"Comedy, scandal and parody of justice!—these were the words French Prime Minister Briand used in 1921 on the Leipzig trials concerning German war crimes against the French.\textsuperscript{1} "What lesson can we learn from Versailles and Leipzig? First, the United Nations must not again trust the Germans to do justice in the case of German war criminals. To the Germans, these men are heroes." These statements were Sheldon Glueck's evaluation of the Leipzig trials as expressed in 1944.\textsuperscript{2} In 1953 the American State Department came to a very similar conclusion—that time with regard to the German attitude to the Nuremberg trials:

\begin{quote}
[...]he German position on the trials of war criminals is a problem which has continued to trouble us ever since the trials were held. The Germans have failed to accept the principles on which the trials were based and do not believe that those convicted were guilty. Their attitude is very much sentimental and can not be influenced by arguments or an objective statement of the facts. They adhere to the view that the majority of the war criminals were soldiers who were punished for doing what all soldiers do in war, or indeed were ordered do.\textsuperscript{3}
\end{quote}

\textsuperscript{*}Professor of Criminal Law and Procedure, International Criminal Law and Public International Law in the University of Cologne. The text is the extended version of the author’s inaugural lecture delivered on December 16, 2005 at the University of Cologne; the oral style was largely maintained. I wish to thank Professor Hans-Heinrich Jescheck and Judge Hans-Peter Kaul for talking to me at length as Zeitzeugen. I am also grateful to Professor Hartmut Schiedermair for sharing his memories about Hans Kelsen and Hermann Jahrreiß with me. Thanks furthermore to Thomas Darnstädt who published some highly informative articles on the subject in the leading German weekly DER SPIEGEL for a number of stimulating conversations. Anja Seibert-Fohr and Markus Benzing helped me access some precious literature on the subject from the shelves of the library of the Max Planck Institute for Foreign Public Law and Public International Law in Heidelberg. Last but not least, my sincere thanks go to Till Gut and Karl Molle for their extensive and most valuable assistance in preparation of the lecture. The article is dedicated to my teacher, Professor Thomas Weigend, with admiration and gratitude.

\textsuperscript{1} Reprinted in 48 JOURNAL DU DROIT INTERNATIONAL 442 (1921).
\textsuperscript{2} SHeldon Glueck, War criminals: Their prosecution & punishment 34 (1944).
Forty-five years later in 1998, William R. Pace, the American convenor of the global coalition of non-governmental organizations for an international criminal court passed the following verdict on Germany's international criminal law policy:

[n]o country can be prouder than Germany of their participation and support for the [International Criminal Court] . . . The German refusal to accept what they called an "alibi court," and their resistance to the highly publicized United States threats to the German leaders during the Rome Conference deserves great appreciation by the world community.4

These four quotes capture eighty-five years of German international criminal law policy and they point to an eventful story. This article will start its historic journey looking back to Versailles and Leipzig in section I. The article will then turn to Germany's critical position towards Nuremberg and towards the Nuremberg Principles until the early years of Germany's membership in the United Nations in section II. After touching upon the views expressed within German legal scholarship at the time in section III, the article shall move on to the new German policy from the 1990s in section IV. In doing so, the article will distinguish between the years when Germany showed a growing goodwill but without taking any initiatives, and the time after 1997 when Germany turned into a driving force. The article will conclude with a thought about Germany's international criminal law policy for the near future in section V.

I. Versailles and Leipzig

To say that Germany's international criminal law policy started in Versailles and Leipzig is not entirely correct. The Leipzig Trials have been called the "Prologue to Nuremberg."5 In the same sense one could say the "Prologue to International Criminal Law." But it is just a prologue because, it is not easy to prove the existence at that time of criminal law rules directly rooted in the international legal order. This is true even with war crimes that the International Military Tribunal of Nuremberg later referred to when it asserted that "since 1907 they have certainly been crimes punishable as offences against the laws of war."6 The U.S. delegates to the 1919 Commission on Responsibilities, Robert Lansing and James Brown Scott, declared as late as 1919 that "[t]he American representatives know of no international statute or convention making a violation of the laws and customs of war... an international crime, affixing a punishment to it, and declaring the court which has jurisdiction over the offence."7 At the time, Germany would, no doubt, have taken the same position.

But certainly, Versailles and Leipzig were the prologue to international criminal law. In view of numerous German killings, abuses, deportations of civilians and prisoners of war, and under the fresh impression of Germany's unconditional submarine warfare, the Ver-

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5. James E. Willis, Prologue to Nuremberg passim (1982).
sailles Treaty put an end to the longstanding European state practice of impunity in the case of war crimes. To that end, the treaty obligated Germany to "hand over to the Allied and Associated Powers, or to such one of them as shall so request, all persons accused of having committed an act in violation of the laws and customs of war." The German Government successfully rejected the Allied demand by arguing that convincing any German authority to comply with the request for arrest and handover would be impossible. Germany had to pay a price, however—it had to accept the obligation of investigating relevant cases itself. The Reichsgericht sitting in Leipzig was given the competence to adjudicate the cases in the first and last instance.

The question is: were the Leipzig trials in fact nothing more than a comedy, a parody of justice, and a scandal? In light of recent research the answer cannot be a simple "yes" thanks to the 1921 judgment in the famous case Llandovery Castle. The facts are as follows: in June 1918 the German submarine U 86 sank the English hospital ship Llandovery Castle outside a zone of military restriction. Then German soldiers opened fire on English survivors who had made their way into the lifeboats. But only one lifeboat escaped and more than 100 Englishmen died. Because the commander of U 86 had escaped, the trial focused on the naval officers Dithmar and Boldt. They were charged with aiding and abetting the firing on the lifeboats. The two officers were convicted of aiding manslaughter and were sentenced to a term of imprisonment of four years.

The judgment has proved important in two respects. First, the Reichsgericht applied the general crime of manslaughter and referred directly to the laws of war when addressing the question of a possible defense. This may not seem spectacular from today's perspective. At the time, however, the Reichsgericht was setting the course in a direction that was far from uncontroversial. This became evident from the testimony of the Supreme Commander of the German Naval Forces for the High Seas at trial. Never, he said, had the thought even occurred to the naval command that rules of general criminal law could have any significance whatsoever in combat activities.

German scholarly writing of the time echoed the military's position. In the Zeitschrift für die gesamte Strafrechtswissenschaft, a critic attacked the judgment in Llandovery Castle as containing reasoning that, "if seen from distance by our descendants will appear as a delusive mixture of untenable doctrine." But this angry criticism has proven markedly wrong. Still in 2004, the Bundesgerichtshof followed the lines set out by its predecessor when it decided the well known Italian hostage case of Friedrich Engel.

10. Llandovery Castle, 2 ANN. Din. 436 (1921 [Cmd. 1422] 45). For more details on that case, see von Selle, supra note 9, at 199; Hankel, supra note 9, at 452, 500.
11. Llandovery Castle, supra note 10, at 436.
12. Id.
13. Id.
14. Hankel, supra note 9, at 460.
15. W. Hofacker, Die Leipziger Kriegsprozesse, 43 Zeitschrift für die gesamte Strafrechtswissenschaft 670 (1921).
The second crucial legal principle in the *Llandovery Castle* judgment is the rejection of the defence of superior orders. The *Reichsgericht* found that this defence was not available where the order must indisputably appear criminal to everyone, including the subordinate. This alludes to the principle of manifest illegality that, again, was not yet clearly recognized at the time. In fact, the position that the *Reichsgericht* took was audacious in light of the wording in section 47 of the old German Code of military criminal law. The same is true if seen in a comparative perspective. Lauterpacht did not endorse the principle of manifest illegality until 1944 in the leading English treatise of public international law and he did so by relying on the *Llandovery Castle* case. Lauterpacht's reception of the principle, in turn, brought about a change in the British Manual of Military Law to the same effect. Today, the principle of manifest illegality is enshrined in article 33, paragraph 1(c) of the International Criminal Court Statute and in section 3 of the German Code of Crimes against International Law. Because of the judgment in *Llandovery Castle*, the English reaction to the Leipzig trials was more positive than the French's. In fact, the head of the English observer mission spoke of a success from the public international law perspective. In addition, it is interesting to note that the revelations of the details of German submarine warfare had some impact on public opinion in Germany. The legal view of the Navy's Supreme Command that law was irrelevant to combat activities was criticized by the liberal press as being disgraceful in the eyes of German people. For a moment, the Leipzig Trial indicated a potential to impede the formation of a national legend, a potential that we can begin to see in the former Yugoslavia as well. But the judgment in *Llandovery Castle* remains the lone exception. As for the rest of the cases, the Leipzig trials reveal in all clarity the lacking will to seriously consider the Allied war crimes charges. Then Justice Minister Gustav Radbruch commented on the Leipzig trials even after the Second World War as follows:

> [t]he war crime trials were a heavy burden for the *Reichsgericht*. The proceedings had to be handled in a dilatory manner during my term of office. . . . Once the Supreme Council declared its désintéressement as regards the future course of the proceedings, no more reason for dilatory action existed. The great number of proceedings which had been initiated on the basis of untenable accusations could now be abandoned.

Until 1922, however, the proceedings conducted were by no means based on untenable accusations. The absence of German will to prosecute is one explanation for why most of

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21. The statement of Solicitor-General Sir Ernest Pollock is reported in von Selle, supra note 9, at 200; see also id n.46.
23. For the most detailed account of the story of the Leipzig trials, see Hankel, supra note 9, at 89 et seq.
the proceedings still ended in acquittals or were abandoned. The German judiciary availed
itself of a similarly excessive concept of Kriegsnotwendigkeit [military necessity] as the Ger-
man military. It converted the recognized limitation of certain prohibitions of the laws of
war through the concept of military necessity into something akin to a general German
reservation to the ius in bello. Through that method, the Reichsgericht could use Kriegsno-
twendigkeit almost as a legal passepartout to the benefit of the German accused. Moreover,
both the way the judiciary conducted proceedings and weighed evidence revealed an ap-
preciable degree of bias in the bench. For example, a witness against an accused general
would be asked: “you will not be able to dispute the facts as stated by his Excellency, the
general, will you?” Afterward, the presiding judge would keenly turn to the accused general
and say: “Excellency, I did, of course, not wish to place the slightest doubt on your words,
I only had to confront you with that which it is my duty and office to confront you with.”
It comes as no surprise that in most cases, the court did not have the slightest doubt of the
compelling necessity of an acquittal. Its words of choice to express this view were that the
trial had not yielded “any shadow of evidence” to support the charge.

To conclude, the following overall assessment continues to hold true: in the words of
modern international criminal law, the Leipzig trials are a prime example of the absence
of a genuine will to investigate alleged war crimes charges. The reason why such a will was
absent becomes apparent from the following passage of the memoirs of the then Chief
Prosecutor, Ludwig Ebermayer:

[even today I still find it hard to understand that we took on the obligation in the Versailles
treaty to have these war crimes . . . prosecuted in Germany and in the German courts. We had
lost the war, we had to submit to the harsh conditions of the enemy, dictated by hate and
revenge, and we suffered losses, both of land and money, something which was unavoidable.
We should, however, have never ever allowed ourselves to submit to the condition of prose-
cuting our own people for these so-called war crimes, when no other country involved in the
war took it upon themselves to undertake such an obligation. Such a concession went against
our honour.24

Was Leipzig, for those reasons, a setback on the way to the establishment of an inter-
national criminal legal order? This author thinks the answer is no. Rather, the failure of
Leipzig has helped to more clearly identify two fundamental problems of international
criminal law. First, the quote from Ebermayer, while ignoring the national sentiment of that
period, highlights the problem of an asymmetrical enforcement of international criminal
law; this problem has not lost its relevance in our days.25 That Germany was not the only
party to the First World War that is responsible for war crimes is beyond question. Thus
one lesson from Leipzig is that even where the war crimes charges differ in nature and
scope, a one-sided prosecution will raise a question of legitimacy. Second, Leipzig illustrates
a raison d’être of international criminal law—that state will to investigate and prosecute a
case of alleged state-based crime is inherently fragile. The inherent skepticism whether
there will be a genuine reaction to such criminality at the national level constitutes one
main reason for the need to set up at least a complementary26 international criminal juris-

24. LUDWIG EBERMAYER, FÜNFZIG JAHRE DIENST AM RECHT, 190 et seq. (1930).
25. For an analysis of the same problem in the early practice of the International Criminal Court, see Claus
26. For a stimulating policy argument in favor of a decentralized system of international criminal justice, see

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dition. Complementary international criminal jurisdiction in turn presupposes the existence of truly international criminal law rules. Thus the existence of a direct link between the failure of Leipzig and the breakthrough of international criminal law before the Nuremberg Tribunal is not surprising. In his opening speech, the American chief prosecutor asked early on whether one should leave it to the Germans to prosecute their criminals. Jackson declared that “the world-wide scope of the aggressions carried out by these men has left but few neutrals. Either the victors must judge the vanquished or we must leave the defeated to judge themselves. *After the First World War we learned the futility of the latter course.*”

Thus Germany had inadvertently contributed to the birth of international criminal law not only through the war crimes committed under its name during the First World War but also through its unwillingness to punish these crimes. It follows quite naturally that no positive attitude towards international criminal law resulted from that experience. In 1934, Hellmuth von Weber prefaced his study of the subject, which remained isolated at the time, as follows:

> It has gone almost unnoticed by the German public that a movement to establish an international criminal jurisdiction has started after the World War. The German reservation is rooted in the fact that this movement has at its origin the allegation of Germany’s responsibility for and during the war. Such allegation made it impossible for a German to take a positive attitude towards the said movement.

II. Nuremberg and the Nuremberg Principles

*Nuremberg* bolstered this negative position towards international criminal law for quite a while. And the feeling of offended national dignity acquired from Leipzig resurfaced, this time specifically in connection with the *Nuremberg* follow-up trials before American, British, and French military tribunals. In a judgment from 1958, the *Bundesgerichtshof* quoted a statement from a member of parliament, Dr. von Merkatz, stating that the non-recognition of the *Nuremberg* judgments was a matter of “German dignity.” Recent research supports the idea that this statement by a parliamentarian mirrors a widely held view among the German population. But the overwhelming part of those convicted in the *Nuremberg* trials were not persons who acted “in the heat of the battle” as it was often said euphemistically. Instead, the sentenced persons belonged to the *Einsatzgruppen* or were guards in concentration camps. In light of the monstrosity of the crimes committed by the *Einsatzgruppen* and in the concentration camps, it is difficult to understand why quite a few Germans saw *Nuremberg* as an assault upon German dignity. This may be said today without ignoring the fact that the German experience of the 1950s, though presenting itself quite pointedly, does not appear to be specifically German in nature. The convictions of Italian war criminals by British military tribunals provoked very similar reactions among the Italian population.

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as among the German population. The criticisms voiced in Serbia and most recently in Croatia regarding the arrest of General Gotovina *vis-à-vis* the work of the International Criminal Tribunal for the former Yugoslavia (ICTY) show that the phenomenon continues to be relevant.

But returning to Germany, the federal government was always accurately informed about the type of inmates kept in Allied custody in Landsberg and Werl. Accordingly, the government refrained from relying on Germany's dignity in the context of Nuremberg. Instead, the government argued on two levels. First, it advanced humanitarian grounds for pardon. Second, it challenged the Nuremberg trials on strictly legal grounds. It relied upon three fundamental guarantees pertaining to criminal justice that were introduced or reintroduced by the German Grundgesetz: the prohibition of the death penalty, the rule against the establishment of a special criminal jurisdiction, and the principle of *nullum crimen sine lege*.

The controversy surrounding the *nullum crimen* principle is remembered best. The controversy is also reflected in the European Convention on Human Rights as the prohibition against *ex post facto* laws was qualified in article 7, paragraph 2, in order to place the Nuremberg proceedings beyond question. According to this qualification, punishment of a certain conduct conforms with human rights if, while not having been a criminal offence in the forum, impunity would contradict general principles of law recognized by civilized nations. On a sensible reading, this qualification has a narrow scope of application. Essentially, it aims at criminality pursuant to a state policy. When a successor regime decides to deal with its past, the qualification is meant to preclude the positivist reliance on the fact that the criminal regime had legalized the human rights violations and had thereby exempted from criminal responsibility those who committed the violations. Despite this narrow focus, Germany made a reservation to the qualification in question. The Foreign Relations Committee of the German Parliament explained this reservation by reference to the abuses that Germany experienced with the abolition of the *nullum crimen* principle by the Nazis.

Since this article is based on an inaugural lecture delivered at the Cologne Law School, it should perhaps be mentioned that scholars who belonged to this law school took a very active part in the Nuremberg controversy. This is true first and foremost for Hermann Jahrreiß who was appointed director of the Seminar for Public International Law in 1937 and who belonged to the law school for fifty-five years thereafter. In Nuremberg, Jahrreiß was part of Major-General Jodl's defense team. During the course of the final pleadings he had to argue on behalf of all defendants in general that the charge of waging an aggressive war was contrary to the principle of non-retroactivity. Jahrreiß eloquently concluded that

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32. For an illuminating recent contribution, see HELMUT KREICKER, ART. 7 EMRK UND DIE GEWALTATEN AN DER DEUTSCH-DEUTSCHEN GRENZE 96 et seq. (2002).


34. Telford Taylor praised Jahrreiß's performance in Nuremberg as "excellent" and stated that he was impressed by the "dignity, skill of words and genuine passion" of Jahrreiß's closing argument. TELFORD TAYLOR, THE ANATOMY OF THE NUREMBERG TRIALS 433, 474 et seq. (1992).
The regulations of the Charter negate the basis of international law, they anticipate the law of a world state. They are revolutionary. Perhaps in the hopes and longings of the nations the future is theirs. The lawyer, and only as such may I speak here, has only to establish that they are new, revolutionarily new. The laws regarding war and peace between states had no place for them—could not have any place for them. Thus they are criminal laws with retroactive force.15

Not long before Jahrreiß pleaded in Nuremberg, Carl Schmitt had already rejected the concept of criminal aggressive war as retroactive in nature. Friedrich Flick asked Schmitt, who belonged to the Cologne Law School for six months in 1933, for a legal memorandum on the matter because Flick was afraid he might be put in the dock in Nuremberg along with Germany's alleged major war criminals.36 The fact that this memorandum was even written is remarkable on its own. Eleven years earlier, in his horrible article "Nationalsozialismus und Rechtsstaat,"37 Schmitt had declared that the nullum crimen principle ought to be replaced by the new principle of justification of nullum crimen sine poena. The ground for the abolition of the nullum crimen principle by the Nazis was then prepared. Obviously, Schmitt was not disturbed by the fact that with this in mind his brief would necessarily have a negative overtone regardless of its intellectual vigor. The brief is remarkable in yet another respect. Schmitt significantly narrowed down the scope of the non-retroactivity principle with regards to international criminal law. In particular, Schmitt expressed that the retroactive application of the crime against humanity did not violate international law. This view was based on the peculiarity of the common law method. According to Schmitt, at the time, the common law also recognized the concept of creative precedent even in the area of criminal law. Such a creative precedent is understood to reveal through considerations of natural justice and common sense what is perceived as a pre-existing criminal offence. Schmitt then distinguished the waging of a war of aggression from crimes against humanity. The highly political and genuinely international character of waging a war of aggression exemplifies its distinctive nature. In light of this specificity, the idea of holding individuals criminally responsible for waging a war of aggression in 1939 was presented as too novel even for a creative precedent.

The Nuremberg judgment rebutted this argument with an audacious argumentum e fortiori based on the undisputable criminality of war crimes: "In the opinion of the Tribunal, those who wage aggressive war are doing that which is equally illegal, and of much greater momentum than a breach of one of the rules of the Hague Convention."38

As early as 1944, Hans Kelsen had gone even one step further. Kelsen was the founder of the Seminar for Public International Law at Cologne Law School, which received its current name as Institute for Foreign Public Law and Public International Law in 1950. Kelsen taught in Cologne from 1930 to 1933 before he was driven out of office by the

35. The quote is from a typescript of Jahrreiß's closing argument. It is part of his personal Nuremberg file that he left with his former Seminar, the now Institute of Foreign Public Law and Public International Law. The author's sincere thanks goes to the director of the Institute, Professor Bernhard Kempen, for allowing him to conduct research into these documents at his Chair for Criminal Law, Criminal Procedure, European Criminal Law and International Criminal Law.

36. The memorandum has been reprinted and usefully annotated in Helmut Quaritsch, Carl Schmitt. Das internationalerechtliche Verbrechen des Angriffskrieges und der Grundsatz "Nullum crimen, nulla poena sine lege" passim (1994).


38. Judgment of the International Military Tribunal, supra note 6, at 40.
Nazis—and against opposition by his faculty.\(^3\) When he entered into the debate about non-retroactivity and the prosecution of the Axis war criminals, Kelsen was professor of public international law and jurisprudence in Berkeley. Kelsen started with the premise that an international prohibition against an ex post facto rule of criminal law can only derive from a general principle of law. The common law, however, contained a prohibition against retroactive criminalization only in cases of previously innocent acts. On the other hand, the war of aggression had lost its innocence under public international law by virtue of its prohibition under the Briand-Kellogg Pact.\(^4\) From this, Kelsen could deduce that the German leaders could be punished for waging aggressive wars without violating international law. This must still be considered to have been an arguable case in the days of Nuremberg and it should be noted that in his leading modern treatise on international criminal law, Cassese appears to approve of Kelsen's line of reasoning.\(^4\) It may well remain an open question forever whether retroactive criminalization of the waging of an aggressive war contravened international law as it stood at the time. This article shall return to the question whether the American insistence on the extremely creative precedent concerning aggressive wars is of enduring importance.

But coming back to the efforts of the German government to reduce the legal effects of the Nuremberg trials as much as possible, eventually these efforts were more successful than Japan's concerning the Tokyo Trial. Germany negotiated its non-recognition of the Nuremberg follow-up judgments into article 6 number 11 of the 1955 Convention on the Settlement of Matters Arising out of the War and the Occupation.\(^2\) The British Foreign Office justified this concession laconically by stating that in contrast with Japan, an army was expected from Germany. Sixty years after the Nuremberg trial, one should also remember this agreement that has been criticized by some as "Nuremberg's grave."\(^3\) In response to an ardent German campaign for pardon, by 1958, the occupying powers also had released all persons convicted in the course of the follow-up trials to Nuremberg. The last grants of pardon concerned staff officers of the SS, who had originally been sentenced to death in the Einsatzgruppen trial for their involvement in the mass murders.

The year 1958 marks a historical irony with regards to the reaction to German crimes under international law. On the one hand, the project of Nuremberg—with the exception of Spandau—drew to a close in a manner that casted doubts on the perseverance of the Allied Powers. Helmut Quaritsch, perhaps the harshest German critic of international criminal law, has taken the surge of pardons as another piece of evidence after Leipzig that despite their often emphatic commencement, international criminal cases tend to wind up as false amnesties.\(^4\) On the other hand, 1958 also stands for the decisive turnaround towards


\(^5\) Antonio Cassese, INTERNATIONAL CRIMINAL LAW 142 et seq. (2003).

\(^6\) BGBI. II 1955 at 405.

\(^7\) The German historian and journalist Jörg Friedrich coined the term. He has conducted extensive research into the matter. See Jörg Friedrich, Das Grab von Nürnberg. Zur Annullierung der Kriegsverbrecherurteile (unpublished manuscript, on file with the author).


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an intensification of German prosecutions of crimes under international law committed under the Nazi rule. In that year, the German Länder established the Central Investigative Agency for Nazi Crimes located in Ludwigsburg. Only through this concentration of competence did it become possible to carry out systematic preliminary investigations of crimes against humanity that were alleged to have been committed by Germans outside the territory of the Federal Republic of Germany. These preliminary investigations resulted above all, in the crucial 1963 to 1965 Frankfurt Auschwitz trial that the legendary Chief Regional Prosecutor, Fritz Bauer, initiated.

However, those proceedings were not conducted on the basis of the Nuremberg Principles and in the Auschwitz trial, the crime of genocide was not among the charges, although it had been incorporated into the German Code of Criminal Law following the adoption of the 1948 Genocide Convention. Instead, the standard criminal offenses of murder and manslaughter formed the legal basis for the proceedings. In light of the German protest against Nuremberg, the decision against the Nuremberg principles is unsurprising. But this decision was by no means uncontroversial, which is rarely mentioned: Until 1950, German courts continued to apply the law of Nuremberg in some cases. Most important in this respect is the case law on crimes against humanity under Allied Control Council Law Number 10 as developed by the Supreme Court for the British Occupation Zone which had been set up in Cologne in 1947. In 1951, a majority of the German Länder were of the view that the Nuremberg crime against humanity should also apply to future proceedings; it was seen as an appropriate tool to deal with the systemic crimes committed under the Nazi regime. This position did not prevail, however. The Federal Ministry of Justice relied on the principle of non-retroactivity that meant, by implication, that the case law of the Supreme Court for the British Zone would be rejected. Then president of the Bundesgerichtshof, Hermann Weinkauff, voiced the strongest opposition against Control Council Law Number 10. He criticized Law Number 10 as vague and completely alien to German legal thought. The specificity of the crime against humanity could, of course, be questioned at the time as it can—in some respects—be questioned now. One wonders, however, whether an equally rigorous and loud critique was ever articulated by the same critics regarding some of the rather imprecise definitions of crimes as contained in the German Code. The position


46. These investigations bear a certain resemblance with the activity that the International Criminal Court Prosecutor undertakes before deciding under article 53 of the International Criminal Court Statute whether to initiate an investigation.

47. For an excellent documentation of this trial, see GERHARD WEHRLE & THOMAS WANDRES, AUSCHWITZ VOR GERICHT. VÖLKERMORD UND BUNDESDEUTSCHE STRAFJUSTIZ, passim (1995).

48. Former section 220a of the Criminal Code was introduced into the Criminal Code in 1954; in 2002 the provision was transferred to section 6 of the new Code of Crimes against International Law. For a commentary see Claus Kreß, § 220a/§ 6 VStGB, in 3 MÜNCHENER KOMMENTAR ZUM STRAFGESETZBUCH 638 (Wolfgang Joecks & Klaus Miebach eds., 2003).


50. The official collection of the case law of the Court is contained in three volumes called Entscheidungen des Obersten Gerichtshofes für die Britische Zone in Strafsachen, 1949/1950. For a recent appraisal, see Hinrich Rüping, Der Einfluß von Prinzipien der Nürnberger Prozesse auf das deutsche Strafrecht, in Festschrift für HELMUT PIEPER 445 (Peter Salja ed., 2000).

51. Cf. BROCHHAGEN, supra note 30, at 166 et seq.

52. Fit examples would be the requirements of "base motives" ("niedrige Beweggründe") for murder under
that Weinkauff took was also telling insofar as the Bundesgerichtshof considered certain Nazi laws that legalized certain outrageous conduct as void for contradicting natural law. Only a later ruling of Germany's Constitutional Court would reveal the fact that the reference to natural law differed more in its legal construction than in substance from the formally retroactive application of Allied Control Council Law Number 10 to the crimes against humanity during the Second World War.

Notwithstanding this issue of legislative policy, the German criminal judiciary received multiple reprimands, and not only from abroad, for its approach towards Nazi atrocities during the period after 1958. The Königstein Declaration of 1966 gained notoriety when an expert group instituted by the most prominent German law reform commission, the Deutscher Juristentag, spoke out against undeserved clemency of the criminal judiciary towards Nazi felons. This article argues, however, that the final appraisal should not be overly critical, even though leaving out of account here the Bundesgerichtshof's self-assessment of its own adjudication of Nazi judicial injustice, which it labeled an "overall failure." From 1958, the applicable statutes of limitation only left room for murder and manslaughter charges. In that respect, one can criticize how the German courts applied the untenable, extremely subjectivist doctrine of participation as a covert mitigating factor benefiting the recipients of superior orders who had killed in mere compliance with Nazi policies. Even more remarkable is the fact that the East German border snipers were subsequently denied the status of simple aiders and abetters. This body of case law on Nazi killings, however, needs to be viewed against the backdrop of the thorny German law on capital offences. German law lists the elements of the crime of murder in highly questionable phrasing while providing for mandatory lifetime imprisonment. German courts usually deemed it inappropriate to impose this ultimate sanction on so-called Mitläufer (subordinates acting upon superior orders). Such moderation appears to be well-founded in social psychology and consonant with the first sentencing judgment rendered by the ICTY, in which the court held that pressure to conform generated through "virulent propaganda" should be considered when imposing the sentence. With respect to those offenders who commit crimes


53. Weinkauff himself later explained this line of cases in Hermann Weinkauff, Der Naturrechtsgedanke in der Rechtsprechung des Bundesgerichtshofes, 1960 NEUE JURISTISCHE WOCHENSCHRIFT 1689.

54. See the text and the reference accompanying infra note 83.

55. Cf. the report in 1966 NEUE JURISTISCHE WOCHENSCHRIFT 2049.


57. Instead, they were incorporated as "Täter vor dem Täter" ("Perpetrator in front of the Perpetrator") into Claus Roxin's theory of a "Täter hinter dem Täter" ("Perpetrator behind the Perpetrator") as a specific form of principal perpetratorship to capture those who direct other persons through a hierarchical quasi-State apparatus. One may note that Roxin developed his theory as early as 1963 in critical response to case law on Nazi killings in his famous article Straftaten in Rahmen organisatorischer Machtsapparate, in GOLTDAMM's ARCHIV IN STRAFSACHEN 193 (1963). The two leading judgments of the Bundesgerichtshof that finally endorsed Roxin's theory are reprinted in 39 AMTLICHE SAMMLUNG DER ENTSCHEIDUNGEN DES BUNDESGERICHTSHOFES IN STRAFSACHEN 1 (1994) and in 40 AMTLICHE SAMMLUNG DER ENTSCHEIDUNGEN DES BUNDESGERICHTSHOFES IN STRAFSACHEN 218 (1995).

58. FRANK NEUBACHER, KRIMINLOGISCHE GRUNDLAGEN EINER INTERNATIONALEN STRAFGERICHTSBARKEIT 430 et seq. (2005).

under international law based on superiors' orders, consistency in meting out criminal justice manifests itself not in the harshness of the sentence but in the finding of guilt as such. That there may well be such guilt despite the order and in what it consists, has been expressed most memorably by Jewish physician Otto Wolken in his witness testimony during the Auschwitz trial. Dr. Wolken, who practiced as a medical doctor while detained in Auschwitz, stated that

I have come here, free of any hatred, free of any vengeful feelings. Twenty years have passed since then. I have survived but for a lucky twist of fate. What ought to make us think is the fact that this machinery of death would have never gotten underway, had not tens of thousands stood ready to operate it. That is the guilt of the Accused. 60

German courts have asserted this guilt, along with the far greater one of overenthusiastic executioners and those at the superior levels of the state apparatus many times since 1958. In the tradition of *Llandovery Castle* jurisprudence of the *Reichsgericht*, they have frequently refuted the defense of *respondeat superior* according to the principle of manifest illegality. Moreover, it may indeed have been conceded that some of the accused held a belief of having acted under duress. As to their factual findings, though, the courts constantly denied the existence of duress arising from orders, and thus thwarted the comforting emergence of a myth. With regard to criminal procedure, many of the problems that contribute to delays in the proceedings before the international criminal courts today were also encountered during the major trials in Germany. The indictment in the Auschwitz trial comprised 700 pages and the judgment comprised 900 pages; Presiding Judge Hofmeyer stated in retrospect that the adjudication of this case had pushed the outer limits set by the physical realities of the administration of criminal justice. 61 The *Majdanek* case before a Düsseldorf jury court, the most extensive trial against Nazi felons in German legal history even exceeded this experience. 62 Finally, the German judiciary undertook substantial efforts to dispel the recurring threat of statutory limitations. The *Bundestag* debates on the issue of statutory limitation, which culminated in declaring murder exempt from limitations in 1979, are rightly hailed as stellar moments of German parliamentary history. It seems fair to conclude, in spite of all oversights and flaws, that Germany did not lack the genuine will to prosecute Nazi crimes in the years after 1958; thus Leipzig did not repeat itself. And seen from the perspective of the overall history of international criminal law, a comparative glance may perhaps be cast on Japan: Since the Tokyo trial, no other trial for an alleged crime under international law has been reported to have taken place to date. 63

What were, at that point, the future prospects of German international criminal policy? The protest against *Nuremberg* had been placed on record. Moreover, as we have just seen, genuine efforts had been made since 1958 to react to past crimes under international law committed by Germans. Against this backdrop and considering Germany's foreign policy

60. Werle & Wandres, supra note 47, at 59.
61. The statement is reported in 1966 *Neue Juristische Wochenschrift* 2050.
62. The *Landgericht Düsseldorf* rendered its judgment on June 30, 1981. The trial lasted five years and seven months and the overall proceedings took twenty-one years if one includes the preliminary investigations phase. Röckerl, supra note 45, at 204.
63. Philipp Osten, Der *Tokioter Kriegsverbrecherprozess und die japanische Rechtswissenschaft* 120 et seq. (2003). The U.S. occupying authorities stopped the Japanese authorities from initiating proceedings for war crimes in 1945 and 1946 because they feared alibi proceedings would create the defense of ne bis in idem. Id.
emphasis on multilateralism and the rule of law in international relations, one could have expected Germany to take a more favorable stance towards international criminal law for the future. The first opportunity to take such a position at the international level came in 1978 when the sixth Committee of the General Assembly of the United Nations resumed its work on the codification of international criminal law, a task it had abandoned in 1954. But when Germany took the floor in 1980, it spoke out against international criminal law without great diplomatic clouding. According to the record, the German delegation voiced serious doubts about the usefulness of resuming the discussion about the Nuremberg principles. Whether it would be possible to pronounce rules of international criminal law that could gain support from the international community was deemed questionable. Thus it would take more time before Germany became ready for a new policy on international criminal law.

III. Germany's Legal Scholarship and Nuremberg Between 1945 and the Early 1990s

Before moving on to the shift in German foreign policy, this article will touch briefly upon the views expressed within Germany's legal scholarship at the time. In a nutshell, there was no significant opposition to the government's line. This is true first, for the branches of criminal law scholarship. As far as criminology is concerned, for many years only Herbert Jäger took a special interest in researching the specifics of systemic criminality. With regards to dogmatic criminal law scholarship, speechlessness was again widespread when it came to international criminal law, although Hans Heinrich Jescheck constitutes a noteworthy exception. From 1947 through 1949, and under the fresh impression of press reports about German concentration camps that reached Jescheck during his time as prisoner of war in France, he wrote his monumental work on the responsibility of state organs under international criminal law. This book, published in 1952, firmly established the word Völkerstrafrecht as the German term of art. It also defined the concept with utmost precision and with validity which endures today.

If State organs are directly responsible towards the international community for breaches of public international law they must, to that extent, be seen as subjects of that legal order. The individual is then not only citizen of his or her State but member of another and higher society which comprises all States, the civitas maxima. International criminal law presupposes the existence of a set of global rules which penetrate through the shell of State sovereignty, which are directly binding upon everyone within the State and which prevail over conflicting national rules.

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65. Cf. in particular, Herbert Jäger, Makrokrimalität. Studien zur Kriminologie kollektiver Gewalt, passim (1989). Recent growth of research interest is evidenced in Christina Möller, Völkerstrafrecht und Internationaler Strafgerichtshof—kriminologische, straftheoretische und rechtspolitische Aspekte passim (2003); Neubacher, supra note 58, at passim.
67. Id. at 11.
Yet even in Jescheck's work international criminal law remains a project that has only started to slowly leave the realm of utopia to enter the political and judicial sphere. In 1965, Jescheck even sounded as if he had come to the conclusion that international criminal justice would remain a utopia. After ten years without touching upon the early drafts of the International Law Commission, his words were that "[b]oth drafts seem to us today to be the result of a very promising, yet unsuccessful attempt of creating a legal system truly reflecting the idea of the international community." In the years following 1965, Otto Triffterer, a student of Jescheck, remained the only German criminal lawyer who took an interest in further developing international criminal law. With regards to Germany's public international lawyers, the picture is essentially the same: international criminal law commanded, at best, a very peripheral interest at the time. To the extent that this topic was at all touched upon, the reactions were a mixture of skepticism and rejection. Quaritsch, the tireless critic, called the debates within the International Law Commission "glass bead games by an international sect of lawyers." And Wilhelm Grewe, the eminent historian on international law and the influential international legal advisor of the Foreign Office in Adenauer's days articulated the following plainly negative assessment:

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


As we know, the turbulent development since the 1990s caused the realist Grewe, to be disproved by reality. It is a fascinating piece of contemporary legal history to see how and
why the German position towards international criminal law has changed in the course of this development. To begin with, Germany was not among the driving forces when it came to the establishment of the two international criminal courts for the former Yugoslavia and Rwanda. In both cases, the United States, as in Nuremberg, was the key player. In 1995, it was rather by chance that Germany made possible the first and groundbreaking international criminal trial before the Yugoslavia Tribunal. The Bavarian criminal justice authorities had pursued a case against Tadic up to the point when it was ready to go to trial, when Germany received a request from the Yugoslav Tribunal to hand the case over to it. Germany fulfilled the unusual request and sent the case from the national to the international level. This step was of considerable significance. Thinking back to the year 1995 for a moment, the Yugoslav Tribunal had existed for two years but was still without an accused in the dock because of the reluctance of the United Nations peacekeeping forces. Quaritsch, our critic, had already convinced himself that the establishment of the Tribunal was no more than “a nostalgic gesture of symbolic politics to meet the disappointment about the failure of the world community and the European States.” In this precarious moment, the Yugoslavia Tribunal decided to issue this unusual request. In order for the Tribunal to be able to conduct its first criminal trial in legal history, it agreed that the accused be only a middle-level officer. Germany fulfilled its international duty when it complied with the request.

Still, one cannot fail to note a stark contrast with Germany’s position on Nuremberg: In the early 1950s, the German Minister of Justice refused to recognize the Nuremberg case law on the basis of the constitutional impermissibility of special criminal jurisdictions. Following the logic of this argument, it would not seem to have been far-fetched to also criticize the ICTY, which was established ad hoc and partly ex post facto. Perhaps even more remarkable from a historical perspective is the fact that Germany would enforce the international sentence of imprisonment imposed on Tadic. It must be noted that the Tadic case law comes close to the Nuremberg jurisprudence both in its legal significance and in its method. In terms of substance, the Tribunal paved the way for the recognition of war crimes in non-international armed conflicts and for crimes against humanity committed in times of peace, and thus for the “second generation of international criminal law.” As for method, the groundbreaking appellate decision in Tadic on October 2, 1995 was as much a creative

74. The story behind the First International War Crimes Trial Since Nuremberg is told most vividly by Michael P. Scharf in MICHAEL P. SCHARF, BALKAN JUSTICE passim (1997).
75. For a comment by one of the German prosecutors involved in the case, see Rainer Griesbaum, Über die Verfahrensgründe des Jugoslawien-Strafgerichtshofes, auch im Vergleich zum nationalen Recht, in VÖLKERRECHTLICHE VERBRECHEN VOR DEM JUGOSLAWIEN-STRAFGERICHTSHOF, NATIONALEN GERichten UND DEM INTERNATIONALEN STRAFFERICHTSHOF 117, 130 et seq. (Horst Fischer & Sascha Rolf Lüder eds., 1999).
76. It is telling that the former ICTY Judges Sir Stephen and Vorah highlight the importance of the Tadic case while looking back to the early years of the Tribunal. See Sir Ninian Stephen, A Viable Mechanism, 2 J. INT’L CRIM. JUST. 385, 386 (2004); L.C. Vohrah, Some Insights into the Early Years, 2 J. INT’L CRIM. JUST. 388, 390 et seq. (2004).
77. Quaritsch, supra note 44, at 228.
79. Prosecutor v. Tadic, Case No. IT-94-1AR72, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction (Oct. 2, 1995).
precedent as the *Nuremberg* judgment. Accordingly, it was also susceptible to criticism under the principle of non-retroactivity. If we study the case made by the ICTY Appeals Chamber for recognizing war crimes committed in non-international armed conflict crimes under customary international law, the parallels to *Nuremberg* are particularly evident. Indeed the ICTY expressly establishes them by relying on the *Nuremberg* precedent at a crucial juncture of its reasoning. On a final analysis, the Tribunal’s audacious case law on war crimes committed in non-international armed conflicts—without acknowledging it—follows the line of the *Nuremberg* qualification to the European Convention on Human Rights: denying the criminality of conduct underlying a civil war crime using the general principles of law as recognized by the civilized nations is difficult. Therefore, the creative precedent essentially consisted of internationalizing a pre-existing national accountability under domestic law. How this latter fact could satisfy Germany despite its reservation against the *Nuremberg* qualification to the European Convention on Human Rights, was, of course, difficult to see. Germany’s further decision to enforce the *Tadic* sentence could thus be regarded as another step back from the country’s *Sonderweg* regarding non-retroactivity and international criminal law.

The first step back was perhaps the decision not to protest against the Israeli proceedings in *Eichmann* as those proceedings were conducted on the basis of a formally retroactive statute of 1950. Germany’s Constitutional Court then took the critical step in 1996. In the context of state criminality in the former East Germany, the Court accepted an exception to the principle of non-retroactivity. Reasons of substantive justice were said to now forbid invoking a defense that had been available previously, if that defense had been formulated by the state to legalize serious violations of internationally recognized human rights. In this article’s context, whether the recognition of the said exception was necessary to deal with the border regime installed in East Germany is of secondary importance. The alternative would have been to confront the perpetrators with the applicable law at the time of their conduct and to interpret this law in conformity with human rights. What matters in this article’s context, is the recognition of an exception to the principle of non-retroactivity that covers not only international criminal law *stricto sensu* but more generally, criminality pursuant to a state policy. In essence, the exception corresponds with the

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83. On the *Eichmann* case, see, above all, Attorney-Gen. of the Gov’t of the State of Isr. v. Eichman, 36 I.L.R. 277, 281 (S. Ct. 1962) (Isr.).

84. Decision of 24 October 1996, 95 AMTLICHE SAMMLUNG DER ENTSCHEIDUNGEN DES BUNDESGERICHTS 96, 133.

85. The *Bundesgerichtshof* took this approach in its ground-breaking judgment on November 3, 1992. See 39 AMTLICHE SAMMLUNG DER ENTSCHEIDUNGEN DES BUNDESGERICHTSHOFES IN STRAFSACHEN 1, 15 et seq.

86. Cassese, *supra* note 41, at 139 et seq., 140 n.9 (2003) (categorizing the approach chosen by the Constitutional Court as an exception to what he calls the doctrine of strict legality based on a consideration of substantive justice).
Nuremberg qualification to the European Convention on Human Rights. This is true even though the Constitutional Court has confined the exception to the level of defenses because strictly maintaining such a limitation is impossible in light of the judgment's ratio decidendi. The Constitutional Court has ruled that the principle of non-retroactivity is not meant to protect the belief in the legality of the most serious human rights violations, if such legality has been created by a regime that defies the rule of law. This idea would also apply if the regime chooses a different technique of legalization and qualifies the definition of the crime itself in gross violation of internationally recognized human rights. It would appear from the judgment that the Constitutional Court could, in such a case, accept an exception to retroactivity concerning the very definition of the elements of the crime. This conclusion stems from the fact that the Constitutional Court refers to the Supreme Court of the British Zone case law and considers the formally retroactive application of Allied Control Council Law Number 10 by the latter court as a solution in similar conflict. The German government has pursued the path of the Constitutional Court to a logical end before the European Court on Human Rights. Here, it has justified German case law on the border regime also by reference to the Nuremberg qualification. The old German reservation to this qualification has now become a hindrance and was demoted to the status of a legally irrelevant statement of intent in a convoluted last paragraph. In fact, a degree of reluctance is noticeable even with regards to the mentioning of the reservation as such. Germany made the final step that had been overdue on October 5, 2001. On this day, Germany formally withdrew what was no longer called a reservation to the Nuremberg qualification. Apart from its logic, this decision carries symbolic weight in two respects. First, it signals a belated reconciliation with Nuremberg. Second, it points to a completely new German policy on international criminal law. By the year 2001, the period of benevolent reaction was long over; Germany had become a driving force behind international criminal law.

Interestingly, all three government branches enter into this new picture. The executive has left its mark by its very active involvement in the negotiations on the Statute of the International Criminal Court within the group of the so-called like-minded states. The opening quote from William Pace alludes to the fact that the German delegation contributed more than marginally to the birth of the first permanent International Criminal Court in legal history. That Germany's commitment was not directed to an extension of the subject matter of international criminal law is worth stating. Quite to the contrary, Germany advocated its limitation to the crime of aggression, genocide, the crime against humanity, and war crimes. In each case, Germany worked towards definitions of the greatest possible precision and opposed the lowering of general prerequisites of individual criminal responsibility. The express reference to the principle of culpability in rule 145, paragraph

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87. Decision of 24 October 1996, supra note 84, at 133 et seq.
89. German Minister of Justice Brigitte Zypries recently expressed the new German view on Nuremberg in Brigitte Zypries, Das Völkerstrafrecht 60 Jahre nach den Nürnberger Prozessen unter besonderer Berücksichtigung der Herausforderungen an die Anwaltschaft, in RECHTSPOLITIK UND BERUFSPOLITIK. FELIX BUSSE ZUM 65. GEBURTSTAG 324 et seq. (Martin Henssler et al. eds., 2005).
90. Pace, supra note 4, at 197.
1(a) of the Rules of Procedure and Evidence\(^91\) is due to a German request. Germany was keen, however, to see that this rather narrow concept of international criminal law be construed with full recognition of the principle of universal equality before the law.\(^92\) It would have flown into the face of this principle to establish the International Criminal Court as a “permanent ad hoc Tribunal” of the Security Council. Therefore Germany, together with the great majority of states, was in favor of empowering the international prosecutor to take up situations \textit{proprio motu}, under the control only of the international judges.\(^93\) Germany also advocated that the International Criminal Court have universal jurisdiction to ensure universal equality under the law. The underlying idea is a conception of the International Criminal Court as a new organ of the international community, enabling the community to directly enforce international criminal law regardless of the place of the alleged crime and the nationalities of the alleged offender and of the victim. With respect to the universality principle, Germany remained unsuccessful due primarily to the powerful resistance of the permanent members of the Security Council. Germany could at least help to prevent the final compromise—that is a combination of the principles of territoriality and active personality—from having been watered down further.\(^94\)

As is well-known, the United States has challenged the Rome compromise on jurisdiction to the extent that it confers jurisdiction over official acts carried out by third state nationals.\(^95\) This brings out another Nuremberg memory: Germany was a third party \textit{vis-à-vis} the London Charter that created the \textit{Nuremberg} Tribunal. The then legal advisor of the United States, Hans Kelsen, defended a strict interpretation of the act-of-state doctrine and was therefore of the view that Germany had to consent to the Charter, one way or another. Kelsen suggested solving the problem based on Germany's loss of statehood by way of \textit{debellatio}.\(^96\) At the time, the U.S. government did not follow Kelsen's advice. Instead, it held that the doctrine of act of state had no place in the case of the \textit{Nuremberg} crimes.\(^97\)

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\(^92\) Germany’s Minister of Justice, Brigitte Zypries, recently reiterated this concern. Zypries, supra note 90, at 325 (citing Claus Kreß & Felicitas Wannek, \textit{Von den beiden Ad-Hoc-Strafgerichtshöfen zum Internationalen Strafgerichtshof, in Internationale Strafgerichtshöfe} 239 (Stefan Kirsch ed., 2005)).


\(^95\) The Head of the U.S. delegation to the Rome conference, David J. Scheffer, explains the official position of the United States in David Scheffer, \textit{The United States and the International Criminal Court}, 93 Am. J. Int'l. L. 12, 17 (1999). For a concurring view, see Turner, supra note 26, at 20 et seq.


\(^97\) Cf e.g., the relevant passage in Jackson’s opening speech, \textit{in Trial of German Major War Criminals}, supra note 27, at 42.
International Military Tribunal of Nuremberg approved this position, and rightly so. It appears that on July 17, 1998 the United states did not wish to recall its position at Nuremberg. Conversely, Germany’s commitment to the principle of equality before international criminal law may be seen as following a tradition. After all, Germany’s main critique both after the First and Second World War actually pointed to the one-sidedness of the prosecution of crimes under international law.

Shortly after the Rome breakthrough, the Bundesgerichtshof made its first encounter with the task of defining a crime under international law: on April 30, 1999, the Court delivered its landmark judgment on the crime of genocide by applying the definition to the macro-criminality committed in Bosnia-Hercegovina. From that moment on, one could witness the emergence of a sort of dialogue between the judges of the Bundesgerichtshof and of the Yugoslav Tribunal. The dialogue was not entirely free of tension but for this very reason, fascinating to follow. The dialogue resulted in further ground-breaking judgments of the Third Chamber of the Bundesgerichtshof on the crime of genocide and on war crimes. Then Presiding Judge of the Third Chamber of the Bundesgerichtshof, Ruth Rissing-van Saan, recently summarized the contribution that the Bundesgerichtshof made in the following striking terms: “[p]erhaps it could be said that German courts assume their driving role, strengthening international humanitarian law and contributing to the effectiveness of international criminal jurisdiction, not in competition, but in cooperation with international courts.”

The Constitutional Court has unreservedly endorsed this open attitude towards international criminal law.

Finally, Parliament has entered the scene and has amended the German law in three brave strikes to match the new landscape of international criminal law. In 2000, the Parliament amended article 16, paragraph 2 of the Grundgesetz to allow the possible surrender of Germans to the International Criminal Court. In the summer of 2002, it followed this up with the enactment of the law on German co-operation with the Court and of the Code of Crimes under International Law. Together with the laws enacted in Finland, France, Spain, New Zealand, and Switzerland, the German cooperation law belongs to the small number of implementing acts that duly recognize the vital importance of effective state assistance within the framework of international criminal justice and break new grounds in light of that fact. Two features must be highlighted. First, the law is very generous in allowing the International Criminal Court to sit on German soil, and Peter

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98. Judgment of the International Military Tribunal, supra note 6, at 42.
99. Although this critique is not without substance, it should perhaps be noted that it is one thing to argue in favor of a future system of international criminal justice that is well equipped to meet any possible critique of victor’s justice and it is quite another matter to emphatically use this critique to discredit the prosecution of past crimes committed in one’s own name.
100. 45 AMTLICHE SAMMLUNG DER ENTSCHEIDUNGEN DES BUNDESGERICHTSHOFES 64.
104. Code of Crimes against International Law, supra note 20, at 2254.
Wilkitzki, the German grand master on cooperation in criminal matters, has called this an almost revolutionary step. Second, it appears that recognition of an international duty to testify and the readiness to compel a witness based on the Court’s order are at least of equal importance. What emerges here is the as of yet barely noticed concept of the procedural duty of a Weltbürger that constitutes another element of a system of international criminal justice.

The new openness of the German Parliament towards international criminal law is even more clearly visible from the German Code of Crimes under International Law. Through the incorporation of the international definition of crimes against humanity into the German legal order, the Code overrules the negative decision on the Allied Control Council Law in 1950. In addition, the Code embodies an ambitious attempt to systematically codify war crimes committed in international and non-international armed conflicts. Finally, and what has received the widest degree of national and international attention, the law includes the principle of universal jurisdiction; hereby, the Code again follows the Nuremberg legacy as the university principle was already alluded to in U.S. v. List and others.

At this juncture, critics of the universality principle may, however, ask whether the German legislature acted like an overzealous convert. The question is warranted but it must be answered in the negative. A majority of judges from the International Court of Justice who expressed their views on the matter in the Arrest Warrant case, Congo v. Belgium and

107. For want of a legal basis to detain a compelled witness at the seat of the Court under the ICC Statute, the only way to compel a witness to appear is by imposing a conditional (national) fine or imprisonment. For a detailed analysis of the procedural intricacies, see Claus Kress, Gesetz über die Zusammenarbeit mit dem Internationalen Strafgerichtshof, in INTERNATIONALER RECHTLHELPVERKEHR IN STRAFSACHEN, supra note 103, at III 26, 487 n.143.
110. U.S. v. List and others, Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10, vol. 11, 1950, p. 1241, refers to an international crime as an “act universally recognized as criminal, which is considered a grave matter of international concern and for some valid reason cannot be left within the exclusive jurisdiction of the state that would have control over it under ordinary circumstances”; in the meantime, the international practice and the conceptual thinking on the matter has much evolved; for a recent clarification of the concept, see Roger O’Keefe, Universal Jurisdiction, 2 J. INT’L CRIM. JUST. 735 (2004).
111. For recent criticism, see, e.g., George P. Fletcher, Against Universal Jurisdiction, 1 J. INT’L CRIM. JUST. 580 (2003); Turner, supra note 26, at 14.
112. The Court did not rule on the matter in its judgment on February 14, 2002, and decided the case exclusively on the basis of the international law on immunities. Yet a number of judges offered their views as to whether the universality principle over crimes under international law is part of current international law. Those in favor were Judges Koroma (individual opinion, paragraph 9), Higgins, Kooijmans, and Buergenthal (joint individual opinion, paragraph 59 et seq.), van den Wyngaert (dissenting opinion, paragraph 67); contra, Judge Guillaume (individual opinion, paragraph 16). Other than Judge Guillaume, Judges Rezek (individual opinion, paragraph 10), Ranjeva (individual opinion, paragraph 12), and Bula-Bula (individual opinion, paragraph 79) did not express an opinion on the universality principle as such but oppose only its adjudicative exercise in absentia (although paragraph 79 of Judge Bula-Bula’s opinion comes close to Judge Guillaume’s generally negative conclusion). Judge Oda refrained from expressing any conclusive opinion; instead he notes
the eminent Institut de Droit International in its 2005 Kracow Resolution confirmed the principle of universal jurisdiction over crimes under international law and welcomed this principle as an additional tool to end the impunity of such crimes. The two main functions of the universality principle consist in the elimination of safe havens for suspected international criminals and in what may be called anticipatory legal assistance by securing evidence with a view to subsequent proceedings in a directly affected state. The idea of anticipatory legal assistance offers one more example for the need to think afresh within the context of international criminal law. Here, German investigative acts can be important even when it is predictable that the proceedings cannot be completed in Germany. There still remains the possibility of later proceedings in a directly affected state, in particular after a regime change. It may conveniently be recalled that the Central Agency in Ludwigsburg in the years since 1958 relied to a great extent on prior foreign investigations. That Germany has no desire to step up as a rowdy policeman of this world can be seen from the fact that its universal jurisdiction is subsidiary only, and this can be seen in two respects. First, a procedural provision enacted to complement the Code explicitly acknowledges the primary competence of states because they are more closely connected with the crimes and of competent international criminal jurisdictions. This principle of double subsidiarity also applies when Germany acts as the forum deprehensionis. Whether the German solution will be the magic stick for all cases remains to be discussed in light of the practical experience. Ideally, the adjudicative exercise of universal jurisdiction by states would be the object of an international agreement. In that context, one could think of an international mechanism to prevent or identify abuses, for example by establishing a system of international accreditation. Within such a system, the fair trial standards of those states that are ready to act as fiduciaries of the international community can be tested and the

a tendency to support the universality principle that he considers not yet sufficiently developed (dissenting opinion, paragraph 12). Although Judge Al-Khasawneh did not opine explicitly on the universality principle, the general thrust of his individual opinion (note in particular from paragraphs 7 and 8b of his dissenting opinion, his view that the duty to effectively prosecute crimes under international law trumps the immunity even of acting heads of state) strongly indicates a supporting view. For a different but somewhat selective reading of the opinions, see Turner, supra note 26, at 14 n.75.

113. Institute of International Law, Resolution on Universal Criminal Jurisdiction with Regard to the Crime of Genocide, Crimes against Humanity and War Crimes (2005), available at http://www.idi-iil.org/idiE/resolutionsE/2005_kra_03_en.pdf. The Resolution stops short of delineating the precise scope of the universality principle in its carefully worded operative paragraph 3(a). Importantly, operative paragraph 3(b) excludes "acts of investigations and requests for extradition" from the otherwise suggested requirement that the suspect be present in the adjudicating State. The Resolution thus steers an interesting middle course as regards the heated controversy about the so-called universal jurisdiction in absentia.

114. For an important recent contribution on the conceptual underpinnings of universal jurisdiction over (a narrowly defined set of) crimes under international law, see Thomas Weigend, Grund und Grenzen universaler Gerichtsbarkeit, in Festschrift für Albin Esers zum 70. Geburtstag 955 (Jörg Arnold et al. eds., 2005).


117. For such suggestion, see Susanne Wältcher, Terra Incognita: Wird staatliche internationale Strafjustiz den Menschen gerecht?, in Festschrift für Albin, supra note 114, at 953.
in institutional independence of a Chief Prosecutor or Attorney General can be scrutinized. The test and the scrutiny are meant to ensure that the application of the universality principle is not directed by the political preference of the government of the state concerned.

From the perspective of recent legal history, one finally wonders how the latest development of Germany’s policy on international criminal law has come about. There can be no doubt that the overall context had changed in a way that was conducive for a move in the new direction. In the 1990s, parliamentarians of all relevant political parties voiced support for the ideas of international criminal law and international criminal justice. The new perspective of German Liberals is most telling. While the Liberal Party had vigorously fought against Nuremberg and the so-called war crimes psychosis in the 1950s, the German delegation negotiated in Rome with the firm backing of two Liberals, Foreign Minister Klaus Kinkel and Justice Minister Edzard Schmidt-Jortzig. Yet the decisive move did not come from any politician. The crucial actor was Hans-Peter Kaul, who was then head of the public international law section in Germany’s Foreign Office and who is now an International Criminal Court judge.

Kaul’s contribution is threefold. First, as early as the mid-1990s he had a sense that a window of opportunity had opened to finally reach an agreement regarding the century old project of an international criminal court. Second, Kaul laid the foundation to enable Germany to play an active role in the negotiation process. As late as August 1996, a German delegation was physically present but not really participating in the debate. At this time the odds were that Germany would once again navigate in the slipstream of others during negotiations of a highly political nature. The picture changed in a lasting manner once Kaul became head of the delegation in February 1997. From that point on, there was a consistent overall concept that had been worked out with noticeable support from academia and there was a readiness to act accordingly even when this was diplomatically delicate. Finally, Kaul worked tirelessly, courageously, and sophisticatedly behind the scenes and built a broad consensus within the government and the Parliament to have the new German role based on safe grounds. The solidity of the policy consensus on international criminal law that exists in Germany can be clearly seen in the statement that Christian Democrat Norbert Roettgen made while he was a member of an opposition party during the final reading of the Code of Crimes under international law. He stated that “[d]uring this term of parliament we had many controversies on legal policy issues. Germany’s commitment for an international order of criminal law and criminal justice was no and is no controversy, though, but constitutes a firm common ground of German legal and foreign policy.”

V. A Final Look Ahead: Germany and the Crime of Aggression

This article has reached the point where the author would like to offer his final thoughts on Germany’s future policy on international criminal law. More specifically, the point the


120. Deutscher Bundestag, Plenarprotokoll 14/233, reprinted in Materialien zum Völkerstrafgesetzbuch. Dokumentation des Gesetzgebungsverfahrens 95 (Sascha Rolf Lüder & Thomas Vormbaum eds., 2002).
author wishes to make is on the crime of aggressive war or, as it is nowadays called, the crime of aggression.\textsuperscript{121} For the United States, \textit{Nuremberg} was primarily about creating a precedent on aggressive war; to move the law forward in this regard, the U.S. government was even prepared to take the critique of retroactive criminalization.\textsuperscript{122} This U.S. policy no doubt yielded short term success because the \textit{Nuremberg} judgment elevated the crime of waging an aggressive war to the frightening level of the ultimate international crime.\textsuperscript{123} Yet the United States already solemnly declared that it would look to a future far beyond \textit{Nuremberg}. In his opening speech, Jackson stated emphatically that

\begin{quote}
[t]he ultimate step in avoiding periodic wars, which are inevitable in a system of international lawlessness, is to make statesmen responsible to law. And let me make clear that while this law is first applied against German aggressors, the law includes, and if it is to serve a useful purpose it must condemn, aggression by any other nations, including those which sit here now in judgment.\textsuperscript{124}
\end{quote}

The United States has not yet acted according to this moral promise. Quite to the contrary, it has missed out on the opportunities to build upon the \textit{Nuremberg} precedent during the formulation of the Statutes of the Yugoslavia Tribunal and of the Special Court for Iraq.\textsuperscript{125} From the perspective of international criminal law history, it is ironic that recently, Germany, rather than the United States, has been the country persistently working towards the transposition of Jackson's words into an international legal instrument. These efforts proved unsuccessful in Rome. Or to be more precise, they have not yet been entirely successful because the crime of aggression has made its way back into the list of crimes under international law.\textsuperscript{126} For want of a definition, the International Criminal Court must not yet exercise its jurisdiction over the crime.\textsuperscript{127} The States Parties have, however, entrusted themselves with the mandate to fill the last big normative gap in international criminal law at a Review Conference, the first of which will be held in 2009.\textsuperscript{128}

To fulfill this mandate is first and foremost a matter of consistency.\textsuperscript{129} The third paragraph of the preamble to the treaty on the International Criminal Court lists international peace

\begin{footnotesize}
\begin{enumerate}
\item[121.] \textit{Cf.} ICC Statute, \textit{supra} note 119, at art. 5, \textit{¶} 1(d).
\item[122.] \textit{See}, above all, Taylor, \textit{supra} note 34, at 635 \textit{et seq.}
\item[123.] "To initiate a war of aggression, therefore, is not only an international crime, it is the supreme crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole." Judgment of the International Military Tribunal, \textit{supra} note 6, at 13.
\item[124.] \textit{Trial of German Major War Criminals,} \textit{supra} note 27, at 45.
\item[125.] On this missed opportunity, see Claus Kress, \textit{The Iraqi Special Tribunal and the Crime of Aggression}, 2 J. Int'l Crim. Just. 347 (2004).
\item[126.] \textit{Cf.} ICC Statute, \textit{supra} note 119, at art. 5, \textit{¶} 1(d).
\item[127.] \textit{Cf. id.} at art. 5, \textit{¶} 2.

\begin{quote}
[t]he Commission shall prepare proposals for a provision on aggression, including the definition and Elements of Crimes of aggression and the conditions under which the International Court shall exercise its jurisdiction with regard to this crime. The Commission shall submit such proposals to the Assembly of States Parties at a Review Conference, with a view to arriving at an acceptable provision on the crime of aggression for inclusion in this Statute.
\end{quote}

\item[129.] For a view to the contrary that cannot be discussed in full within the limited scope of this article, see Andreas L. Paulus, \textit{Peace through Justice? The Future of the Crime of Aggression in a Time of Crisis}, 50 WAYNE L. REV. 1 (2004).
\end{enumerate}
\end{footnotesize}
as the first world community value to be protected by international criminal law. How can it be possible then that the International Criminal Court is precluded from exercising jurisdiction over the very crime that directly damages this value? Second, the credibility of ceremonial claims by some states to support international criminal law is at stake. A considerable number of African States, Middle and Far Eastern States, and Central and Southern American States closely follow the course of the negotiations on the crime of aggression to see whether "the West" takes international criminal law seriously. Many states have declared their accession to the International Criminal Court dependent on the inclusion of a definition of the crime of aggression into the Court’s Statute.

Two major hurdles remain to be surpassed within the remaining two or three years of negotiations within the special working group on the crime of aggression. First, the definition must stay away from the highly controversial gray zone that surrounds the international prohibition on the use of force not only as a result of recent events but essentially since its coming into existence. Take as an example for this difficult—but solvable—problem: the case of a humanitarian intervention without Security Council mandate that contradicts international law according to many international law scholars, but does not entail criminal responsibility under customary international law that should guide the drafters of the definition of the crime of aggression. Second, and most importantly, there is the role of the Security Council. For the time being, its permanent members insist on the view that criminal proceedings for an alleged crime of aggression may be opened only after the Security Council has decided in the affirmative. This would turn the five states in question into quasi-judges that, because of their veto power, cannot be outvoted even in a case against themselves. It stands to reason that this position flies in the face of the principle of equality before international criminal law. The question remains whether this position must perhaps grudgingly be accepted because the United Nations Charter grants the five permanent members a hegemonic position not only within the old system of collective security but also within the new system of collective criminal justice. The answer to this question is no. Neither the wording, the context, the objective of the United Nations Charter, nor the subsequent practice of interpretation supports the view that the claim of the five permanent members has a basis in law. What is thus at stake is not a legal assertion but one

130. This working group was established by virtue of operative paragraph 2 of Resolution ICC-ASP/1/Res. I adopted by the Assembly of States Parties, on September 9, 2002 by consensus.


132. For the position of the United States, see, e.g., David J. Scheffer, supra note 95, at 21. For the position of the Russian Federation, see U.N. Doc. PCNICC/1999/DP. 12.

of power politics. Such an assertion of power does not sit comfortably, however, with the basic principles of a system of international criminal justice.

In 1980, at a time of skepticism towards international criminal law, the Federal Republic of Germany supported the position of the five permanent members.\textsuperscript{134} Germany reiterated this position in 1997\textsuperscript{135} at the Preparatory Committee on the Establishment of an International Criminal Court, and in 1999 at the Preparatory Commission for the International Criminal Court.\textsuperscript{136} Since then, though, Germany seems to have refrained from taking a stance on the matter. Germany should now adopt a principled position and not shy away from a critical dialogue with closest friends, including the United States, to work from there towards a sound compromise on this question of fundamental importance.

Germany's aggressive wars under the Nazi regime provoked the victorious powers to help international criminal law to its breakthrough. After a long period of skepticism dating back to Leipzig, hardened by the Nuremberg experience, Germany is now contributing in an active and principled manner to the emergence of a system of international criminal justice. It would follow the logic of its new position and suit the country well in light of its recent history if Germany soon decided to make a special effort towards completing the international criminal justice system with respect to the crime of aggression in harmony with the principle of equality before international law.
