds.): Zehn Jahre Völkerstrafgesetzbuch (Ten Years of the Code of Crimes against International Law), Baden-Baden 2013, p. 161.

Attorney General Peter Frank who, confronted with the refugee influx after 2015, wanted to prevent Germany from being seen as a “safe haven” for war criminals.⁷⁷

However, the investigations against Colonel Klein also show that there is a high level of civil-society awareness in Germany.⁷⁸ In particular, Berlin lawyer Wolfgang Kaleck and the European Center for Constitutional and Human Rights (ECCHR) which he founded, ensure that criminal complaints are filed and potential plaintiffs are supported. While such activities were initially perceived as a nuisance by the prosecution, today Karlsruhe is often grateful for the information gathered by civil-society actors. This is another example of the importance of NGOs and individual activists in international criminal law.

The international community’s avowed commitment to not only ending the fighting and tracking down terrorist cells in Afghanistan, but also to establishing a liberal democracy and creating a society that respects human rights ultimately did not pay off. In 2021, the Taliban took over the government once again. It had not been possible to consolidate the security structures in such a way that they could have survived without foreign support. The subsequent panicked withdrawal of US forces under President Trump during his first term left behind a helpless Afghan society which had, at least to a great extent, hoped for a self-determined and free life. The Taliban government quickly turned back the clock which meant, above all, an end to women’s rights.

At 1600 Pennsylvania Avenue in Washington, D.C., Afghanistan was not initially the main focus. At the beginning of the 2000s, the White House was rather looking for a pretext to drive Saddam Hussein out of office in Iraq. Ten years earlier, George W. Bush’s father, as president, had failed to finish the “job” during the Second Gulf War. The “hawks” in the White House around Vice President, Richard Cheney, and Secretary of Defence, Donald Rumsfeld, now wanted to change that. A justification for intervention was quickly cobbled together, with claims that Hussein possessed weapons of mass destruction and was prepared to use them, primarily against Israel. A pre-emptive war was supposed to prevent such attacks. Secretary of State, Colin Powell, who had attained high esteem in the White House and among the public as Chairman of the Joint Chiefs of Staff during the Second Gulf War, appeared in person before the United Nations Security Council on February 5, 2003, to present convincing evidence. It later transpired that this evidence had been falsified, a situation which Colin Powell retrospectively described as a “blot” on his career, but it nevertheless made a big impression at the UN Plaza. On November 8, 2002, the Security Council

⁷⁷ Peter Frank and Holger Schneider-Glockzin: Terrorism and international crimes in armed conflict, in: *Neue Zeitschrift für Strafrecht* 2017 pp. 1–7, p. 1.

⁷⁸ GBA, decision of April 16, 2010 – 3 BJs 6/10-4, in: *NStZ* 2010, p. 581; Christoph Safferling and Stefan Kirsch: The criminal liability of members of the German Armed Forces on foreign missions: Afghanistan is not a legal vacuum, in: *Juristische Arbeitsblätter* 2010, p. 81; Kai Ambos: Afghanistan Einsatz der Bundeswehr und Völker(straf)recht (Afghanistan deployment of the German Armed Forces and international (criminal) law), in: *Neue Juristische Wochenschrift* 2010, pp. 1725–1727, p. 1725.

had already addressed the issue of weapons of mass destruction in Iraq in Resolution 1441, recalling that Resolution 678 authorised the use of “all necessary means” against Iraq and that Resolution 687 also obliged Iraq to disarm.

The US, together with the United Kingdom, assembled a “coalition of the willing” to invade Iraq, this time with the aim of toppling Hussein and his Baath Party government. The US invoked Resolution 1441 to legitimise its actions. Although this was a Chapter VII resolution, it clearly did not authorise the use of armed force. The three other permanent members of the Security Council agreed on this point.⁷⁹ Nevertheless, the war began on March 20, 2003. An attempt by the Security Council to denounce the war failed due to the vetoes of the US and the United Kingdom. On May 1, 2003, the Iraqi army had been subjugated and Baghdad conquered. Since then, it has not been possible to form a stable government in the country. For years, everyday life was marked by violence, terror and civil war and the power vacuum created by the invasion has basically not been filled to this day.

Despite all attempts at justification, the 2003 invasion of Iraq was a war of aggression that violated international law. This was not only the reasoning given by then Chancellor Gerhard Schröder for not joining the coalition of the willing; it was also confirmed by the Federal Administrative Court after a *Bundeswehr* major refused an order to support the US Army in the course of his duties. The refusal to obey orders was classified by the federal judges in Leipzig as being irrelevant under disciplinary law, precisely because it was a war of aggression contrary to international law. A soldier cannot be forced to participate in such a war.⁸⁰ The invasion was also condemned internationally. The then Secretary-General of the United Nations, Kofi Annan, declared the war to be in breach of international law. In the literature in the field of international law, the illegality of the war is the prevailing opinion. No evidence of weapons of mass destruction or plans for an attack could ever be found.

The fall of Saddam Hussein had another, less welcome consequence. Similar to what happened in Germany after World War II, a process of “de-Baathification” was to be carried out. This also included criminal proceedings. The Saddam Hussein Tribunal, which was set up specifically for this purpose, was a hybrid tribunal and was supposed to be an Iraqi court with strong international, in this case American, participation.⁸¹ Saddam Hussein was ultimately charged with a single isolated incident, sentenced to death and then executed. This was a mistake in several

⁷⁹ Christian Tomuschat: *Völkerrecht ist kein Zweiklassenrecht* (International law is not a two-tier law). *Der Irak-Krieg und seine Folgen* (The Iraq War and its consequences), United Nations 2003, p. 41.

⁸⁰ Federal Administrative Court, judgment of June 21, 2005 (Ref.: 2 WD 12. 04); see also Tim Metje: *Fundamental rights. Non-binding nature of a military order on grounds of conscience*, in: *Juristische Arbeitsblätter* 2006, pp. 97–99, p. 97.

⁸¹ Sascha Mikołajczyk and Amir Makee Mosa: *The case against Saddam Hussein before the Iraqi High Tribunal (IHT)*, in: *Zeitschrift für Internationale Strafrechtsdogmatik*, 2007, pp. 307–316, p. 309.

respects. A truly international court would, of course, not have been able to impose the death penalty. European states, for example, cannot support a court that imposes the death penalty as a form of punishment. In Germany, this is not only prohibited by the Basic Law but also by the European Convention on Human Rights and the European Court of Human Rights. Furthermore, the hasty execution meant that the investigation into the Hussein regime remained incomplete. This is still very much a problem to this day for those minorities persecuted and abused by Hussein.

After Afghanistan and Iraq, the “War on Terror” transformed into a drone war. Isolated killings of suspected terrorists from the air became common practice, which was continued and even expanded by George W. Bush’s Democrat successor, Barack Obama. To justify this approach, international humanitarian law was rather shamelessly redefined. Anyone suspected of terrorism was simply declared an “unlawful enemy combatant”. On the global battlefield of the “War on Terror”, such enemy combatants were ultimately deprived of their rights and could be fought anywhere. The distinction between combatants and civilians, which is fundamental to international humanitarian law, was thus largely abandoned. The American public enemy number one remained Osama bin Laden, who was obviously responsible for September 11. Ten years after the deadly attacks in New York, Washington and Shanksville, he was finally tracked down in Pakistan. A special forces unit stormed his hideout and killed him. “Justice has been served” was the comment made by Democratic US President Barack Obama, who had followed the operation from the White House Situation Room.⁸² The images of this event were broadcast throughout the world.

This particular case reveals a fundamental misunderstanding between revenge and justice. The correct course of action would have been to arrest bin Laden and bring him before a court, possibly even an international court. There was no legal justification for this killing; it was an execution. The fact that international law was also violated by the fact that the SEAL team entered Pakistani territory without authorisation is, by comparison, of little significance.

Since September 11, 2001, the American nation, which had always been proud of the Virginia Declaration of Rights of 1776, the oldest human rights document in the modern world, has been caught up in a vortex of violence and the associated gradual dismantling of human rights. The War on Terror was waged on the premise that the end justified the means. Torture prisons were set up around the world where terror suspects were held without trial and subjected to “intensive” interrogation. The Abu Ghraib torture prison in Iraq became particularly infamous. Were there any legal consequences? In fact, there were indictments...

A blatant breach of law was committed when Guantánamo was established in Cuba. The American enclave of Guantánamo served, and still serves, to detain Islamist terror suspects who

⁸² John R. Crook: U.S. special operations personnel raid compound in Pakistan, kill Osama bin Laden, in: *The American Journal of International Law*, 2011-07, Vol. 105 (3), pp. 602–605.

are then held without trial in inhumane conditions and completely without rights. Of course, this is a violation of Article 9 of the International Covenant on Civil and Political Rights. In accordance with this article, a person may only be detained if they have been convicted in a fair trial by an independent court or if they pose an acute danger. The former was never attempted in Cuba. The latter is an absurd idea, months and years after Al-Qaeda paled into insignificance.

On US territory, such a curtailment of individual human rights would have been a blatant violation of the Constitution. restriction of individual human rights would have been a clear violation of the Constitution. In Cuba, the situation was different; the US Constitution does not apply there. Of course, lawyers filed lawsuits against the US government, but they were unsuccessful.

International law is also being violated in Guantánamo. Human rights must also be observed extraterritorially. The extent of this responsibility is viewed differently in detail. However, if a state exercises actual control over a situation, then its representatives must also respect human rights, according to the European Court of Human Rights. For example, Turkey was held responsible for human rights violations in Northern Cyprus due to unlawful expropriations, as Turkey exercises actual control over the government in Northern Cyprus.

These fatal misinterpretations of international law were not legally recognised. Europe remained silent and, by and large, played along. Legal proceedings were only initiated in isolated cases. However, the European Court of Human Rights condemned Macedonia, Poland, Italy, Lithuania and Romania for participating in the US's secret torture and interrogation programmes.⁸³ September 11 itself was prosecuted in Germany as the attacks were largely planned by Al-Qaeda's "Hamburg cell". One of the pilots, Mounir al-Motassadeq, had managed the funds and simulated a normal student life in Hamburg. He was sentenced to fifteen years in prison for aiding and abetting 246 counts of murder.⁸⁴ International law did not apply here. Even though the attack can certainly be described as a crime against humanity, such a charge was out of the question at the time as the Code of Crimes against International Law did not come into force until 2002. Murat Kurnaz, a Turkish citizen born and raised in Germany, spent five years in the Guantánamo prison camp.⁸⁵ His efforts to take legal action against his detention and treatment were unsuccessful in Germany. Even a parliamentary investigation committee was unable to find evidence of mistreatment, especially by German soldiers in Afghanistan. However, a US federal court did find that there was no evidence of nya connection to terrorist cells and that Kurnaz had not been a threat to the US. Criminal proceedings in Germany were discontinued.

⁸³ See <https://www.blaetter.de/dokumente/bis-heute-hat-sich-die-bundesregierung-nicht-bei-murat-kurnaz-fuer-die-menschenrechtsverletzungen> (last accessed on May 2, 2025).

⁸⁴ The interesting revision with legal clarifications on the criminal liability of aiding and abetting: BGHSt 51, 144.

⁸⁵ He later wrote an autobiography: Murat Kurnaz, *Five Years of My Life, A Report from Guantanamo*, Berlin 2019.

Preliminary investigations into US drone strikes were also dropped. The case concerned a German citizen who had been killed in a drone strike in Pakistan. The Federal Prosecutor General considered the attack to be justified in the context of an armed conflict.⁸⁶ The fact that the US also controlled its drones from Ramstein Air Base in Germany triggered, according to the Federal Administrative Court, a duty of protection on the part of the Federal Republic. However, the Federal Government fulfils this duty through diplomatic consultations with the US.⁸⁷

September 11, 2001, marks a turning point in international law. Since then, human rights have been subordinated to security and, in some cases, blatantly violated. The US, as the central and only remaining superpower, as the self-appointed leader of the West and defender of democratic values, no longer unreservedly commits itself to respecting human rights. Terrorists have no human rights. The fight against terror legitimises governments to deny human rights to those who themselves do not respect them. What was celebrated in Nuremberg after the end of World War II as a civilisational achievement, namely, to use constitutional means against perpetrators of crimes against humanity in order to demonstrate a moral superiority, has no significance in the global war on terror. It is a fatal slide into lawlessness that has engulfed the US and the entire Western world and raises questions about the credibility of their policies and values.

[...]

⁸⁶ GBA ruling, reprinted in: *Neue Zeitschrift für Strafrecht* 2013, p. 644; see Kai Ambos: GBA decision of June 20, 2013, on the use of drones in Mir Ali/Pakistan on October 4, 2010, and the killing of German citizen B. E. – Note on the “open version” of July 23, 2013, in: *Neue Zeitschrift für Strafrecht* 2013, p. 634

⁸⁷ Federal Administrative Court, judgment of November 25, 2020 – 6 C 7/19, in: *Neue Zeitschrift für Verwaltungsrecht* 2021, p. 800 ff.