

Do we need another Nuremberg?



Geoffrey Bindman explains why the ICC is the appropriate forum for bringing to justice the perpetrators of the war against Ukraine

Two former prime ministers, Gordon Brown and Sir John Major, are supporting the creation of an international tribunal modelled on the post-World War II Nuremberg tribunal, to try those responsible for the Russian invasion of Ukraine. A call for legal action has been made by President Biden. Ukraine has itself initiated proceedings in the International Court of Justice, and the prosecutor of the International Criminal Court (ICC) has launched an investigation (see my article ‘Russia flouts international law’, *NLJ*, 18 March 2022, p8).

These initiatives rightly reflect widespread demands to bring the perpetrators of atrocious crimes in and against Ukraine to justice. What is the best way to pursue this aim? Is Nuremberg the right model?

The current Russian assault reminds us all too vividly of the problem that faced the nations who defeated the Nazi regime in 1945. How to ensure that such a catastrophe could not occur again? Thanks to the vision of Western leaders at the time, the United Nations (UN) was created, along with a new framework of international law prohibiting the use of force to settle disputes. But reducing the risk of future war must also include retribution for those who started the one just concluded. 21 of the leading culprits were in custody (Hitler, Himmler and Goebbels had already died), but there was no suitable court or body of law by which they could be tried.

The solution was by no means uncontroversial, and the views of the four leading victorious nations—the US, UK, France, and Russia—differed. The US at all times favoured a legal solution—a public trial in which the Nazi leaders would have the right to defend themselves against specific charges and, if convicted, would be duly sentenced

to appropriate punishment. Others felt that guilt was so obviously already established that the culprits should be punished without further delay; Winston Churchill was among these. The Russians were prepared to agree to a trial, but their conception resembled the notorious Moscow show trials of the 1930s in which the aim was the humiliation and exposure of the crimes of the accused, with the result a foregone conclusion. It was no coincidence that the Russian minister in charge of their participation at Nuremberg was the same Andrey Vyshinsky who had managed the show trials.

Creating a new tribunal after the event, and applying laws yet to be formulated, was problematic. But agreement was reached on what was essentially a British and American model. And there was some existing legal basis in the laws of war agreed in the Hague Conventions of 1899 and 1907. A drafting committee produced a list of offences and, by reference to these, an indictment to which the accused were invited to plead. On this basis the trial was conducted by four judges, one from each of the four prosecuting states. Judge Robert H Jackson of the US Supreme Court was the lead prosecutor. After more than a year, on 1 October 1946, judgment was given: 19 of the 21 were convicted and two acquitted. Of those convicted, there were 12 death sentences and the remainder received prison sentences. The convictions were largely based on the responsibility of each accused for initiating and conducting an aggressive war.

Jurisdiction of the ICC

But we cannot ignore later reforms of international criminal law, albeit long delayed. After Nuremberg, the ‘Nuremberg principles’ became established. These include the denial of head of state immunity to those

who commit war crimes, and the rejection of the defence that crimes were committed in obedience to the orders of a superior authority. The most significant reform was the establishment of the ICC by the Rome Treaty of 1998. The Rome Treaty has majority support among the nations, and the rulings of the ICC are universally binding.

The jurisdiction of the ICC—over war crimes, crimes against humanity, aggression, and genocide—largely mirrors the jurisdiction of the Nuremberg trials. But the important difference between Nuremberg and the ICC is the unchallengeable legitimacy of the ICC. It has faults and obstacles—see my earlier article mentioned above—but it is not vulnerable to the charge against Nuremberg of ‘victor’s justice’.

Yet there is a snag, which supports the hesitation of Gordon Brown and others about relying entirely on the ICC. Art 15.5 *bis* of the ICC Statute says: ‘In respect of a State that is not a party to this Statute, the Court shall not exercise its jurisdiction over the crime of aggression when committed by that State’s nationals or on its territory’. Does this rule out charging Putin with the crime of aggression before the ICC? It appears so, but Art 12 allows the court to exercise its jurisdiction if a state upon whose territory the alleged crime has occurred accepts the court’s jurisdiction, and Ukraine has done exactly that though, like Russia, it is not a party to the ICC Statute. Disputes over jurisdiction can be determined by the pre-trial chamber of the court. It has jurisdiction over war crimes, crimes against humanity and genocide, all of which could be levelled at Putin and his associates, but it may be that to try him for the crime of aggression would require an amendment to the Rome Treaty or a new forum. Yet the end of aggression was an explicit objective of the UN, of which Russia is a founder member. It is unthinkable that legal niceties should protect those responsible, and that those who commit such crimes should escape justice by reliance on technicalities.

Justice today

Putin is not entirely impervious to international law. He has claimed his invasion of Ukraine is justified legally as self-defence. Russia is party to the UN Charter, Art 51 of which states: ‘Nothing in the present Charter shall impair the right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations...’. He can argue that in court.

Nuremberg is a landmark of legal history. The ICC is the appropriate forum today for bringing to justice the perpetrators of the war against Ukraine. Only if it is unable to carry out the task need any alternative be considered. **NLJ**

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