
The American Perspective on Nuremberg: A Case of Cascading Ironies

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It is an honor to attend this 60th Anniversary Nuremberg conference and to explore the American perspective on the Nuremberg trials. There are many states of mind appropriate to examining the US point of view. At this moment in history, however, the most appropriate mental state is irony.¹ I would like to explore three of these ironies.

The first emanates from the contrast between the profound impact the Nuremberg trials have had on international law, and the fact that the United States, a prime moving force behind the trials came close to neither fostering nor participating in them. A second irony flows from the fact that the paramount legal principle motivating US participation at Nuremberg, criminalizing aggression, has been the least durable of the Nuremberg principles. The final, and most dramatic irony lies in the efforts of the current American Administration to advocate new norms governing the use of force and to foster new attitudes suggesting US unwillingness to adhere to international law. These efforts could nullify much of the meaning of Nuremberg for the US.

However, before examining these ironies let me suggest a framework for analyzing the American role at Nuremberg. Professor Richard Falk has described a post war “normative architecture”² which rejects “genocide, crimes against humanity” and other violations of human rights and humanitarian law. The foundation for this architecture can be found in a trilogy³ of documents, the London Charter, the Universal Declaration of Human Rights, and the UN Charter. This trilogy and the resulting normative architecture has provided a quantum leap in the protections afforded to two vulnerable groups: (1) non-combatants during armed conflict and (2) all human beings subject to persecution by government authorities. Those protections include establishing and confirming norms, criminalizing violations of many of those norms and, where necessary, conferring jurisdiction on international courts and tribunals to adjudicate major norm violations.

Within this trilogy of documents and the resulting normative architecture, the London Charter is unique in providing all these forms of protection. It assessed individual criminal responsibility before a multinational tribunal, established new norms and reaffirmed aspects of customary law. Additionally, in charging violations of “crimes against humanity” the Charter challenged the idea that Westphalian sovereignty was absolute and laid the groundwork for extending international jurisdiction to humanitarian law (and ultimately human rights) violations even during peacetime.⁴

The notable contributions of the United States to this process include its role in spawning the Nuremberg trials, its determination, to reinforce existing norms governing the use of force, and its desire to criminalize violations of the norm prohibiting aggressive war. (Additionally, the United States supported, albeit inconsistently, evolution of much of the balance of the normative architecture.)

Trial, “Punishment” or Both

The initial irony surrounding American participation in Nuremberg springs from the very existence of multinational postwar trials for “major war criminals of the European Axis countries.” Despite the huge shadow that the trials have cast in retrospect,

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judicial proceedings for leading Nazis and alleged German war criminals were not a foregone conclusion for most of the war. Both the US and Great Britain were undecided about non-judicial punishment for Senior Nazi's as late as 1944.

The 1943 Moscow Declaration's⁵ Statement of Atrocities noted that most offending German military personnel and Nazis would face legal process. The Statement warned that those who took "consenting part" in

"...atrocities, massacres and executions will be sent back to the countries in which their abominable deeds were done in order that they may be judged and punished according to the laws of these liberated countries and of free governments which will be erected therein."⁶ (emphasis added)

However, the major potential offenders, "German criminals whose offenses have no particular geographical localization,"⁷ faced the calculatedly ambiguous promise of being "punished by joint decision of the government of the Allies."⁸ (emphasis added)

At the Quebec Conference of 1944 Roosevelt and Churchill endorsed both the "Napoleonic Precedent" (punishment without trials) and the Morgenthau Plan (Germany reduced to an agrarian non industrial society and summary executions of leading Nazis).⁹

The draconian nature of Morgenthau's proposal left little room for trials for major violators. It advocated the following:

APPENDIX B

PUNISHMENT OF CERTAIN WAR CRIMES AND TREATMENT OF SPECIAL GROUPS.

A. *Punishment of Certain War Criminals*

(1) Arch-Criminals.

A list of the Arch criminals of this war whose obvious guilt has been recognized by the United Nations shall be drawn up as soon as possible and transmitted to the appropriate military authorities. The military authorities shall be instructed with respect to all persons who are on such list as follows:

(a) They shall be apprehended as soon as possible and identified as soon as possible after apprehension, the identification to be approved by an officer of the General rank.

(b) **When such identification has been made, the person identified shall be put to death forthwith by firing squads made up of soldiers of the United Nations.**¹⁰

The first official indication that the US position would change came on January 3, 1945. Roosevelt sent a brief note to Secretary of State Stettinius which constituted the President's first and only written communication on the subject.

Please send me a brief report on the state of the proceedings before the War Crimes Commission, and particularly the attitude of the US representative on offenses to be brought against Hitler and the chief Nazi war criminals. The charges against the top Nazis should include an indictment for waging aggressive warfare, in violation of the

Kellogg[-Briand] Pact. Perhaps these and other charges might be joined in a conspiracy indictment.¹¹

Of course this memo did not spring without prompting from the President's pen. Both Nuremberg participants¹² and subsequent scholars¹³ believe that Roosevelt was heavily influenced by the work of Colonel William Chandler of the War Department, one of the moving forces shaping American perspectives on the eventual trials and an advocate of prosecuting the crime against peace. However, even Chandler and other War Department lawyers did not begin actively working on the legal foundations for post war trials until the fall of 1944.

The broader American consensus for trials developed slowly as well. In April of 1945, just weeks before President Truman appointed Associate Supreme Court Justice Robert Jackson as the US Chief Counsel for war crimes, Jackson had suggested in his famous "Rule of Law Among Nations" speech¹⁴ that he would not enter into the "controversy" about the wisdom of a "military or political" decision to execute war criminals "high or humble."¹⁵ (The speech has become better known for Jackson's warning that no man should be tried "if you are not willing to see him freed if proven not guilty"). Although Jackson accepted Truman's offer and was committed wholeheartedly to the notion of war crimes trials, he more than once threatened the British, Soviets and the French with the prospect of withdrawing from the London Charter negotiations and holding separate American proceedings.¹⁶

The substance of President Roosevelt's Note of January 1945 provides additional evidence of the late hour at which the US decided to conduct international post war trials. If the President had determined early in the war to focus primarily on "aggression" and "conspiracy" much of the legal analysis for the trials could have commenced as early as 1942. We now know that the Tribunal's verdict focused on Germany's long list of treaty violations in lieu of an element analysis of the crime against peace. These treaty violations were well known before 1944, as were the contents of *Mein Kampf*, cited in the Judgment's analysis of the German preparation for war. For example, the fate of Rudolf Hess hinged almost entirely on documents available early in the war. He was convicted on Counts 1 and 2 in large part on the basis of public speeches made and orders he had signed before his 1941 flight to the United Kingdom.

These observations do not denigrate the significant evidence accumulated by the prosecution during the occupation of Germany or suggest that prosecutors or pre-war planners could have known the principle evidence on which the Judges would rely. However, it is clear that preparatory analysis for "conspiracy" and "aggression" could have begun earlier than the work on Counts 3 and 4 had there been a decision before 1945 to proceed with trials.

The possibility that there might not have been any Nuremberg trials becomes more dramatic when we acknowledge the belated endorsement of trials by the United Kingdom. The impact of two twentieth century wars involving Germany, and the conduct of the leaders of the insatiably bellicose¹⁷ Third Reich, left the British war Cabinet still favoring summary executions as late as April of 1945.¹⁸

The more we value the trials' historic and legal impact, and closer we study the catalytic role of the US, the more pronounced is the ironic possibility that the trials could easily have been replaced by summary executions or by the exclusive use of

national traditional military tribunals, processes that would have lacked Nuremberg's profound legacy.

Victor's Justice or Not

Some contemporary voices charged that the entire Nuremberg effort was fatally flawed. All of those charges did not emanate from sources as tainted as Hermann Goering, who when he received his indictment, allegedly added to it the phrase, "The victor will always be the judge and the vanquished the accused."¹⁹ The Chief Justice of the United States Supreme Court, Harlan F. Stone, (annoyed that he had not been consulted about Jackson's appointment to serve as war crimes prosecutor while remaining on the Supreme Court) opined,

"Jackson is away conducting his high-grade lynching party in Nuremberg. I don't mind what he does to the Nazis, but I hate to see the pretense that he is running a court and proceeding according to common law. This is a little too sanctimonious a fraud to meet my old-fashioned ideas."²⁰

Immediately after the trials, Senator Robert Taft used the criticism of crimes against peace to condemn both the Nuremberg and Tokyo trials.

"I believe that most Americans view with discomfort the war trials which have just been concluded in Germany and are proceeding in Japan. They violate that fundamental principle of American law that a man cannot be tried under an ex post facto statute. The trial of the vanquished by the victors cannot be impartial, no matter how it is hedged about with the forms of justice. I question whether the hanging of those who, however despicable, were the leaders of the German people will ever discourage the making of aggressive war, for no one makes aggressive war unless he expects to win. About this whole judgment there is the spirit of vengeance, and vengeance is seldom justice. The hangings of the eleven men convicted will be a blot on the American record which we shall long regret."²¹

Over the ensuing 60 years that broad criticism of Nuremberg has receded²² even as uncertainty about the viability of the crime against peace has remained. The establishment during the post cold war years of the Ad Hoc Tribunals for the former Yugoslavia and Rwanda, the Special Court for Sierra Leone and the entering into force of the Rome Treaty for the International Criminal Court have built on the legal precedents, the political example, and the spirit of Nuremberg. As a lawyer practicing as co-counsel for an accused²³ at the Special Court for Sierra Leone during 2004, I was continuously impressed at the frequency and vigor with which Nuremberg was cited as a precedent by Judges, Prosecutors, and Defense Counsel.²⁴ In fact some observers maintain that "contemporary international criminal courts typically treat Nuremberg precedent as canonical"²⁵

The American commitments to "aggression" and "conspiracy" found the US pressing against the boundaries of existing international law. Although conspiracy, has gained traction²⁶ since Nuremberg, in 1945 and 1946 it endured vigorous attacks. The French and Soviet delegates were confounded by the concept during the Charter negotiations. During deliberations, the French Judge Donnedieu de Vabres believed

that the charge was “ex post facto”²⁷ and would likely lead to a revised version of the German “‘stab in the back’ legend.”²⁸

Despite the Judges’ ultimate acceptance of conspiracy to wage aggressive war, their sentencing calculus suggests it was a less than wholehearted embrace. With one exception, only defendants convicted of war crimes and crimes against humanity were executed.²⁹ Hess, convicted only on Counts 1 and 2 was sentenced to Spandau. An intellectual fault line existed between the conspiracy and the crime against peace on one hand, and war crimes and crimes against humanity on the other.

Despite this skepticism, conspiracy has continued to remain a viable part of international criminal law. A much less favorable view can be taken of the charge most important to the US and to Robert Jackson, the crime against peace. Once the US was committed to holding the trials, (or at least to negotiating the London Charter) it was primarily motivated by a desire to solidify legal norms governing aggression and to criminalize the violation of those norms.

This highlights the irony that this objective was only partially achieved and is now being challenged by the United States. The UN’s ratification of the Nuremberg judgments³⁰ and the adoption of Article 51 of the UN Charter³¹ reflect the rapid acceptance of the prohibition of aggression in international law. However, the criminalizing of the violation of this norm has been the most heavily and trenchantly resisted aspect of the Nuremberg experience.

This negative reaction has not been restricted to legal scholars or critics with questionable anti-Nazi credentials. General Matthew Ridgeway, wartime commander of the 82nd Airborne Division and ultimately President Eisenhower’s Army Chief of Staff believed that,³²

“[t]o apprehend, arraign and try an individual for the wanton killing – murder, if you please, – of prisoners of war, for example, is one thing. To do likewise to individuals who waged war in the uniform of their nation and under the orders or directives of their superiors is another and quite different thing. I believe the former is fully justified. I believe the latter is unjustified and repugnant to the code of enlightened governments. ... Until such distant date, if this ever transpires, as nations can and will agree on a world political organization with judicial tribunals whose jurisdiction is acknowledged and whose judgments are accepted, I think trials in the second category described above, are steps backwards to the instant past when the fate of a defeated people was determined at the whim of a victor.”

Raymond Aron who edited *France Libre*, newspaper of the Free French forces and became a prominent post-war intellectual³³ held a similar view.

Interestingly, two of Jackson’s Nuremberg assistants abandoned their defense of the crime against peace against the ex post facto charge in their later years. Telford Taylor’s 1992 memoir recites his own 1945 memorandum evaluating the draft executive agreement for the London Charter. In his memorandum he offered the elegant but unpersuasive argument that the aggressive war charge survives the ex post facto attack,³⁴ because “this is a political *decision* to declare and apply a principle of international law.”³⁵ However, in the memoir’s final chapter, *Epilogue and Assessment*, Taylor conceded that,

“Arguments in support of punishing individuals ex post facto for violation of the crime against peace can be made, but, if conducted on a plane devoid of political and emotional factors will be won by the defense. But in 1945 those very factors were overwhelming. Peoples whose nations had been attacked and dismembered without warning wanted legal retribution whether or not this was a ‘first time.’ The inclusion of the crime against peace vastly enhanced the world’s interest in a support to the trials at Nuremberg.”³⁶

Professor Bernard Meltzer, who served under Jackson at Nuremberg, also expressed a change of heart concerning the ex post facto criticism of the crime against peace.

“The international formulations relied on by Justice Jackson were silent about individual responsibility for aggressive war. Indeed, such responsibility was disclaimed during the confirmation discussions in the United States Senate of the Kellogg-Briand Pact, a pact on which Jackson heavily relied. Thus, Senator Borah, the chairman of the Senate Foreign Relations Committee, had declared that the pact was an appeal solely to the conscience of the world and that its breach was not to lead to any punitive consequences.”³⁷

Although the International Military Tribunal convicted twelve defendants of the crime against peace and generally defended the Charter, this aspect of the trial and verdict has been the most heavily criticized.³⁸ The inability of the international community after years of debate and a concerted effort at the Rome Conference for the International Criminal Court to arrive at a suitable definition of aggression are signs that a principle American Nuremberg objective, to criminalize aggression, has still not been achieved.³⁹

Supreme Irony or Reasoned Response to Latent Threats

Technical difficulties offer a partial explanation for the lack of a post-Nuremberg treaty banning aggressive war. However, no such ambiguity surrounds the underlying norm governing the use of force. The United States currently asserts that it will use force to pre-empt “emerging” threats as well as those which are imminent. It argues that changing circumstances warrant new strategies. On its face, this suggests movement away from the accepted norm embodied in Article 51 of the UN Charter. Although there is a rich and growing literature debating this point, it would be ironic if the US were deemed to be taking the lead in changing a norm it sought to criminalize at Nuremberg, even if it does so in response to new technological and geopolitical threats.

However, a larger irony would surface if as some suspect, the US is asserting that the world’s “hyperpower” is not bound by any international norms governing the use of force. Such a position would be in dramatic contrast to the position asserted by the US at Nuremberg and supported in the UN Charter.

The Bush Doctrine, articulated shortly after the attacks of September 11th announced that the US would use force to “to preempt emerging threats.”⁴⁰ This doctrine was ultimately employed to justify the US invasion of Iraq in 2003. As the

British and American publics learned during the May 2005 British Parliamentary election, even America's staunchest ally had reservations about this extension of the parameters governing the use of force. The now famous "Goldsmith Memorandum" submitted by the United Kingdom's Attorney General to British PM Tony Blair⁴¹ March 7, 2003, set forth the following view:

"...It is now widely accepted that an imminent armed attack will justify the use of force if the other conditions are met..... However, in my opinion there must be some degree of immanence. I am aware that the USA has been arguing for recognition of a broad doctrine of a right to use force to pre-empt danger in the future. If this means more than a right to respond proportionately to an imminent attack (and I understand that the doctrine is intended to carry that connotation) this is not a doctrine which, in my opinion, exists or is recognized in international law."

In response to the controversy surrounding the United States' articulation of this new doctrine the UN Secretary General has announced the need for a "consensus" on "when and how force can be used to defend international peace and security..." specifically focusing on whether states "may use force against 'latent' or non-imminent threats..."⁴² However, there remains a large gap between much of the world and the US on whether the new "consensus" will endorse unilateral action or find that the prevailing norms require action by the Security Council.

Underlying this serious debate about whether the "war on terror" will be a catalyst for a new international consensus on the use of force is the suspicion that the US is rejecting the idea that it is bound by international norms governing force. The controversial Downing Street Memorandum⁴³ hints at the possibility that the Bush Administration attempted to "fix" the evidence that Saddam Hussein was a latent threat possessing Weapons of Mass Destruction. If the United States employed a pretext in order to bring its Iraq invasion within the parameters of its new use of force doctrine such conduct would constitute a flagrant affront to the rule of law. It would also suggest that America's UN Ambassador Bolton⁴⁴ should be taken literally when he says,

"It is a big mistake for us to grant any **validity to international law** even when it may seem in our short-term interest to do so, because over the long term, the goal of those who think that international law really means anything are those who want to constrict the United States."⁴⁵

Eventually, participants at this Conference, diplomats, scholars, NGO and rights activist will be forced to explore in the future a supreme Nuremberg irony. This controversial irony will center around the questions of whether the American responses to the terrorist⁴⁶ attacks of September 11, 2001, the promulgation of the Bush Doctrine and the invasion of Iraq without unambiguous Security Council support, have neutralized the American contributions to Nuremberg. In fact the debate will extend to whether the current US position is in derogation of the use of force principles articulated throughout the normative architecture. One American "realist" has already announced that,

“The effort to subject the use of force to the rule of law was the monumental internationalist experiment of the 20th century; the fact is that that experiment has failed.”⁴⁷

Another American “realist” has announced that US legitimacy in the world stems from military power not from commitment to international law.⁴⁸ While realists can make valuable contributions to debates about the rule of law their contributions often warrant close scrutiny. Had the realist plans of Secretary Morgenthau been embraced in 1945, 2500⁴⁹ “arch criminals”⁵⁰ would have been “summarily executed” and the normative architecture to which Nuremberg has made such a significant contribution might never have been constructed.

In fact, these departures from Nuremberg’s legacy suggest the possibility of a US retreat from the normative architecture itself. There has been a strong, though not unanimous consensus⁵¹ among speakers at this Conference that the establishment of the International Criminal Court is an effort to extend Nuremberg’s legacy.⁵² If history confirms this view, the United States’ rejection of the Rome Treaty provides further evidence of the Bush Administration’s abandonment of a set of human rights, and humanitarian law principles the US has championed since the Second World War. Even more troubling is the enthusiasm which has accompanied this repositioning. It is difficult to misinterpret the ironic portent of the comments of Ambassador Bolton who described the signing of the Rome Treaty as “the happiest moment in my government service.”⁵³

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¹ It is not suggested that this paper constitutes an exhaustive or comprehensive exploration of the US contribution to Nuremberg. See for example Evan J. Wallach, ‘*The Procedural And Evidentiary Rules of the Post-World War II War Crimes Trials: Did They Provide An Outline For International Legal Procedure?*’ 37 COLUMB. J. TRANSNAT’L L. 851 (1999) on the US contribution to the Rules of Procedure and Evidence at the trial.

² Richard Falk has explained the term in the following way: “There has been the remarkable emergence of what I would call a normative architecture that repudiates genocide and crimes against humanity that has been erected in the half century since World War II.” Keynote Speech, *Remembering the Holocaust and the Geopolitical Persistence of Indifference*, Conference on Law and the Humanities: Representation of the Holocaust, Genocide, and Other Human Rights Violations at Thomas Jefferson

School of Law (Jan. 17, 2005). For those who might see the “normative architecture” as an ideological construct, *see* the view from a career military officer, Lt Col. Schmitt. [f]or nearly as long as humans have engaged in organized violence, there have been attempts to fashion normative architectures to constrain and limit it. Such architectures—labeled the law of armed conflict in late Twentieth century parlance—are the product of a symbiotic relationship between law and war.

Michael N. Schmitt, *Bellum Americanum: The U.S. View of Twenty-First Century War and its Possible Implications for the Law of Armed Conflict*, 19 MICH. J. INT'L L. 1051, 1051 (1998). The “Deep Concerns” expressed by twelve senior Flag and General Officers about the nomination of Alberto Gonzales as Attorney General because of his characterization of Geneva Convention protections of POWs from torture as “quaint” further reflects the legal rather than political nature of the normative architecture. An Open Letter to the Senate Judiciary Committee, (available at http://www.humanrightsfirst.org/us_law/etn/gonzales/statements/gonz_military_010405.pdf).

³ I note with interest Professor Rebecca Witmann’s observation that one of the prosecutors at the Aushwitz Trial conducted in the German municipal court system in 1967 “sought to place his efforts in the context of the worldwide human rights movement that had begun with the creation of the United Nations and been solidified with the human rights convention.” See comment on closing argument of Hans Grofmann BEYOND JUSTICE: THE AUSCHWITZ TRIAL, 195 (2005)

⁴ See, e.g. Telford Taylor FINAL REPORT TO THE SECRETARY OF THE ARMY ON THE NUREMBERG WAR CRIMES TRIALS UNDER CONTROL COUNCIL LAW NO. 10, at 64-5, 69, 224-229 (1949)

⁵ See Declaration of Four Nations on General Security, 9 DEP'T ST. BULL. 308 (1943), reprinted in 38 AM. J. INT'L L. 5 (1944) (Hereafter Moscow Declaration)

⁶ Moscow Declaration, Statement of Atrocities

⁷ Ibid.

⁸ Ibid.

⁹ Ibid. There does appear to be a subordinate irony that on September 15th, the day the President “initialed” the Morgenthau Plan in Quebec, that Col Murray Bernays, assigned to G-1 in the War Department distributed a memorandum in which the beginnings of the “Nuremberg ideas” were to be found. Telford Taylor THE ANATOMY OF THE NUREMBERG TRIALS (Hereafter ANATOMY) at 35 (1992).

¹⁰ Italics in original, bold text added for this paper. Memorandum from Henry Morgenthau Jr. to President Roosevelt (the Morgenthau Plan), September 5, 1944 Bradley F. Smith THE AMERICAN ROAD TO NUREMBERG, THE DOCUMENTARY RECORD, 27-8 1944-1945 (1982)

¹¹ Roosevelt Memorandum to Stettinius cited in ANATOMY at 37.

¹² ANATOMY at 38.

¹³ Professor Jonathan A. Bush has observed that Roosevelt’s note was a “milestone on the road to Nuremberg” and that Chandler’s apparent involvement in inspiring it is “a humble reminder of a time when Pentagon lawyers were well in advance of activists and academics in formulating human rights theories,” in: *“The Supreme ... Crime” And Its Origins: The Lost Legislative History of the Crime Of Aggressive War* 102 COLUMB. L. REV. 2324, 2363-4 (2002) Hereafter *Lost Legislative History*

¹⁴ This section of the speech cited ANATOMY 44-5. The entire text can be found at <http://www.roberthjackson.org/Man/theman2-7-7-1/>

¹⁵ Jackson would later declaim in his opening statement at the trials “That four great nations, flushed with victory and stung with injury 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.”

¹⁶ In July of 1945, during the four power negotiations on the London Charter Jackson threatened to withdraw and hold separate American sponsored trials because he was not satisfied with the authority held by the other negotiators. (ANATOMY, 63). Subsequently Jackson issued the same threat in frustration at the substantive disagreement over the scope of the crime against peace. (ANATOMY, 66-7)

¹⁷ For an excellent synthesis of the relationship of Hitler’s regime and military Aggression see Richard Bessel *NAZISM AND WAR* (2004)

¹⁸ ANATOMY at 35

¹⁹ Lieutenant Colonel Michael A. Newton, ‘*Comparative Complementarity: Domestic Jurisdiction Consistent with the Rome Statute of the International Criminal Court*’, 167 *MIL. L. REV.* 20, 23 (2001).

²⁰ Graeme A. Barry, ‘*The Gifted Judge: An Analysis of the Judicial Career of Robert H. Jackson*’, 38 *ALBERTA L. REV.* 880, 883 (2000).

²¹ See Mary Margaret Penrose, ‘*Lest We Fail: The Importance of Enforcement in International Criminal Law*’, 15 *AM. U. INT’L L. REV.* 321, 330 fn 34 (2000).

²² But see, Istvan Deak, *The Thinkable*, “Acting on the basis of [the Llandoverly Castle case at Leipzig], the Nuremberg Court and the postwar German courts, at least in my own view, could have tried and severely punished all the Nazi mass murderers. Instead the courts chose to create legally doubtful ex-post-facto laws so as to punish the defendants.” [Review essay] *The New Republic*, February 18, 2002

²³ There were nine detainees in the Special Court Detention Facility. (No accused had been granted bail.) Except for the Sierra Leonean Army, each of the main military forces active during the conflict was represented. Three accused were from the Revolutionary United Front, RUF, three from the Civilian Defense Force, CDF, and three from the Armed Forces Revolutionary Council, AFRC. Although prosecutors originally sought a joint trial, the Special Court severed the proceeding into three different trials. The three RUF accused were Issa Sesay, Augustine Gbao, and Morris Kallon; they faced indictment SCSL-04-15-T. I was co-counsel to Kallon.

²⁴ This was especially intense in citations to the High Command Case in disputes over distinctions between “staff” and “command” functions during arguments about the scope of command responsibility, and in citations to the Nuremberg Judgment over the nature of “criminal enterprise,” a critical theory of liability in the AFRC and RUF indictments.

²⁵ See Allison Marston Danner and Jenny S. Martinez, ‘*Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law*’, 93 *CALIF. L. REV.* 75, 118 (2005).

²⁶ *Id.*

²⁷ Bradley F. Smith, *REACHING JUDGMENT AT NUREMBERG*, 122 (1977).

²⁸ Id., at 1256.

²⁹ See the frequently criticized Streicher verdict.

³⁰ Affirmation of the Principles of International Law recognized by the Charter of the Nuremberg Tribunal. Resolution 95 (I) of the United Nations General Assembly, 11 December 1946.

³¹ All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.

³² Cited in THE LAWS OF WAR: A COMPREHENSIVE COLLECTION OF PRIMARY DOCUMENTS ON INTERNATIONAL LAWS GOVERNING ARMED CONFLICT (W. Michael Reisman and Chris T. Antoniou eds. 1994), 334 citing , DOENITZ AT NUERMBERG: A REAPPRAISAL; WAR CRIMES AND THE MILITARY PROFESSIONAL (H.K., Thompson Jr. and Henry Sturtz eds. 1975) 181, 194.

³³ ...There is no international court. To that you will retort that after the last war, there was the Nuremberg court. But we know now – and I think I wrote at the time – that any nation losing a war will be subjected to the decisions of a Court like that of Nuremberg. But it is sure that the country subjected to a Nuremberg court will be the guilty country; it will certainly be the country that has been conquered. In the case at hand, the conquered nation was also the guiltiest one that is Nazi Germany. But as soon as we begin condemning 'crimes against peace,' for example, I am sure the country that wins a war will demonstrate that the vanquished was responsible for it." Raymond Aron FROM THE COMMITTED OBSERVER *LE SPECTATEUR ENGAGÉ* - CONVERSATIONS WITH JEAN-LOUIS MISSIKA AND DOMINIQUE WOLTON, 247 (1983).

³⁴ Taylor regarded the arraignment of the Kaiser in Article 227 of the Treaty of Versailles as lacking precedential value because the language of Versailles was “opaque” and “had no roots in international legal doctrine.” ANATOMY 16. Professor Bush is slightly more open to Versailles as precedent but regards the language of Article 227 as “loose” and “never put to the test.” *Lost Legislative History* at 2332. See Treaty of Versailles, June 28, 1919, art. 227, 2 Bevans 43, 136.

³⁵ ANATOMY at 51 (emphasis Taylor’s).

³⁶ ANATOMY at 629.

³⁷ Bernard D. Meltzer, *TRIBUTE: Robert H. Jackson: Nuremberg’s Architect and Advocate*, 68 ALB. L. REV. 55, 60 (2004).

³⁸ Despite the principle of *tu quoque*, certain factual discrepancies between the wartime conduct of victor nations and the factual bases of the convictions of the leading Nazi’s on the crime against peace created embarrassment and broadly raised questions about the Tribunal’s credibility. The Soviet invasion of Poland and the fact that the allegation of Nazi aggression against the USSR hinges on the German violation of Nazi – Soviet Non-Aggression Pact of 1939 was embarrassing at the time the verdict was rendered. Serious questions about whether the German Invasion of Norway was a response to earlier British invasion plans also raises difficult questions. Bradley F. Smith, REACHING JUDGMENT AT NUREMBERG 144-150.

³⁹ ICC Article 5 which defines “Crimes within the Jurisdiction of the Court” provides that “The Court shall exercise jurisdiction over the crime of aggression once a provision

is adopted in accordance with articles 121 and 123 defining the crime and setting out the conditions under which the Court shall exercise jurisdiction with respect to this crime. Such a provision shall be consistent with the relevant provisions of the Charter of the United Nations.”

⁴⁰ See National Security Strategy of the United States of America (2002), available at www.whitehouse.gov/nsc/nss.pdf.

⁴¹ First made public on in May of 2005.

⁴² Report of the Secretary-General, In Larger Freedom: Towards Development, Security and Human Rights for All, U.N. GAOR, 59th Sess., Agenda Items 45 and 55, U.N. Doc. A/59/2005 (2005) para 122.

⁴³ See <http://www.timesonline.co.uk/article/0,,2087-1593607,00.html>

⁴⁴ At the time of the Judging Nuremberg Conference, John Bolton was the UN Ambassador Designate. He subsequently received a recess appointment on August 1, 2005. Bush Names Bolton U.N. Ambassador in Recess Appointment, *Jim VandeHei and Colum Lynch, Washington Post August 2, 2005*.

⁴⁵ *Nomination of John R. Bolton: Hearing Before the Senate Foreign Relations Committee*, 109th Cong. (April 12, 2005) (testimony of John R. Bolton, then nominee for U.S. Ambassador to the United Nations). It should be acknowledged however, that there is a school of thought that argues that during its pre-war diplomatic efforts the Bush Administration believed it was “acting on behalf of international, and not exclusively national, interest” see Jonathan Monten, ‘*The Roots of the Bush Doctrine: Power, Nationalism and Democracy Promotion in U.S. Strategy*’, INTERNATIONAL SECURITY 29:4, 112, 146 (2005).

⁴⁶ For purposes of this article “terrorism” describes ideologically motivated violence against civilian targets. This is not the forum for an extended discussion of “terrorism” or the lack of a universally accepted definition but see the acknowledgment of the UN’s High Level Threat Panel that “The United Nations ability to develop a comprehensive strategy has been constrained by the inability of Member States to agree on an anti-terrorism convention including a definition of terrorism,” UNITED NATIONS, A MORE SECURE WORLD: OUR SHARED RESPONSIBILITY, REPORT OF THE SECRETARY-GENERAL’S HIGH-LEVEL PANEL ON THREATS, CHALLENGES AND CHANGE, UN Doc. A/59/565, para. 157 (2004) See also Johnathan Weinberger, ‘*Defining Terror*’, 4 SETON HALL JOURNAL OF DIPLOMACY AND INTERNATIONAL RELATIONS, 63 (2003) and for an earlier exploration of this definitional problem from a widely respected scholar of international law currently serving as an advisor to the Iraqi Special Court see M. Cherif Bassiouni *Crimes of Terror Violence* in INTERNATIONAL CRIMINAL LAW 2ED. 777 et seq. (M. Cherif Bassiouni ed. 1999).

⁴⁷ See Michael J. Glennon ‘*Why the Security Council Failed*’, FOREIGN AFFAIRS, May/June 2003 at 24.

⁴⁸ See Robert Kagan, ‘*America’s Crisis of Legitimacy*’, FOREIGN AFFAIRS, March/April 2004, at 65. Kagan maintains that American legitimacy since World War II stems from its ability to contain the Soviets during the cold war, not from its commitment to emerging international legal norms.

⁴⁹ Howard Ball PROSECUTING WAR CRIMES AND GENOCIDE: THE TWENTIETH CENTURY EXPERIENCE. 46 (1999).

⁵⁰ Bradley F. Smith THE AMERICAN ROAD TO NUREMBERG, THE DOCUMENTARY RECORD, 27-8 1944-1945 (1982).

⁵¹ See for example the comments of Benjamin Ferencz, Whitney Harris, and Judge Hans-Peter Kaul

⁵² Interestingly, the criticisms by General Ridgway and Raymond Aron of the employment of the crime against peace at Nuremberg disappear with the creation of an “international court” See Notes 32-3 above.

⁵³ *UN will refer Darfur crimes to court in Hague. U.S. decides not to oppose resolution*, Warren Hoge, International Herald Tribune, April 2, 2005, 6.