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WITHOUT NUREMBERG—WHAT?

HENRY T. KING, JR.*

First, a word of background. The Nuremberg Trials established the modern Laws of War and laid the foundation for the ad hoc international tribunals erected in the past fifteen years, as well as the permanent International Criminal Court (ICC). One of the difficulties in comparing Nuremberg to its modern descendents is that the Nuremberg Trials were conducted under ideal conditions. Germany and Italy had unconditionally surrendered and the defendants were already in the custody of and under the control of the victorious powers, as was the enormous amount of incriminating documentary evidence. The world's nation states as a whole endorsed the trials, and the daily press coverage made its proceedings transparent to and understandable by the general public, including the Germans.

The modern war crimes tribunals have not been conducted under the same ideal circumstances. Major powers on the United Nations ("U.N.") Security Council have not given their unstinted support, particularly when they deem their self-interests are at stake. Financial short-falls have hampered the gathering of evidence and the apprehension of indicted defendants, both tasks which have been made even more difficult by uncooperative local governments. And sparse media coverage, with the exception of "superstar" defendants like Slobodan Milosevic and Saddam Hussein, has resulted in apathy, misunderstandings, opposition, and proceedings wholly unknown to the victims. Still, these courts have implemented the Nuremberg principles and have even expanded on the crimes over which they have jurisdiction to now include rape, sexual violence, and the forced use of children as soldiers. In spite of the imperfections, they are carrying on the legacy of Nuremberg.

Nuremberg was designed to replace the Law of Force with the Force of Law. This was, indeed, a revolutionary concept.

Since civilization began some 5,000 years ago, the Law of Force had been the order of the day. We should never forget that the Law of Force is barbaric, fleeting, and creates tremendous uncertainty on the part of the populous. It means that highly cultured, peace-loving people could be and have been destroyed by foreign and domestic predators who recognize no

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limits to their behavior. Albert Speer, a prime defendant at Nuremberg, recognized the dilemma created by acceptance of the Law of Force. In his closing statement at Nuremberg he graphically expressed his concern over a future in which some nations devoted their efforts to producing greater weapons of destruction while others focused on cultural growth and peace-loving pursuits. He hoped that Nuremberg would ensure that the growth of international law kept pace with increases in the technology of destruction.

In today's world, many nations accept the Rule of Law as the order of the day. This is particularly true of the European nations who, as members of the European Union (EU), accept the Rule of Law in economic matters. Around the world, one hundred countries have ratified the Rome Statute, creating the ICC. Hopefully, the list of states who accept the Rule of Law will grow significantly as nation-states recognize that it is in their best interest to do so.

We need to recognize the benefits of the Rule of Law in certain areas. For example, international human rights cannot exist *in vacuo*. To be effective, they must be supported by a Rule of Law. Human rights are respected in Europe because of the European Human Rights Convention and a court to enforce it. The principles underlying this Convention were spawned at Nuremberg.

Today, much of the world condemns genocide and has ratified the Convention Against Genocide which became effective in 1951. There are, moreover, several tribunals in operation today whose function it is to punish genocide where it occurs. This is because a Rule of Law directly emanating from Nuremberg condemns it. Genocide is barbaric; it is inhumane. Yet, before Nuremberg there was no international law to punish those criminally responsible for it. Individuals at several points on the globe are being tried today for genocide. This is one graphic illustration of the long reach of the Nuremberg precedents.

Before Nuremberg there was condemnation of war crimes through the Hague Conventions of 1899 and 1907 and the Geneva Convention of 1928, but no structure had been established to try individuals accused of war crimes. Nuremberg gave bite and teeth to the principles agreed upon covering the treatment of civilians and prisoners of war. Until Nuremberg these principles, although agreed upon by many nations, were not enforced. The Nuremberg Court enforced these principles so that today they are an integral part of international law, as recognized by the tribunals currently trying individuals for war crimes. These crimes are precisely defined by the laws governing the operation of these tribunals. Trials for these crimes are not a matter of whim; they are required by the Rule of Law and common moral decency. While these trials should be the order of

the day, they still often take second place to politics and economic calculation. The Security Council was remarkably slow to act to the crisis in Darfur because of little domestic political will for intervention and the close economic ties between Sudan and several permanent members of the Council. Amnesties and immunities are still used as a way of ending wars or conflict. Without compunction under a Rule of Law these individual defendants could well escape trial, depending upon the political circumstances involved. History has repeatedly shown this to have been the case.

The Rule of Law should be all encompassing. The rules need to be enforced by international tribunals with no exceptions, as was the case at Nuremberg. This was, indeed, what made Nuremberg so historically important because this approach had never been followed before. It is why Nuremberg remains inspirational today, in spite of gaps in prosecuting crimes against humanity. Without Nuremberg, there would be no real hope of trying those most responsible for these crimes.

The area of international law where Nuremberg's legacy is more cloudy is aggressive war. The problem here is that the Nuremberg Tribunal's judgment was not generic in this area but dealt with the particular factual situation at hand. The Tribunal found that what the Nazis did constituted aggression, but its language in the judgment did not clearly cover all parallel or related situations. This was the vital count that was not fully dealt with at Nuremberg. An ad hoc approach was not enough. The U.N. Charter attempted to fill this gap by prohibiting the use of force except when authorized by the Security Council or in self-defense *if an armed attack occurs*. However, there was no international legal system established to deal with violations. The only recourse built into the Charter for dealing with acts of aggressive war is through the Security Council, which has often been constrained by international political considerations. The problem this gap created was that it allowed nations leeway in defining for themselves what did or did not constitute aggression. The result has been that some nations, including the United States, have been able to define, in their own interests, what does or does not constitute aggression.

As a consequence, the tragedy is that, as yet, there is no clear-cut, mutually acceptable Rule of Law applicable in this critical area. One only need look at North Korea's invasion of South Korea, the United States in Panama or Grenada, or the U.S.S.R.'s invasions of Hungary and Czechoslovakia to see that there is, indeed, a glaring gap in our inheritance from Nuremberg that must be corrected if peace and security are to be the order of the day.

To understand what the world would have been like without Nuremberg let us look at the following probabilities.

First, there would be no enforceable international human rights because they had not been articulated in any court with enforcement powers. Without Nuremberg, an enforceable international human rights legal system would have to be developed from scratch. But what act would be so horrific for the world to demand or accept such a system if Nazi atrocities did not result in such? The end of World War II was the now-or-never opportunity to face the issue of genocide and crimes against humanity. Nuremberg marked, indeed, the birth of the concept that all individuals have certain inalienable human rights which transcend the boundaries of nation-states. This was a great step forward in human development.

There might not have been a genocide convention without Nuremberg. After all, the Nuremberg indictment was the first to identify genocide as a crime in a judicial proceeding. Moreover, genocide was condemned by name in the closing remarks of the British and French prosecutors. Nuremberg gave genocide visibility, and the evidence produced at Nuremberg drew the world's attention and sympathy. World War II was fought with the world largely unaware of the atrocities being committed. Nuremberg was not just a forum for examining and condemning genocide; it was the world's first conscious attack against genocide. It is a fair statement that genocide would be far more prevalent in today's world without Nuremberg.

In the war crimes area, Nuremberg punished those surviving top Nazi leaders whose policies and actions were responsible for the commission of war crimes against civilians and prisoners of war. The result has been that the military field manuals of the major nations today incorporate the Nuremberg principles in the war crimes area. Nuremberg also revealed gaps in the law involving war crimes. The nations of the world subsequently attempted to bridge these gaps through the 1949 Geneva Conventions and, to a large extent, this has been accomplished. Unfortunately, however, that legacy has been tarnished. The United States was a driving force behind Nuremberg and the creation of clear standards for the treatment of civilians and prisoners of war. The Nuremberg principles have been firmly enshrined in our military field manuals and the Uniform Code of Military Justice (UCMJ). However, by violating the Geneva Convention in its treatment of captured combatants through torture and indefinite detention without trial, the United States is committing the same crimes as the rogue nations we oppose.

As previously mentioned, the big gap in the world's inheritance from Nuremberg is in the aggressive war area. This is in part because of a lack of definition as to what constitutes aggressive war. Although attempts have been made to define it, agreement on any definition has not yet been possible. This primarily has been because some leading nations have been unwilling to give up sovereignty in this area. So, there is much to be done in order to promote a secure future for all of us. As to the urgency of this, we need only harken back to the words of Robert Jackson, the U.S. Chief Prosecutor at Nuremberg, when he said that aggressive war was the primary crime dealt with in Nuremberg.

Nuremberg took us a long way on the path of avoiding human destruction by giving us a blueprint for a Rule of Law. But there is still much ground to be covered in building a secure world for all of us, particularly in the aggressive war area. We need to make urgent efforts to meet this challenge—not only for ourselves, but for future generations.

One question which clearly arises, in light of the foregoing facts, is what effect did all these limitations have on national sovereignty? Here we should note that national sovereignty was comparatively free from limitations from the date of the Treaty of Westphalia in 1648, when nation-states were freed from the Pope's domination, until 1945, the date of the start of the Nuremberg trials. Up until then, national sovereigns, leading members of governments and militaries performing Acts of State were under no legal restraints whatsoever. Thus, Nuremberg marked a revolution, stripping officials of their absolute impunity and holding them individually accountable for their policies and acts.

Some specifics about the changes brought by Nuremberg are in order. First, Nuremberg denied the concept of sovereign immunity. In 1945, the leaders of Nazi Germany were put on trial at Nuremberg while the Kaiser, who is credited with having much to do with the start of World War I, was living peacefully at Doorn in the Netherlands until his death in 1941. Subsequent to Nuremberg, denial of sovereign immunity has meant that Slobodan Milosevic, Augusto Pinochet, and Saddam Hussein have all been denied immunity and been subject to trial in courts of law. This was, indeed, a revolution. It meant that sovereigns and their high ranking officials were to be held responsible for what they did in the name of their nation-states.

Second, Nuremberg denied the defendants the defense of superior orders. What that meant was that, at Nuremberg, superior orders offered no excuse for criminal activity. Here a personal observation is appropriate. On the basis of what Albert Speer told me, I believe that the Final Solution, which involved the extermination of the Jewish race from

Europe, was ordered orally by Adolph Hitler. Speer told me that no one else would have had the authority to order such a drastic move. The defense of the Nazis at Nuremberg, including Otto Ohlendorf, Commander of Einsatzgruppe D, and Rudolf Hoess, Commandant of Auschwitz, was that they carried out Hitler's orders in the extermination of Jews. This defense was denied and they were hung for their actions. The necessary implication of the denial of this defense is that a higher law governed—namely, international law.

Third, a close examination of the crimes against humanity count at Nuremberg, as reflected in the London Charter of August 8, 1945, discloses that in conjunction with certain crimes against humanity, and in particular genocide, domestic national law offered no excuse for defendants charged with committing those crimes. One gruesome example is the Law for the Prevention of Hereditarily Diseased Offspring, which led to forced sterilizations of women and eventually the T-4 Euthanasia Program, which was responsible for two hundred thousand deaths. Count three of the Nuremberg indictment included the sterilization of women at Auschwitz and at Ravensbruck, and the defendants were not able to justify such barbarism based on the Sterilization Law. To summarize, what this meant was that a national law in such a situation was no longer controlling, and that by implication, a higher law—namely, international law—governed. This was a severe limitation of sovereignty as it had existed in the pre-Nuremberg era.

Another encroachment on national sovereignty was Nuremberg's endorsement by implication of the concept of universal jurisdiction. Basically, the Nuremberg judgment states that the four allies conducting the prosecution at Nuremberg were doing collectively what each could have done individually. The Nuremberg judgment laid the groundwork for the concept that some crimes, particularly crimes against humanity, were so egregious that the accused could be tried anywhere without any jurisdictional connection between the trial court and the situs of the crime, because they were crimes against *all* humanity.

The concept of universal jurisdiction was applied in the Eichmann case by the Israeli courts. Here, we need to keep in mind that when Adolph Eichmann committed his crimes Israel was not even in existence and thus he could not have been subject to Israeli law. But the Israeli court, basing its opinion in part on Nuremberg, said that Eichmann's crimes were crimes against humanity and, therefore, subsequent Israeli law could be applied at his trial. This was, indeed, an enormous step forward in holding individuals responsible for crimes of great magnitude. It also represented a limitation on sovereignty. Eichmann was, after all, a German national who

was seized in Argentina and kidnapped by Israeli agents. In effect, this case obliterated the lines of national jurisdiction and rejected traditional legal limits to the exercise of legal rights of nation-states in the criminal area.

In light of the foregoing, the necessary implication is that Nuremberg established certain fundamental international human rights—rights that exist regardless of nation state endorsement. This was, indeed, a severe limitation of sovereignty.

Where are we now on recognition of the Nuremberg principles? In the developed world, particularly Europe, Canada and Australia, much progress has been made. This is true of certain countries in the developing world as well. But in China and Russia forward progress has been glacial, and in some cases they have played the role of goalies in fighting against a rule of law in the world. Neither China nor Russia has joined the ICC, which would institutionalize the Nuremberg principles. On the other hand, neither has vetoed U.N. Security Council resolutions for the creation of ad hoc war crimes tribunals covering the former Yugoslavia, Rwanda and Sierra Leone.

Nuremberg was an American invention, and Supreme Court Justice Robert Jackson, who created the vision of Nuremberg, has stated: “To pass these defendants a poisoned chalice is to put it to our own lips as well.” What he meant was that the United States and the other allies who sought justice at Nuremberg were going to have to abide by the Nuremberg principles in the years that followed.

Today, both Great Britain and France are parties to the ICC, which implements the Nuremberg principles. The United States, however, has not only refused to join the Court but has made extreme efforts to sabotage the operation of this Court. More specifically, the United States has cut off military aid to some thirty-five countries who refused to exempt U.S. soldiers from the Court’s jurisdiction in their countries.

The problem, basically, is that the government of the United States does not want to submit itself to the same rules that are applied to other countries, and it has convinced the American people that this is the only way to keep them secure. A case in point is that of the U.N. International Criminal Tribunal for the former Yugoslavia. In that case, at the instigation of the U.S., the U.N. Security Council set up a war crimes tribunal charged with applying law based on the Nuremberg principles. Parallel tribunals were set up with U.S. endorsement under U.N. auspices for Rwanda and Sierra Leone. The U.S. was emphatic in its support of these efforts, sending both personnel and money to implement them. These were instances where the Nuremberg principles were being applied

to the actions of others. But when it came to applying the Nuremberg principles to its own actions through the ICC, the U.S. said an emphatic, “No!”. Hopefully, this hypocrisy will be revised under a future administration. Protecting our leaders from accountability is not the same as protecting our national interests.

Tragically, the Nuremberg principle which holds sovereigns responsible for what they do in the name of their citizens has been a stumbling block for the development of international law. For instance, it is my judgment that the U.S. government does not support the ICC, not because our servicemen might be tried—so long as the U.S. is prepared to police its own, the ICC does not have jurisdiction—but because our leaders could be. The Constitution and the values it embodies protect Americans from the abuses of government, not abusive government from the people. Sovereignty lies with the citizens of a country, not their government.

One final thought—one that deals with the crime of aggressive war. [Robert] Jackson thought that this was the fundamental crime dealt with at Nuremberg. This is an area where not much progress has been made. This is, however, a crime within the jurisdiction of the ICC subject to its being defined and subject to the definition being approved by seven of the eight parties to the Court. This cannot happen before 2009. Currently, efforts are under way to define aggression and begin the process through which it will become a part of the ICC’s jurisdiction. History has witnessed U.S. aggression in Grenada, Panama, Vietnam, and Iraq. Many U.S. soldiers have been killed in the process and these military actions have been extremely expensive for the U.S. Moreover, they have hurt our image in the world as a peace-loving nation and as an advocate of the Rule of Law. Speaking as a former U.S. prosecutor and as a U.S. citizen, I believe that it would be best for the U.S. as a country to restrain its leaders by international agreement from committing aggression. From the standpoint of national self-interest, we should take this step forward at this time. We cannot afford the costs of war indefinitely in terms of human lives or expense. As a step forward at this time, I would like to see the United States propose a non-aggression pact with those nations who will be willing to accede to the same. Such a pact would define benchmarks of international behavior in this area. In proposing such a move, I say emphatically that the weapons of destruction in the world in which we live are too powerful to be left unchecked by legal restraints.

Many of the U.S.’s abuses and blunders have been in part due to uncertainty in the changes in the world. The Geneva Conventions and the U.N. Charter, the spiritual brothers of Nuremberg, were designed with

states as the main actors. However, in today's world, non-state actors, such as terrorists and drug cartels, are in some ways a more potent threat. Certainly they are more flexible in responding to state actions. However, they are not adequately accounted for in modern international law. Criminal and international law's handling of terrorism is a perfect example. Are terrorists criminals or prisoners of war? How do you effectively gather intelligence necessary to prevent an attack if that intelligence will not stand up in court as evidence under exclusionary rules?

The United States now has the opportunity to take the lead in this aspect of international law. Identifying and addressing gaps in current laws and treaties could be the most significant legal development since Nuremberg. For the remarkably low price of making our leaders live up to American values and commit to the international standards we helped create, the U.S. could lead the world in agreeing to new playing rules, which could effectively counter genocide, terrorism, and the threat of rogue states.

In addressing you here today, I have spoken to you as an institutional memory of Nuremberg and as a citizen of the world. I believe profoundly that Robert Jackson's vision at Nuremberg is as timely today as it was then. We need to move forward with a deep sense of urgency in bringing Jackson's vision to reality in today's world—not only for ourselves, but for future generations. I am confident that we can do so if we will it into our future.