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ADDRESS

THE MEANING OF NUREMBERG*

Henry T. King, Jr.**

NUREMBERG WAS A WATERSHED in the development of international law1 — particularly in terms of its effect on concepts of national sovereignty.

Pre-Nuremberg concepts of national sovereignty emanated from the Peace of Westphalia of 1648, which ended the wars of religion between the Protestant and Catholic states.

The world of the post-Westphalia era was a world in which nation-states ruled supreme. It was a world filled with armed conflicts between national sovereigns which brought about death and destruction. It was a world in which international law, such as it was, imposed no effective restraints on nation-states and their leaders in starting and carrying out aggressive wars. It was a world in which there were no restraints on national leaders in doing as they pleased in their dealings with other states. It was a world in which individuals had no standing under international law to charge nation-states with violations of their rights as human beings. It was a world in which individuals had no effective obligations under international law as heads or leaders of nation-states. Individuals in the pre-Nuremberg world had no obligations to conduct themselves in such a way as not to injure the citizens of other nations. In short, it was a world in which international anarchy was the order of the day.

Nuremberg was designed to change the anarchic context in which the

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1 The primary Nuremberg trial, carried out by the International Military Tribunal, was governed by the London Charter of August 8, 1945. This tribunal consisted of judges from the United States, the United Kingdom, France, and the Soviet Union. The defendants were leaders in different aspects of German life.

The subsequent proceedings governed by Allied Control Council Law #10 were carried out by the United States with only U.S. judges on the bench. The defendants were very important, but they were of lesser rank than those tried by the International Military Tribunal.
nations and peoples of the world related to one another. Nuremberg held that national leaders were responsible for what they did as heads of nation-states — under international law. It held that individuals had rights under international law which were not dependent on nation-state recognition. Nuremberg held that there were enforceable international norms governing the conduct of armed conflict and that individuals were answerable for violating these norms.

Nuremberg was the fountainhead from which initiatives for the protection of human rights emanated. The European Convention on Human Rights, the Genocide Convention, the Universal Declaration of Human Rights, and other similar initiatives are all outgrowths of Nuremberg.

Nuremberg articulated and enforced the international ground rules governing the conduct of armed conflict. The inheritance of Nuremberg is found in the army field manuals of the major nation-states in today’s world. These cover the treatment of civilians and prisoners of war in wartime. They provide a working guide for soldiers engaged in armed conflict. Moreover the Geneva Conventions on 1949 relating to the protection of victims of war, fill gaps in international military law which were identified at Nuremberg.

Nuremberg was the first postmortem analysis of the levers of power in a dictatorship. It showed how power corrupts and the need for a system of checks and balances to avoid a recurrence the power structure which had been the earmark of Nazi Germany. We saw the value of a free press and independent judiciary as restraints on national leaders. We learned that aggressive wars are more easy to come by where a single individual, answerable to no one, decides the fate of his nation and other nations. And we have since learned that, in democracies, the pulse of democratic opinion is a restraint on national leaders from implementing dreams of military aggression.

So much for the broad strokes — now to the specifics of the London Charter which governed the first Nuremberg proceedings before the International Military Tribunal (IMT) involving Hermann Göering et al.

In addition to a conspiracy or common plan count — there were three basic counts — namely crimes against peace (aggressive war), crimes against the laws of war (war crimes), and crimes against humanity (murder and injury to civilians for racial, religious, or political reasons).

The crimes against peace count was based on the Kellogg-Briand Peace Pact of 1928, which outlawed war as an instrument of national policy and on Germany’s violation of the many treaties which committed her to the peaceful resolution of her disputes with her neighboring states. The IMT accepted this concept in its decision and found Göering and his
associates guilty of crimes against peace. But the tribunal’s holding is limited to the facts of the case at hand — the Nazi aggression. The decision lacks sweep and contains little or no language dealing in the general concept of aggression.

Moreover, the tribunal limited its judgment and findings of guilt in the crimes against peace count to wars of aggression. Invasions, such as those of Czechoslovakia and Austria were not found by the IMT to be crimes against peace on the ground that they were acts of aggression and not wars of aggression. However, Control Council Law #10, which governed the subsequent proceedings at Nuremberg after the first case before the IMT, specifically included invasions in its definition of crimes against peace.

The Nuremberg holding on war crimes was quite comprehensive. But, it is a large area in scope, and the primary Nuremberg trial and subsequent proceedings did not wholly clarify the rules on the taking of hostages and reprisals. These gaps were corrected by the 1949 Geneva Conventions and, as clarified, have been reflected in the army field manuals of the major powers.

According to the London Charter of August 8, 1945 and the holding of the International Military Tribunal, the crimes against humanity could not stand on its own bottom. These offenses — murder, enslavement, etc. of civilians for political, religious, or racial reasons to be actionable — had to be carried out “in connection with or in execution of” another crime within the jurisdiction of the tribunal. What this meant was that the pre-war persecution of the Jews in Nazi Germany was not actionable because it was not connected with a war crime or crime against peace.

But this gap was corrected in Control Council Law #10, which removed the requirement that crimes against humanity had to be tied to war crimes or crimes against peace to be actionable. This meant that Control Council Law #10 encompassed crimes against the Jews in pre-war Nazi Germany and that such crimes against humanity could stand on their own bottom. Crimes against humanity, as modified in Control Council Law #10, did thereupon become the core of the genocide convention.

The war crimes and crimes against humanity counts at Nuremberg were the forerunners of the heart of the United Nations Security Council resolution of May 25, 1993, which provides the basis for the ad hoc tribunal now sitting at the Hague and trying individuals for crimes committed during the hostilities in the former Yugoslavia. The Hague tribunal has no jurisdiction over crimes against peace. To a large extent, the definition of actionable crimes which guides the Hague tribunal in its important deliberations follows the International Military Tribunal’s definitions, although one additional crime — that of rape — has been
added by the Security Council's definition of crimes as set forth in its resolution. Control Council #10 does specifically list rape as a crime against humanity, but it seems that no persons were convicted of that crime in the Subsequent Proceedings. Moreover, the resolution guiding the Hague tribunal follows Nuremberg in eliminating superior orders as a defense and also the head-of-state defense.

The primary difference between the Hague and Nuremberg tribunals is the Hague's requirement that the defendant be in custody to be tried. Here, in this connection, it will be recalled that Martin Bormann was tried in absentia at Nuremberg. I have some personal reservations about this requirement. For example, I think that it would have been better to have tried Saddam Hussein in absentia rather than not at all. He could have been given the opportunity to be heard — even by satellite and to present his case. If he declined, that was his doing and not ours. Suffice it to say that, if we had tried him, we might have avoided the current unfortunate situation where he remains a continuing source of trouble for the U.S. and its allies who fought so hard to contain and repulse his invasion of Kuwait. There certainly was a great deal of evidence documenting his crimes, and the world should have had an opportunity to see and assess it. I say emphatically, what did we gain by looking the other way and turning our back on his personal responsibility for his crimes? The more we ratify what he did by inaction, the more likely his type of behavior will be repeated — as it currently is.

The current U.N. initiative for a permanent international criminal court, which is a direct inheritance of Nuremberg, has been gathering steam. The deliberations at the U.N. on this initiative are vital to our long-term future and warrant our close scrutiny. I am confident that my colleague Ben Ferencz, who has followed and participated in these deliberations on a day-to-day basis at the U.N., will address them in his remarks today. Ben deserves a vote of thanks from all of us in this regard for his persistent efforts on behalf of all mankind.

THE LESSONS OF NUREMBERG

Nuremberg was, for me and, I believe, for the rest of the world, the most impressive moral advance emanating from World War II.2

2 Historically, it is a matter of supreme irony that we can now equate Nuremberg with constructive limitations on sovereignty designed to create an assured peace. For it was less than a decade before the International Military Tribunal convened at Nuremberg in November 1945, that Nuremberg was the site of the annual Nazi Party Day rallies where Adolf Hitler whipped up his Nazi stormtroopers into nationalistic frenzies which foreshadowed the start of World War II. Then, Nuremberg symbolized
At Nuremberg, we came to grips with the problem that national sovereignty poses for mankind in our quest for a better and more peaceful world. The fact is that unrestricted national sovereignty poses for mankind in our quest for a better and more peaceful world. The fact is that unrestricted national sovereignty means, in real terms, international anarchy. Nuremberg showed us that there must be some limitations on national sovereignty if we are to have a more secure world.

Nuremberg gave us a blueprint for a better world. Nuremberg showed us that wanton aggression cannot be permitted if we are to have a secure world and an assured peace.

Nuremberg showed us that we must reach the behavior of individuals to create a better world. That we must penetrate the veil of national sovereignty and punish individuals for violations of international law if we are to give that law life and vitality.

Nuremberg also taught us that, for a better world, we need to recognize individuals as having international rights which are not dependent on nation-state recognition.

Albert Speer, in his closing statement at Nuremberg, reminded us that the march of destructive technology has changed the context in which nations and individuals must relate to each other. He said that a “new large-scale war will end with the destruction of human culture and civilization. Nothing can prevent unconfined engineering and science from completing the work of destroying human beings which it has begun in so dreadful a way in this war.”

Speer added that, “[t]herefore, this trial [Nuremberg] must contribute towards preventing such degenerate wars in the future, and towards establishing rules whereby human beings can live together.”

Nuremberg’s most important pronouncement was that individuals, and not merely nations, should be held responsible for violations of the peace of the world and of human rights. In finding that aggressive war was a crime, it held that individuals could be punished for their share in starting such a war. It also held individuals responsible for what they did in the name of nation-states in violating human rights and the laws of war. The application of the Nuremberg law meant that no longer could individuals hide behind the facade of nation-states in committing international crimes. It meant that these individuals had to come to grips with their guilt and pay the penalty that society demanded that they pay.3

3 Two other points on the primary Nuremberg judgment are worthy of note. One is that acting upon the orders of a superior officer was held not to be a defense, even

nationalism run amok. Ten years later, after the most devastating war in human history, mankind was seeking a better way, and Nuremberg came to symbolize that better way.
In a nutshell, Nuremberg was, together with the founding of the United Nations, a seminal legal event in the twentieth century. It provided the blueprint of a better world — a vision of the future which, some day, I am confident will be realized.

In Nazi Germany, individuals had surrendered to the external and mechanical power of the police state. National sovereignty had run wild under Adolf Hitler. Nuremberg marked the re-affirmation of the importance of the individual in the world of nation-states. It held that individuals had rights which transcended national boundaries and that individuals had obligations which were very real and the nation-state afforded no cover for them in denying their responsibilities.

Nuremberg was right, and it was just. It was a revolutionary break with the shackles of the past, and it grew out of the conviction that there was a better way. We saw the stars at Nuremberg and the vision of a secure world under a rule of law. Let that vision always remain with us, and let us always keep our eyes on the stars.

where the orders were given by the head of state. Here, the case of the ranking military defendant at Nuremberg, Wilhelm Keitel, is a case in point. Keitel's defense at Nuremberg was that he was ordered to do what he was charged with by Adolf Hitler, the head of the German state. In finding Keitel guilty, the Nuremberg court ruled that Hitler's orders afforded no defense for Keitel. Implicitly, a higher law over and above German law was applicable, and Keitel's guilt was established under that law.

The other defense which the Nuremberg court disposed of was the "head of state" defense. Under this approach, national sovereignty could not be used to exonerate leaders for what they did in violation of international law. The court held the line on this one and said that the test for punishment was whether the actions in question violated international law, not German domestic law. National leaders could be complying with German law, but that was not enough — they had to be complying with international law in their behavior to be vindicated. Since they were not, they were found guilty at Nuremberg.