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Discussion

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## Discussion After the Speech of Henry T. King, Jr.

QUESTION: *Mr. O'Grady:* Henry, I would like to congratulate you on your work at Nuremberg; I have read the opening summation of Robert Jackson to the Nuremberg tribunal many times, and it is an inspiring piece of writing.

I would like to ask you this: it seems to me that we are somewhat at the stage that the English were in the 1830's, when Sir Robert Peale, against a great deal of opposition got approval for the concept of the Metropolitan London Police Force, and got financing for it. The English sense of justice then had the backing of a police force. This is probably simplistic, but it does seem to me that what the world needs very badly now is a police force.

The situation in Bosnia calls for a real police force. There should be one or two armies mobile at the disposition of the Security Council, five or six divisions with armed transport and air support, and the contributing nations have to be prepared to pay for it and they have to be prepared to take the casualties that would be inevitable in sending such a force into the mountains of Bosnia or wherever. The difficulties are numerous.

If such an army or police force had been sent into Somalia, would it have succeeded any better? Who knows. But I do not think that we are going to be able to move much further into a real system of world order unless we get a police force.

It must be many years away, but, on the basis of your experience, do you think that we might someday achieve a world police force?

ANSWER: *Professor King:* When my testimony was submitted before the Senate Foreign Relations Committee, and when we discussed it at our Nuremberg prosecutors' reunion, we thought we had such a police force, because the U.N. Security Council had mobilized against Saddam, and we thought that this was the beginning of such a force. In other words, the U.N. had a police force, and although it was *ad hoc*, Saddam was within our grasp.

The action by the U.N. Security Council is another alternative to creating a police force. I think the rules for the operation of the war crimes tribunal in Yugoslavia, from my reading of Rule 11 and Rule 59, seem to indicate that the tribunal is to have backup from the UN Security Council. That is another alternative to the standing army concept, but we lost a golden moment when we did not go for Saddam, because the evidence was all televised. It was right there before our eyes. The Nazi evidence was in their files. Nuremberg was a very documentary case, but in the case of Iraq, all we had to do was look at the television, and we would use those pictures as evidence. So, it should be

done either on an *ad hoc* basis, or the ideal is the way you suggest, and that is the concept I had when I came back from Nuremberg.

It is, however, hard to sell an idea of an international standing army. When I worked with the United World Federalists, I found that it was very hard to get it accepted. So, I changed tactics and worked through the American Bar Association to help in getting the idea accepted.

To answer your question, the idea of an international standing army is good, but an *ad hoc* force is another, possibly more doable way to do it.

QUESTION: *Mr. Kloos*: At Nuremberg there seemed to be contradictions. For example, Albert Speer was imprisoned for 20 years, and yet people who were underneath him got hung. Could you explain the reason for something like that, Professor King?

ANSWER: *Professor King*: Well, one of the points to keep in mind at Nuremberg is that the defendants said they were ordered by Hitler to do the things they did.

What you were up against at Nuremberg was that there were many people who were still sold on Adolf Hitler. I talked with Herman Goering on September 28, 1946 just before he committed suicide. He felt that Hitler was the greatest person that had ever lived.

So you had numbers of people who denied their active complicity. They said that they took orders from Hitler, they did only what he told them to do. There were other people, like Kaltenbrunner, who said they really did not participate, even though their signature and handwriting indicated that they had. Albert Speer was the only one who indicated any sense of guilt. In effect he pleaded guilty at Nuremberg in his final statement.

About 15 years later, I talked with Hans Flachsner who was his counsel, and he told Speer not to say "I take responsibility." He told Speer that if he took responsibility, they would hang him.

Speer got mitigation for two reasons: First, implicitly because of what he said in terms of accepting responsibility, and secondly, he prevented the obliteration of Germany, because there was an order which was initiated by Martin Bormann and signed by Hitler for the destruction of all industrial facilities in Germany. Speer went around to the facilities, at great personal risk, and he told the generals not to carry the order out. Then, he went into the bunker April 24, 1945, just before Hitler died, he told him that he disobeyed the order, and he expected to be executed. Hitler had just executed his brother-in-law for disobeying his orders.

So Albert Speer had a degree of personal courage which the other defendants did not have. He was a demonstration of an acceptance of the Nuremberg principles. That is why he had a twenty year sentence rather than death. He told me later, just before he died, that he felt

justice was done at Nuremberg.

QUESTION: *Mr. Champagne*: Professor King, to what extent do you feel that the new judges, nominated for the court for Yugoslavia, will feel bound to follow the rules that you laid down in Nuremberg, or what we call the Law of Nuremberg?

ANSWER: *Professor King*: The rules are very precisely drafted to follow the Nuremberg Charter. They deal with war crimes; crimes against the customs and laws of war; and crimes against humanity, murder and ill treatment of individuals for racial, religious or political reasons. The judges are sort of hemmed-in by what was done at Nuremberg, because the Security Council Resolution establishing the court for Yugoslavia explicitly follows the Nuremberg charter in many respects.

Now, one thing that was done regarding the war crimes in Yugoslavia is that the Security Council resolution specified punishment, and the punishment is not as extreme as it was in Nuremberg. Death by hanging was the penalty at Nuremberg if you were found guilty of major crimes. In Yugoslavia, it is a sentence of a term of years; so there is a difference.

And as I pointed out, in the Yugoslav situation, the defendant has to be there. Now to get the defendant there, one device would be economic sanctions against the country that withholds a defendant. They can also be tried in other countries. For example, there is one Serbian war criminal who is in German custody at the present time. He has not been tried, but he is in custody.

In the Yugoslavia situation then, they are not stopping national courts but the international court at the Hague would have priority over national courts if there is a conflict.

QUESTION: *Mr. Champagne*: Do you think if they succeed this time, they would end up having a permanent court under the United Nations?

ANSWER: *Professor King*: Well, that is what we are aiming for. If we could show that an *ad hoc* U.N. court worked, then we would have a good demonstration project.

That is one of the hopes, because what we have in operation at the Hague is a court with, among others, a U.S. judge, a Canadian judge, and an Italian judge presiding, and money has been appropriated for it, so I think it has a potential for getting somewhere.

QUESTION: *Ms. Leibman*: Professor King, if the Serbs win the war, and even if they do not, how will we get a hold of these criminals to try them? In your opinion, do you really think it is realistic that the tribunal will actually be able to try these people?

ANSWER: *Professor King*: Well, I think that it is realistic. The hope is that the U.N. Security Council will give this tribunal, which is its own creation, a backing which is not explicit in the resolution.

One thing I noticed is that the Russians are less supportive of the Serbs at this time. There are indications that they are tired of the Serbian activities. So maybe that is a hope, that they would not veto the resolution giving further backing to the Tribunal.

The Security Council took military action against Saddam so maybe they could support the Tribunal in the Serbian Case. It is a possibility, but I am not going to forecast what they do.

QUESTION: *Ms. Leibman*: Will it have any effect on the Tribunal if the Serbs do in fact win the war? At Nuremberg, the allies were victorious; with Saddam once again we were victorious. Will this make a difference?

ANSWER: *Professor King*: It might make a difference positively if the Serbs won the war, because they would be alienated from the international community. If there is a negotiated peace — and I have talked with the *New York Times* reporter who covered the war — they are more likely to insist being forgiven for their sins.

In other words, the terms of the negotiated peace might include at the Serb's demand, some exemption from punishment. But, if the Serbs win, they will be on the outside looking in, and my feeling is that punishment from the Tribunal might be more likely if the Serbs win than if they do not. What you have to worry about for this Tribunal is the possibility of peace terms, under which if there are concessions made by the Serbs, there might be concessions on trying Serbian war criminals. I hope not, but that is what the possibility is.

QUESTION: *Mr. Stock*: Along those lines is an underlying philosophical question, which really lies at the heart of Nuremberg, and that is whether the Nuremberg principles really apply logically in any situation other than at that failed aggression.

Nuremberg really proves only that if you win, you can nail the loser, if the loser violated international law. And so I ask whether the Nuremberg principle can logically be extended to a successful aggressor. Do we have the international mechanisms that allow us to do that.

And a related issue is, it seems that the resolution that has been passed with respect to Bosnia turns Nuremberg on its head, because it specifically avoids trying the Serbs for crimes against peace, and yet, as I understand it, it is the very crime against peace which was the lynch pin of the Nuremberg prosecution. So how are we going to try to prosecute the Serbs without prosecuting them for having waged a war of aggression, in a circumstance in which they may very well not be a defeated aggressor?

ANSWER: *Professor King*: On your first point, I think it depends on the size of the aggressor. You could have small aggressors that win, who warrant the condemnation of the international community, and can get hurt, maybe even obliterated by economic sanctions.

So, you can have a situation where the small aggressor, like the

Serbs can win, but there are still other means of punishment, such as economic sanctions, which can be very destructive. They were very destructive in South Africa, where they are having elections this weekend, because of economic sanctions.

Now, in terms of the lack of the aggressive war count in Yugoslavia, I think that was a conscious decision by the people who wrote the resolution, because they did not want to get into the argument that it was *ex post facto*. That it had not been defined as a crime beforehand was the same argument used in Nuremberg.

In Yugoslavia, they did not want to muddy the water. I think the main thing there was to simplify it: war crimes, crimes against humanity, the horrors you see every night on television. The evidence is replete; it is right there. I think that was a conscious decision. I think they could have gone further. I think they could have gone for crimes against peace.

Now, with Saddam, there were crimes against peace, because the tanks rolled into Kuwait and the armies were marching; you had televised evidence there. So there was a perfect opportunity to charge Saddam with crimes against peace. I think it was just a strategic decision to simplify it.

QUESTION: *Mr. Stock*: Do you see any circumstances under which the Nuremberg principle could ever have applied to a defender against aggression who used excessive force, who committed crimes against humanity, or otherwise violated laws of war?

ANSWER: *Professor King*: The Nuremberg principle says that to have a crime against humanity, you have to have a crime of aggression. That is the way the Nuremberg judgment reads.

In other words, crimes against humanity at Nuremberg does not stand on its own bottom; it is not self contained. It has to be pursuant to some other crime, such as a crime of aggression.

So, I think that crimes against humanity were at Nuremberg, defined to be limited to the period of the war. But I think since that time, the concept has been extended to cover crimes of genocide during peacetime too.

QUESTION: *Mr. Le Forestier*: Could you address why the UN seems to have had a change of heart in that it did not pursue prosecution of war crimes after Saddam Hussein did what he did.

In Africa once western oil supplies were secured, it seemed that the interest of the U.N. was gone, but in the former Yugoslavia, you have war crimes occurring on European soil in the so-called powder keg of Europe, which the U.N. seems now interested in prosecuting. Could you address why that might be?

ANSWER: *Professor King*: Yes, I think the big thing is that it is hard to get an initiative going. It is the public support that seemed to be for the trial for war crimes in Yugoslavia, and I emphasized that in

my remarks. Public support for change is very important, and Yugoslavia was really identifiable; it was immediate in the European area. Yugoslavia, after all, is the first time we have pursued prosecution since Nuremberg.

I think it was a start, at least. I am sure that there are war crimes being committed in Ethiopia and in other places in Africa, but I think that the important thing is that at least this was something where everybody agreed something should be done.

Now, one thing to keep in mind is that this took place May 25, 1993; it was during the regime of Clinton. So you have had a change of heart in the administration in Washington. And as I have mentioned, the United States is a key player in Europe.

I think that Yugoslavia is right in the innards of Europe, and there are people in the U.S. and in other countries who have relatives there. So I think there are ties there that were not present in some of the other places.

QUESTION: *Mr. Chen*: If we were to envision that we have in place an international court again, which was to prosecute criminals for war crimes, how would it be funded, and what kind of power would the smaller countries have in the control of this?

ANSWER: *Professor King*: I think it will be funded to the extent that the Security Council deems necessary and there are indications that \$40 million will be appropriated by the U.N. Security Council for the Court at the Hague. \$3 million has been appropriated to date. This is a start. Now, this is primarily paid by the United States and other major powers, and your point is well taken, that the little countries do not have as much to say about this at the present time as they might have in the future.

The Security Council is the one that passed the resolution. That means that it involves the big countries. This, however, is just a start. The Yugoslav tribunal is relying on the Security Council for its backup. So the driving force is the Security Council under the U.N. Charter at the present time. It would have to be changed to give little countries a say.

QUESTION: *Mr. Chen*: If there were world peace by now, how would it stay intact in your vision? How would it maintain the status quo?

ANSWER: *Professor King*: Well, you would have to have a regular appropriation for a tribunal that would be part of the U.N. budget. But it is important that the United Nations do it, rather than just any group. One thing that was encouraging about Nuremberg was that four major countries did it and that nine other smaller countries acceded to the Nuremberg principles. So we had good support from the small countries as well as the big countries.

QUESTION: *Mr. Stock*: What do you see is the risk that this

tribunal, once constituted, would become something of a runaway international grand jury, prosecuting willy-nilly under a broadly construed human rights genocide charter, and thereby realizing the worst fears of the opponents of the genocide convention?

What is the risk, as you see it, that such a body would begin to increase its expanse of powers and interpret the genocide convention and other underlying documents in a way to reach peacetime activities of other than aggressor nations, and bring them before the bar of world justice?

ANSWER: *Professor King*: The charter of the tribunal in the former Yugoslavia, which was the U.N. resolution, says that the territory of the tribunal is the former Yugoslavia. I think that is very important. It is very much under the control of the U.N. Security Council. The definitions tie it to a particular territory so that it cannot be all over the line.

Now, one of the things about the Code of Crimes Against the Peace and Security of Mankind is that it does not contain a final effective definition of aggression. The Code indicates that the UN Security Council will define aggression. So it is pretty tightly controlled.

It is important to keep in mind is that to operate this tribunal requires funding, and there are some implicit controls there which are linked to funding. In the past, when U.N. activities have gone beyond the bounds of what many countries thought they should have, the water was turned off on the funding. So funding is linked to control.

I think that it is pretty well tied up to the source of your authority, and the source of your support. And the U.N. Security Council includes some of the major powers in the world, including the United States some other big ones.

QUESTION: *Mr. Kloos*: Not to open a can of worms, but Israel really prosecuted John Demjanjuk. Can you comment on that situation, especially with regard to the idea that the evidence was difficult to gather after that many years, in terms of the eye-witness testimony?

ANSWER: *Professor King*: Well, I do not think that there would be any purpose in commenting on the Demjanjuk case. I think there were a lot of mistakes made. I think it is a judgment call as to whether he is guilty or not. He was really a minor person. Also, you are concerned with other factors such as the administration of the immigration laws of the United States and whether Israel was a proper place to try him.

I have very definite opinions on this, but I would like to leave everybody in this room with a good taste in their mouth for this evening.

I do want to point out, however, that a Frenchman, who is accused of war crimes in France, was tried and convicted and sentenced to life imprisonment the other day in France, indicating that the Nuremberg principles are still viable in France. They have also been viable in Ger-

many. People are still being tried. So they are alive and well today, and they do not need my comment on the John Demjanjuk case.