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# Legacies of Nuremberg

**John Q. Barrett***

I am very grateful to the leaders and sponsoring organizations that have brought the Dialogs together for ten years, particularly this year in this very special place. I also thank, humbly, Germany and Nuremberg. We are seventy years out from a Nuremberg trial process that was filled with participants who could not have imagined the Germany, the Nuremberg city of human rights, and their sponsorship and teaching, that we all are beneficiaries of today. It is to the great credit of today's generations of German leaders that they have built this Nuremberg.

My topic, "The Legacy of Nuremberg," is not a Justice Robert H. Jackson topic, although I will make some points that concern Jackson or are "Jacksonian." I am in this lecture trying to imagine some of how I think Justice Jackson and his Nuremberg trial colleagues would have thought seventy years ago, looking ahead to our day and farther, about the potential legacies of the Nuremberg trial.

## "Nuremberg" the Word

I begin by stepping back from Nuremberg trials expertise, which each of you has, to consider a more general question: What does "Nuremberg"—which is, as a single word, the short form way

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of referring to the post-World War II Nuremberg trials of Nazi war criminals—mean today, out in the world? Where does one find references to "Nuremberg"?

To answer these preliminary questions, I reviewed popular press during the past few months. Here is some of what I found about how the word "Nuremberg" gets used, invoked, and also tossed around today, outside of the legal and historical literature.

*"Nuremberg" Is a Word That Pertains to Nazis*

I found, no surprise, that the word "Nuremberg" is often used to refer to something about World War II-era Nazis and their crimes—the people and matters that the Nuremberg trials of course began to address immediately after the War.

Those usages break down into two categories. One concerns the original, WWII-era Nazis. For example, in the United Kingdom, stories report public outrage concerning twenty former members of the Waffen-SS, now elderly, retired, men, who live in the United Kingdom and receive public pensions. The Waffen-SS was, of course, convicted here in Nuremberg in 1946 as a criminal organization. Press regarding what those aging, real Nazis are getting away with invokes Nuremberg.

Another context in which "Nuremberg" is mentioned in press today concerning World War II-era Nazis is in reporting on current German efforts to prosecute Nazi war criminals—*spät, aber nicht zu spät.* These efforts include the John Demjanjuk trial in Munich in 2011. Identified, eventually and accurately, as a guard at Sobibor, Demjanjuk was convicted as an accessory to the murders in that camp. These efforts also include the 2015 conviction of Oskar Gröning, the so-called Auschwitz bookkeeper; the Spring 2016 conviction of Reinhold Hanning, who was an Auschwitz guard; and the trial, begun this month in New Brandenburg but proceeding very fitfully,

of former Auschwitz guard Hubert Zafke, who is charged for his work in the month in which Anne Frank was delivered by train and became an Auschwitz prisoner, before she then was shipped to Bergen Belsen and perished. In the context of criminal cases against these real, if old and increasingly scarce, former cogs in the crimes of Nazi Germany, the Nuremberg trials are remembered as history, precedent, and, for the legal system, performance challenge.

The second category of "Nazis," if you will, are today's alleged Nazis. I use the word carefully—my point is only that people do point their fingers and accuse others of being Nazis.

One example, almost amusing but really just deeply appalling, is Ursula Auerbach, age eighty-seven. A friend of Heinrich Himmler's daughter, Auerbach is the so-called "Nazi Granny" in today's Germany. She was convicted in 2016 in Holmberg and sentenced to eight months in prison for incitement and Holocaust denial. That is her hobby, it seems, and it is against German national law. She has assumed Nazi culpability, and Nuremberg-invoking legal liability, by her speaking and its criminal consequences.

Other examples of mentioning Nuremberg when accusing persons of Nazi behavior today come from outside Germany. Just last week, at the Commonwealth of Independent States summit in Kurdistan, the leaders of those former Soviet Republics adopted many statements, including one noting this seventieth anniversary year of the international Nuremberg trial, its verdicts, and its principles. Also last week, at the United Nations General Assembly, the representative of the Russian Federation spoke emphatically about the need to permit no revision of the history of WWII, no glorification of Nazism . . . and then, for some reason, his next paragraph was about Ukraine. Russian Federation memory, celebration, and rhetoric about Nuremberg are not, in other words, limited to historical discussion of the Great Patriotic War. They also have contemporary political context. The

Russian Supreme Court, for instance, recently affirmed the criminal conviction of a blogger who had reposted an article stating—this will not shock you—that Nazi Germany and the U.S.S.R. were allies in 1939, 1940, and into the middle of 1941, and that they invaded Poland together, from their respective sides, in September 1939. This blogging, the Court held, was ground for criminal conviction.

*"Nuremberg" Is a Word That Pertains to Rule of Law Excellence*

These uses of the word "Nuremberg" bridge into a second category: the word as a high legal standard. "Nuremberg" and the Nuremberg trial are invoked as a great rule of law achievement, a gold medal, a world championship in some respect.

Examples are prominent in popular culture. In the 2015 film "Bridge of Spies" concerning a 1960s U.S.-U.S.S.R. prisoner swap in Berlin, Tom Hanks portrays James B. Donovan. He had been a senior U.S. Office of Strategic Services (O.S.S.) official during World War II and then a senior member of Justice Jackson's prosecution team prior to and at Nuremberg. Early in the film, Hanks/Donovan is introduced as a Brooklyn-based insurance lawyer. Why is he being recruited into a Cold War spy case? Well, a colleague explains to him, "You distinguished yourself at Nuremberg." "I was on the prosecution team," he concedes—and no further credential is required. Oliver Stone also invoked Nuremberg in his recent film about Edward Snowden. It says many things, including, to explain the actions of Stone's "Snowden," a passing lecture about the Nuremberg principles.

Writers also mention Nuremberg-trial-as-great-legal-achievement as they cover and consider the U.S. military commissions in Guantanamo. They aspired to become regarded, in our time and then in history, as a twenty-first century Nuremberg. The commission conveners and leaders, including some highly principled and talented people, have pointed explicitly to Nuremberg as their model. That

military commission process, now ten years on since its creation and fifteen years on since 9/11 and the war in Afghanistan, is mired in enormous, probably fatal, logistical and legal issues, including some concerning governmental misconduct. People now, when discussing the military commissions, mention "Nuremberg" to make arguments about what has not happened.

*"Nuremberg" Is a Word That Pertains to Historical Significance*

A third context in which the word "Nuremberg" is used these days is as a trope outside of the realms of adjudicative and legal endeavors. The word is used here as a mark of historical significance and high brand value.

It appears, for example, in many recent obituaries and death notices of men who were World War II soldiers. These reports note that, among life highlights, these men "attended" the Nuremberg trials. (Apparently Courtroom 600 had thousands of seats that are not quite visible in late 1940s photographs.) I love, for its modesty combined with its recognition of the significance of "Nuremberg," one recent obituary that noted a man's wife, children, career, hard work, community endeavors, and that he was "stationed in Europe during the Nuremberg trials."

On the other hand, and I hope that you catch this as a note of true absurdity, I noticed a recently published letter in which the writer, making his point that "following orders" is no defense for the evil of one's own actions, drove home the emptiness of that purported excuse by reporting that Adolf Eichmann had offered it when he took the stand at Nuremberg to explain his role in perpetrating the Holocaust. I believe that if Eichmann had dropped by Nuremberg in the late 1940s to testify, someone would have noticed ... and arrested him. (The writer of course was confusing Eichmann with Auschwitz commandant Rudolf Hoess—the writer got the name wrong but otherwise made a cogent point.)

The conclusion to draw?: "Nuremberg" is, around the world, the word for something that is big, great, and permanent in modern history.

## The International Nuremberg Trial as It Was—Its Legacies for the Future

This seventy-year anniversary moment is not merely an occasion to note the continuing, varied, and striking number of references to "Nuremberg" and the Nuremberg trials. It is, I think, an occasion to step back, look hard, and locate core aspects of what Nuremberg really was, and thereby to think carefully about what it means and what some of its legacies are, for us and for the future.

I will not presume to teach Nuremberg to this crowd. We are the Nuremberg Academy, including in fact, plus professionally and informally in our individual pursuits—historical knowledge of the Nuremberg laws, the Nuremberg trials, and the Nuremberg principles and their applications is part of the deep background that many participants in these Dialogs plus many in their public audience share.

Today, September 30, 2016, is the anniversary of the first of the Nuremberg "Judgments Days." That double plural is an awkward phrase, and I use it deliberately. On September 30, 1946, and on October 1, 1946, the International Military Tribunal (IMT), filling two extensive courtroom days, rendered a series of judgments. September 30 was the day of factual and legal findings—in Courtroom 600 seventy years ago, the seated persons, listening to the judicial reading of the start of the Judgment or to a simultaneous interpreter's voice, heard no judgment on an individual defendant. That all came the next day—October 1 was the day of convictions and acquittals and then, in the afternoon, the sentences imposed on the convicted.

The September 30 IMT judgments were about what the trial evidence had shown, beyond a reasonable doubt, about the defendants' conduct,

and what the Third Reich had done across the years 1933–1945 to consolidate totalitarian power here in Germany, and then as a military aggressor, occupying power, and perpetrator of atrocities across Europe. Note that this is the history that this Documentation Center tells so factually and powerfully. In 1946, the IMT's Judgment was the first official delivery, in what amounts to a substantial book, of this factual record. It was based on the captured Nazi documents and the live witness testimony that the prosecutors had presented as evidence.

The IMT, after making those factual findings, turned to the validity of legal theories that had been the bases for the London Agreement creating the tribunal, and for the indictment that had brought individuals and Nazi organizations to the IMT for adjudication as charged criminals. The IMT held that the waging of aggressive war was indeed, by the late 1920s and into the 1930s, a crime against the international legal order. The IMT also pronounced the legal validity of the war crimes and the crimes against humanity charges, limited to the temporal constraints of Nazi war-waging (September 1939 and later).

In addition to the substance of these judgments, the legacies of Nuremberg include these eight aspects of the trial as it really was:

*The Nuremberg Trial Followed War-Winning*

We must not overlook that the Nuremberg trial was a war-won endeavor. Robert Jackson called it a "post-mortem" of the Third Reich. In other words, the Nazis were killed, as in defeated militarily, as a predicate to what the Nuremberg trial was able to do. As you can see on maps, including here in the Documentation Center, Nazi Germany ceased to exist in May 1945. Its unconditional surrender meant complete relinquishment of sovereignty, Allied military occupation of Germany's former landmass, and division of it into respective zones of French, U.K., U.S., and U.S.S.R. control and total power. Without that Allied power, the Nuremberg trial could not have happened as it did.

*The Nuremberg Trial Grew Out of Allied Power and Will*

Connected, the Nuremberg trial occurred in a moment—a brief, shining moment—of power and political will. Succeeding war, succeeding Nazi Germany, in the occupation, and in the world's 1945 moment, there was a broad, deep consensus among nations. It is easy to see how this binary situation developed: a world war pitted evil against good, and good prevailed; those allies were the united nations; in peacetime, they created immediately the United Nations, and the international tribunal created through the London Agreement, and soon the Universal Declaration of Human Rights, the Genocide Convention, the Geneva Conventions. . . These things were possible during that short interval of time, from 1945 until spring 1949, when Telford Taylor and his U.S. prosecution colleagues concluded the Ministries Case, the last of the U.S. subsequent proceedings at Nuremberg. Only that unity of power and will made Nuremberg happen as it did.

*The Nuremberg Trial Was Focused on the Crime of War*

A third point, in thinking about finding Nuremberg and focusing on what its core legacies are, is to take very seriously the war focus. The Allies, in their moment of victory, power, and consensus, looked back on what had happened. At the core, they identified the Nazi war-waging as the evil. The IMT adjudged it the "supreme" crime against the international order and the basis for individual criminal liability. This is the reality that our friend and hero Benjamin Ferencz continues to represent and develop in his work: war is at the center of the concentric circles of evil.

*The Nuremberg Trial Occurred in Its Crime Scene*

The Nuremberg trial occurred *in situ*—it was about Nazi Germany, which had happened here in the land that had been Nazi Germany. That meant not only the land. In 1945 it also meant the physical

devastation, enormous piles of rubble, the stench of decaying bodies, and desperate, starving people.

The crime scene also included things that were not captured well in photographs. Displaced Persons in organized camps surrounded Nuremberg, some very close to the Palace of Justice. Other survivors were living on their own, for example under wood shelters built in Nuremberg's large Jewish cemetery. These survivors included the remnants of what had been the Jewish communities of Nuremberg and Fürth, the adjacent city. Some had stayed in Nuremberg during the war, and some had fled, endured, and then made it home.

These persons were in the sightlines of everyone who was a lawyer, an investigator, an interrogator, and a jurist at Nuremberg. Justice Jackson's staff, which grew to be very large, included superb lawyers who did very good work, often day and night. Some took breaks on occasion to eat and drink at the Grand Hotel, to dance in its Marble Room, and to fraternize. Others, who happened to be Jews (as many of Jackson's original team were), were more what the lingo of the time called "straight arrows." They were very aware of the refugees and survivors who surrounded the Nuremberg trial, and they visited, interacted with, and did things to support them. On one occasion, for example, they diverted U.S. ice cream—occupation-government ice cream, if you will—to the children of the Fürth synagogue, celebrating *Rosh Hashanah*. This might have been Nuremberg's finest "crime."

Nuremberg *in situ* meant the investigation-prosecution endeavor occurring in the war theater, in the nation, on the land mass, connected to the people. In some war crimes situations, that will be impossible, or at least very difficult, to replicate—Nuremberg could and did happen this way because the Allies had won the war unconditionally, it had ceased entirely, and their power as occupiers was total. But that is exactly my point.

*The Nuremberg Trial Judgment Was Self-Evident*

A fifth dimension and legacy of Nuremberg is its mindset of necessity: the Allies were, in the end, allied in the conviction that they had to undertake this criminal trial project and that it had to obtain, through fair processes to be sure, convictions.

Nuremberg was the Allied response to the self-evident horrors that their people had confronted, first in war, as the Nazis' military adversaries, and then at governmental, diplomatic, policy, and occupation levels following the Nazi surrender. For the Allies, this situation demanded action. The possibility of walking away—calling it a day; concluding the war by being fatigued and not doing anything more—was an implausible alternative, and one that never was considered.

At the other extreme, brutal executive actions—firing squads and so forth—were another alternative, and also one that was not really considered. As Justice Jackson stated publicly at the start of the project, although that option would have been fueled by understandable vengeance, it would have "violate[d] pledges repeatedly given, and would not [have] set easily on the American conscience or be remembered by our children with pride."

For the Allies, there was, in between doing nothing and doing too much with brutality and potential unfairness, the need to conduct the international Nuremberg trial as they did it, and reaching outcomes as it did.

Justice Jackson explained this at the conclusion of his July 26, 1946, closing statement to the IMT:

> It is against such a background [of evidence introduced at the trial] that these defendants now ask this Tribunal to say that they are not guilty of planning, executing, or conspiring to

> commit this long list of crimes and wrongs. They stand before the record of this trial as bloodstained Gloucester stood by the body of his slain king. He begged of the widow, as they beg of you: "Say I slew them not." And the Queen replied, "Then say they were not slain. But dead they are . . . "
>
> If you were to say of these men that they are not guilty, it would be as true to say that there has been no war, there are no slain, there has been no crime.

This statement is much quoted but not, I think, much analyzed or "unpacked." Justice Jackson, a man of words who is remembered for his famously talented pen, was a close, lifetime student of William Shakespeare. As a schoolboy in 1909 and continuing into his years as a law apprentice, Robert Jackson learned from his English teacher and *de facto* second mother to read and to love Shakespeare—he read plays aloud at her home, into the wee hours, in front of the fireplace. And he memorized Shakespeare, as people then did with great literature and oratory. Decades later, here in Nuremberg, Jackson was not carrying the collected works of Shakespeare. Nor did he have a good Internet connection. He did have, however, a fair amount of Shakespearean genius packed into his mind. And one can see, in archives, the paper on which Justice Jackson in 1946 drafted his closing statement at Nuremberg.

In his statement, Jackson was quoting from Shakespeare's *Richard III*. He quoted the scene in which the queen, Lady Anne, confronts Richard, the Duke of Gloucester, as he stands over the dead body of King Henry VI. Richard begs Anne to, in effect, let this and other murders go: "Say I slew them not. . . ." Jackson quoted that line, and then her rejoinder: "Then say they were not slain. But dead they are. . .'" In doing so, Jackson was comparing and equating Richard's request of Anne to what the Nuremberg defendants were, in seeking

acquittal, asking of the IMT. And he urged it to respond as Anne had responded to Richard. In other words:

- say I slew them not . . . but he is dead;
- say we are not guilty . . . but there was this war, covering the continent with death.

Jackson's statement was, in the open, a statement that the facts of World War II, including its human toll, required the IMT to convict Nazi defendants of crime—at the basic, human, moral level, this was a no-brainer, a crime if anything is a crime.

I will add that this Nuremberg belief that heinously destructive conduct must produce a judgment of criminal guilt is also the best of modern international humanitarian law—it is where world consensus exists, without much need for complex diplomacy or persuasion, and where nations act on their agreement that, "Yes, this is it. This is a crime."

*The Nuremberg Trial Was Educational*

Nuremberg was also an educational process. It of course was a documentary case. Robert Jackson had been, maybe for ill from the perspective of people who wished for trial excitement in Courtroom 600, the Assistant Attorney General who headed the Antitrust Division in the U.S. Department of Justice for a year (1937). He knew documents cases, and notice that the Third Reich was prosecuted at Nuremberg as Alcoa had been by U.S. Department of Justice in the late 1930s for market domination and price fixing: it was all there in their own documents. Metal market monopolization is not remotely the evil recorded in Nazi documents—I am comparing only the methods of proof.

Nuremberg's educational process occurred in the context of prosecutors carrying their burden of proving individual criminal

culpability. But Nuremberg, simultaneously, reached the external, public audience around the world. And the published record of the trial is the foundation of historical understanding of the Third Reich. It is a repository of depth and complexity. Every generation uses it, and study, teaching, and understanding thereby grow. The Nuremberg trial record permits us to wrap our minds around the biggest, and what otherwise might be the least comprehensible, of horrors: the Nazis in power and World War II.

*The Nuremberg Trial Was Efficient*

The Nuremberg trial was relatively selective and brief. As Jackson boasted at the time, it happened in an amazing hurry. To go from nothing in May 1945—no judicial institution, no evidence, no Allied agreement on how to proceed—to the commencement of a trial five and a half months later was, he said, faster than many automobile injury cases went to trial in New York State (which is still true). The trial was expeditious because the Tribunal sat for six days, and long days, each week. It rationed witness allocations to the defendants and then cracked down on their extraneous demands. The prosecutors were permitted to present evidence in summary documents, and the IMT restricted their slowing moves too. In part this reflected political will to address public impatience. In part this was just a commendable commitment to focusing on the core issues, to getting right to them.

*The Nuremberg Trial Was Carefully Optimistic*

I do mean both of those words. Yes, Nuremberg's optimism included some very high universal ideals—the "poisoned chalice" line, for example, which Justice Jackson drafted but never uttered in court, but then published in the trial record. I suspect that he never said that "[t]o pass these defendants a poisoned chalice is to put it to our own lips as well" because he had borrowed it from Shakespeare (*Macbeth*, Act 1, Scene 7), and perhaps so obviously that to 1945 Nuremberg

courtroom ears it would have sounded corny. So although it was in the opening statement that he drafted, he drew a line through it on his reading copy and left it unsaid. But the idea that the Allies were holding themselves—ourselves—too to the standards by which they were judging Nazi defendants to be criminals was indeed the high and real universalism of Nuremberg.

The Nuremberg trial stayed, however, within the area of allied consensus. The U.S.-U.K.-U.S.S.R. postwar alliance was fragile. The Soviet show trial instinct versus the American-British-French due process instinct was just barely worked out and bridged over in London in summer 1945, in the agreement that created the IMT and got the Allies together to Nuremberg. They did not push it too far, to their fracture point. Of course they did not put themselves in the dock alongside the German defendants, and that is a fair criticism. But they did put people in the dock for the evils each had perpetrated.

The Allies also were in many respects cautious and skeptical, following Nuremberg, in embarking on projects to codify too much, too broadly, too permanently, words on paper that the world could not live up to. Yes, the United Nations General Assembly adopted in December 1946 the London Agreement of August 1945 and also the IMT Judgment of Fall 1946—in a summary, conclusory way. Yes, the UN General Assembly at that same time adopted the proposed Genocide Convention, Raphael Lemkin's great project and dream, and sent it forward for states to consider, ratify, and potentially make real as a new development in international law. But the idea of a code of crimes, and also the idea of a charter for a permanent international criminal court, were things that not only the Soviets, but also the Americans (including Jackson and his colleague and friend Charles Fahy, legal adviser in Berlin and at Nuremberg, and then at the United Nations and the Department of State) and the British, were hesitant to push after Nuremberg. And why? Not because they were soft on high ideals and universal justice. It was because they were

practical about making progress. They, as international colleagues, had gotten Nuremberg done. And they realized that it would be a risky, perhaps a backsliding, step to attempt in the real world following Nuremberg to be too utopian.

On the other hand, Nuremberg architects such as Jackson and Fahy were interested in moving the United Nations as far as it could really go. This explains how the IMT judgments on September 30 and October 1, 1946, gave birth to the UN General Assembly actions of two-plus months later. The process was push-pull and hydraulic—they toggled well between utopian, idealistic, visionary leadership and pragmatic, political judgments. I suspect that today's international court officials and their national counterparts recognize that as more or less their own job description.

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Where does all of that leave us? It leaves the world, especially those of us who are in the heart of "Nuremberg" expertise as teachers and leaders, using this word as an inheritance of real meanings and duties. We each try in our ways to teach Nuremberg because really to get it requires careful study, not just casual invocation. To study Nuremberg means reading it, debating it, and critiquing it. When we do that, we are better positioned to live up to it, and to build upon it—to take "Nuremberg" and a world of law and, we hope, less war and more peace and humanity, to numbers that will be much bigger than seventy.

I close with an antique phrase from Robert H. Jackson: he said that the meaning of the Nuremberg trial would become clear in "the century run." We are seventy years down from 1946. We have thirty more years to go before that century will have run. I am grateful to be involved and sharing that project of giving meaning to Nuremberg, continuing to do its work, with each of you.