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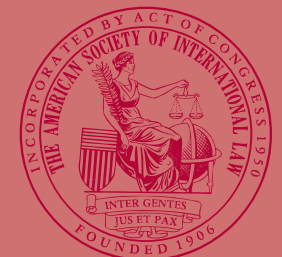
Proceedings of the First International Humanitarian Law Dialogs, August 29, 2007, Chautauqua Institution

# Proceedings of the First International Humanitarian Law Dialogs

August 29, 2007, Chautauqua Institution

Edited by Elizabeth Andersen and David M. Crane

THE AMERICAN SOCIETY OF INTERNATIONAL LAW



**Proceedings of the First  
International Humanitarian Law Dialogs**

*August 29, 2007  
At the Chautauqua Institution*

**Edited by**

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and

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*How does it end*

*This time of man on earth?*

*Will it be by a flood of the seas over the land?*

*The return of the monster, Tyrannosaurus Rex?*

*The crash of a comet into the earth?*

*None of these.*

*The forces of nature we shall surmount.*

*We have naught to fear save ourselves. Only  
ourselves.*

*The tyrant must be forced to end his tyranny.*

*The aggressor must be punished for his  
aggressions.*

*And law, not force, must rule the world.*

*Man's destiny lies in the hands of man.*

Whitney R. Harris



# **Introduction to the International Humanitarian Law Dialogs**

**David M. Crane\***

On 29 August 2007 at the Chautauqua Institution, the first annual International Humanitarian Law Dialogs brought together a group of colleagues and friends—all of the past and current international chief prosecutors from the International Military Tribunal at Nuremberg to the International Criminal Court. It was an extraordinary and historic event. This was the first time that an event such as this had happened and almost all of the prosecutors attended, nine of twelve, in honor of the 100<sup>th</sup> anniversary of the Hague Rules of 1907 which permanently governed armed conflict under the rule of law.

This gathering also brought together human rights advocates, academics, and interested citizens in a dialog related to how the concept of the rule of law in conflict, and in accounting for violations of that law, has advanced over the twentieth century, mankind's bloodiest, which saw the destruction of over 100 million human beings at the hands of their own governments. The comparing and contrasting of events from Nuremberg, the Balkans, Rwanda, West Africa, East Africa, Cambodia, among others, allowed the assembled group to consider the successes, failures, and the

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\* Professor of Practice, Syracuse University College of Law and former founding Chief Prosecutor of the international war crimes tribunal in West Africa called the Special Court for Sierra Leone, 2002-2005.

challenges of developing accountability mechanisms for those atrocities.

The intent of the International Humanitarian Dialogs is to bring together those who were or are mandated to apply law, fact, circumstance, and political reality to seek justice for those ruined by the cynical policies of tyrants, dictators, and thugs. The format allowed the public to sit in and listen, ask questions, and discuss key international criminal law issues with those who take theory and make it reality. Leading the dialog were the men and women who have made history and who have advanced the rule of law in some of the darkest corners of the world, shining the light of hope and accountability in places where there was none.

Set in the pristine setting of the world-famous Chautauqua Institution near Jamestown, New York, home of the Robert H. Jackson Center, a key sponsor of the dialogs, the day long event saw an honest and open conversation that culminated in the first Chautauqua Declaration. The declaration recognized the importance of the past in setting the basis for future institutions to be created and to allow the rule of law to triumph over the rule of the gun. It also recognized that despite the bright red thread of politics, states no longer have the option to equivocate and ignore their obligations under international law and norms—it is now the law.

Despite this, states have hesitated and even cynically reacted to the work of the current modern day tribunals by not handing over key indictees and suspects for a fair and open trial. This remains the key challenge to

international criminal law. The First Chautauqua Declaration solemnly signed by the nine former and current prosecutors in attendance called on all states to uphold the law and their international legal obligations and turn over those indicted for war crimes and crimes against humanity for a fair and open trial.

The dialogs saw moving and compelling lectures, statements, commentary, and speeches by Whitney Harris and Henry King of Nuremberg fame; Juan Mendez, President of the International Center for Transitional Justice; and of course the prosecutors themselves: David Crane, Sir Desmond DeSilva, and Stephan Rapp of the Special Court for Sierra Leone; David Tolbert from the International Criminal Tribunal for the Former Yugoslavia; Hassan Jallow of the International Criminal Tribunal for Rwanda; Robert Petit from the Extraordinary Chamber in the Courts of Cambodia; and Luis Moreno-Ocampo of the International Criminal Court. Most of the prosecutors themselves have provided further commentary for inclusion in this publication.

What follows captures the essence of the dialogs, to include a special poem written by Whitney Harris on aggression; special commentary by Professors Michael Newton of Vanderbilt Law School; Leila Sadat of Washington University in St. Louis School of Law; John Q. Barrett of St. John's University School of Law and Amb. David Scheffer of Northwestern School of Law; along with a summary of the various dialogs that took place on that important day, 29 August 2007.

Many people spent a great deal of time, money, and energy to ensure the success of this extraordinary event. Syracuse University College of Law; The Harris Institute; the Robert H. Jackson Center; the Chautauqua Institution; the Planethood Foundation, and the American Society of International Law—all were key sponsors that allowed for this to happen. They are to be commended for their efforts.

As one reads this volume, reflect on how far mankind has come from the first efforts at Nuremberg to the permanent establishment of a world wide court that reflects the history, procedure, and jurisprudence that will forever hold those accountable for horrors perpetrated on civilization. There is much remaining to do, the journey only begun, but these past 15 years have shown that truly the rule of law can triumph given a chance.

# **Reflections on Nuremberg**





## **The Path from the 1907 Hague Conference to Nuremberg and Forward**

**John Q. Barrett\***

It is truly an honor to speak in the presence of so many of the leading lawyers who have devoted and are devoting their professional lives to international criminal investigations, prosecutions and law-building. At this anniversary moment, it is appropriate to note publicly that their work builds upon the work of the Hague Conference one hundred years ago and the Nuremberg trial just over fifty years ago. This lecture will introduce some of the historical backdrop to the work of these prosecutors and the discussions that they will have today.

Over the past one hundred and more years, the world's path to and forward from the Hague Conference of 1907—the path that led to Nuremberg, and the path that has led from Nuremberg to the work of today and

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\* Professor of Law, St. John's University School of Law, New York City, and Elizabeth S. Lenna Fellow, Robert H. Jackson Center, Jamestown, New York ([www.roberthjackson.org](http://www.roberthjackson.org)). This publication grows out of my August 29, 2007, opening lecture at The International Humanitarian Law Dialog, held at Chautauqua Institution's Athenaeum Hotel. I am very grateful to Professor David M. Crane, Gregory L. Peterson, Elizabeth Andersen, Thomas Becker and their respective Syracuse University, Jackson Center, American Society of International Law, and Chautauqua Institution colleagues for co-sponsoring an extraordinary gathering and program; to my colleague Christopher J. Borgen for his expertise and helpful comments; and to St. John's law students Richard C. Spatola and Karen J. Newbury for excellent research assistance. Copyright © 2008 by John Q. Barrett. All rights reserved.

tomorrow—is one that climbs, if unevenly and over tough terrain, toward international humanitarian law.

## **National Sovereignty**

Please consider, in summary fashion, six points and periods in time. The first is the period that encompasses the nineteenth and eighteenth centuries and even earlier, when national sovereignty was at its zenith and governments' powers thus included assumed rights to wage war and to oppress and abuse internal populations. The records of these millennia were, accordingly, a bloody mass of war and what we regard, under modern standards, as human rights violations.

That period closed in 1899 with the first Hague Conference. This gathering of twenty-six nations produced modest agreements about rules of conduct in war between sovereigns. The nations also created an embryonic international court to arbitrate international disputes.<sup>1</sup>

## **The 1907 Hague Conference**

The second moment to consider occurred exactly one hundred years ago. The United States, through President Theodore Roosevelt, called for a second Hague Conference. A principal United States objective was to

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<sup>1</sup> See 1 JAMES BROWN SCOTT, *THE HAGUE PEACE CONFERENCES OF 1899 AND 1907* at 35-87 (1909); see also WILLIAM I. HALL, *THE TWO HAGUE CONFERENCES AND THEIR CONTRIBUTIONS TO INTERNATIONAL LAW* (1908) (comparing the conferences on a range of specific topics, including origins, organization, proceedings and topics addressed).

create an empowered, more effective international court of arbitration, building on the first international court. As a secondary objective, the United States sought to develop and advance rules of armed conflict.

There was some delay in actually convening this meeting. It had to wait for the end of the Russo-Japanese War, a period that turned out also to encompass the Boer War against British colonial rule in South Africa. Eventually, at the formal invitation of Czar Nicholas II of Russia, the second Hague conference commenced formally on June 15, 1907. Representatives of forty-four nations were present, which sounds like a small number until one recalls that the imperial world of 1907 contained only forty-seven nations.

During the months June through October 1907, the national representatives meeting at The Hague worked in a conference structure that included substantial subcommittee dialog, plenary session deliberations, and voting. They reached unanimous agreement on thirteen resolutions.<sup>2</sup> Many were conceptual advances in developing more humane and restraining rules of conduct in war—the area that was, from the United States perspective, the secondary conference objective.

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<sup>2</sup> See Manley O. Hudson, *Present Status of The Hague Conventions of 1899 and 1907*, 25 AM. J. INT'L L. 114, 115-16 (1931) (itemizing the thirteen conventions); see generally THE HAGUE CONVENTIONS & DECLARATIONS OF 1899 AND 1907 (James Brown Scott, ed., 1915).

In terms of the primary United States objective, the International Court of Arbitration, the second Hague conference achieved much less success. The nations not only failed to take the ultimate diplomatic step of outlawing war itself. They also failed to take the lesser step of creating a binding independent international court process that would have the power to step into international disputes and adjudicate in advance the grievances that might otherwise escalate into warfare. Instead, the nations merely propounded resolutions for adoption in principle and future discussion.

This failure of concrete achievement was not for want of trying, particularly by the United States. At The Hague in 1907, the United States was the neutral nation—it was not invested in or tainted by the interests of and clashes between and among the European empires. And the United States was—from President Theodore Roosevelt’s call for the conference, to the diplomats he sent, to the arguments they made, to the drafts they supplied—the proponent nation of an empowered International Court of Arbitration.<sup>3</sup>

The United States, envisioning and advocating such a court, was willing to and publicly did advocate sacrificing some of its sovereignty in the interest of international justice. The particulars of the United States proposal for a new, binding court are interesting to consider. It proposed a non-packed tribunal of fifteen judges—nine judges from Europe, two from Asia and

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<sup>3</sup> See, e.g., *Gen. Horace Porter Tells What the Hague Conference Really Accomplished*, WASH. POST, Nov. 10, 1907, at 4 (reporting a post-Conference interview with one of the United States delegates).

only four from the United States. In other words, the United States proposed to be bound by the majority vote of a tribunal not comprised mostly of its own nationals.

The United States was not successful, but it was determined to continue. One of the subsidiary accomplishments at The Hague in 1907 was international agreement that such meetings would recur at regular eight-year intervals. In other words, the nations agreed to gather next in 1915 to continue the process of developing international law. Of course that meeting never happened, because by 1915 Europe was at war and the United States soon would join the conflict. That World War and its tremendous toll overtook and transformed the international conversation of 1899-1907.

As of Fall 1907, however, the second Hague Conference had accomplished quite a bit. It had advanced a global discourse and achieved visibility for principles of law and justice. It had disseminated, effectively, across nations and peoples, such concepts, ideas and objectives. Particularly, it had something of a galvanic effect on many Americans. Let me name just four, who are representative if not exactly selected at random:

- One was a New Jersey professor of government, Woodrow Wilson.
- Another was a young lawyer, world traveler and close student of President Theodore Roosevelt who, indeed,

emulated him in many ways: Frank Roosevelt of Manhattan and Hyde Park, New York.

- A third, located in Frewsburg, New York, just twenty-four miles south of Chautauqua Institution, was a fifteen-year-old high school junior, voracious newspaper reader, and interscholastic debater of policy issues such as these: Robert Houghwout Jackson. (Jackson later recalled that “the Hague Conferences” were among the events that shaped his generation’s pre-World War I belief that “except for short and local wars, differences between the great powers would be composed by negotiation or determined by arbitration.”<sup>4</sup>)

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<sup>4</sup> Robert H. Jackson, *An Address Delivered at the Ninetieth Commencement of the Albany Law School* (June 5, 1941), available at <http://www.roberthjackson.org/documents/060541>. Jackson knew well The Hague’s place in world governance, and also its distance from Chautauqua County. In later years, he joked that he, as corporation counsel in Jamestown, New York, during the Wilson administration, “would no more have thought of getting help in any problem affecting my city from Washington than [he] would have thought of getting help from The Hague.” Robert H. Jackson, *The Department of Justice and the Cities*, at 2 (addressing, at the Waldorf-Astoria Hotel in New York, New York, the annual meeting of the United States Conference of Mayors, Sept. 19, 1940), available at <http://www.roberthjackson.org/documents/091940>.

- A fourth, even more remote (at least from The Hague), was a young Missouri student whose talents and efforts would take him to war and business, business failure, machine politics and, ultimately, some greater successes: Harry S. Truman.

## **World War and After**

A third period is the interval that separated the pre-World War I, second Hague Conference moment from the late 1930s. In this forum, I will simply note that this interval occurred, and that it was, for our purposes, significant. It encompassed the War itself, the Allied victory, President Wilson's Fourteen Points, the Paris Conference, and the failed effort to prosecute German war criminals at Leipzig. It also included the Kellogg-Briand Pact and, of particular importance later at Nuremberg, that Pact's declaration that waging aggressive war violated the legal principles of nations.

## **World War II**

The phase that followed began with the world again on the brink of war. Two particular moments during 1940-41 echoed, audibly, the 1907 Hague conference.

The first was the summer 1940 "Destroyer Deal" between the United States and Great Britain. The United States agreed to provide fifty over-age (World War I-era) destroyers to Britain, which then was standing alone



against the Nazis and dependent on North Atlantic trade that was being decimated by German U-boats. In return, Britain granted to the United States ninety-nine year basing rights on British territorial properties throughout the North Atlantic and the Caribbean. This deal, negotiated by President Franklin D. Roosevelt and Prime Minister Churchill, was controversial because it sailed in the face of American public isolationism, United States neutrality laws, (some) international opinion and perhaps international law. Among the United States lawyers who worked on this deal—advising against its first phase, causing it to be reconfigured, and then approving it in a formal legal opinion—was the Attorney General of the United States, Robert H. Jackson.<sup>5</sup> His legal opinion explains the legality of the Destroyer Deal under domestic and incorporated international law.<sup>6</sup> The ensuing public debate, including criticism from Nazi Germany, focused even more explicitly on international law and the Hague conventions.<sup>7</sup>

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<sup>5</sup> See generally ROBERT H. JACKSON, *THAT MAN: AN INSIDER'S PORTRAIT OF FRANKLIN D. ROOSEVELT* 81-103 (John Q. Barrett ed., 2003).

<sup>6</sup> See Robert H. Jackson, *Acquisition of Naval and Air Bases in Exchange for Over-Age Destroyers*, 39 Op. Att'y Gen. 484-96 (Aug. 27, 1940), *republished in* 34 AM. J. INT'L L. 728-36 (1940).

<sup>7</sup> See, e.g., *Berlin Holds Deal Is Unneutral Act*, N.Y. TIMES, Sept. 5, 1940, at 10; Lawrence E. Davies, *Third-Term Issue Divides Bar Group*, N.Y. TIMES, Sept. 11, 1940, at 21 (describing American Bar Association committee debate over the propriety of the Destroyer Deal under international law); Alexander N. Sack, *Provision of International Law Are Cited*, N.Y. TIMES, Oct. 27, 1940, at 75 (invoking Hague Conventions of 1907 to dispute the legality of the Destroyer Deal).

A second moment on this path of international legal development is a speech that Attorney General Jackson gave in March 1941 in Havana, Cuba, to the International Bar of the Americas. Jackson actually only wrote the speech—rough seas prevented him from getting to Havana to deliver it, so it was read for him by a United States diplomat. What Jackson explained, building on both the Destroyer Deal and the Lend-Lease program that then was being legislated, was that the United States was legally entitled to assist Great Britain because Germany's aggression against it was illegal under customary international law and treaty commitments.<sup>8</sup> The legal analysis underlying that conclusion was based in part on the Hague rules of 1907.<sup>9</sup>

## **Nuremberg**

A fifth moment to consider is Nuremberg itself during 1945 and 1946. On this topic, others who are present have the credentials to lead the discussion. I hope that it will to some extent begin to introduce properly former Nuremberg prosecutors Whitney Harris and Henry King if I touch on just a few Nuremberg points.

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<sup>8</sup> See Robert H. Jackson, *Address to the Inter-American Bar Association*, 35 AM. J. INT'L L. 348-59 (1941) (address of March 27, 1941).

<sup>9</sup> See *id.* at 349, 352 & 354-56 n.5.

One is a very early, but conceptually a fundamental, aspect of the endeavor that became Nuremberg: insistence on principle. In spring 1945, Robert Jackson, by then a Supreme Court justice, received his post-war assignment to prosecute Nazi war criminals directly from the new President, Harry Truman, who was thereby endorsing and implementing a plan of his predecessor, FDR.<sup>10</sup> The assignment brought Jackson into ongoing War Department, State Department and other executive branch activities. Jackson learned in early May 1945, for example, of a United States government-supported proposal to use millions of Germans as repair labor forces across Europe and in the Soviet Union. When Jackson got wind of this proposal, he effectively threatened not to take on the possible prosecution of Nazi slave labor practices while acting as a representative of governments that were about to embark on slave labor practices. His and others' opposition caused the government labor proposal to collapse.

A second aspect of "Nuremberg" actually occurred in London, where Jackson and allies negotiated and produced the agreement creating an international military tribunal and its governing charter. The four allied powers (the United States, the Soviet Union, Great Britain and France) accomplished this in a process that in some sense was a descendant of the process that began

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<sup>10</sup> See generally John Q. Barrett, "One Good Man": *The Jacksonian Shape of Nuremberg*, in THE NUREMBERG TRIALS: INTERNATIONAL CRIMINAL LAW SINCE 1945 (DIE NÜRNBERGER PROZESSE: VÖLKERSTRAFRECHT SEIT 1945) 129-37 (Herbert R. Reginbogin & Christoph J.M. Safferling, eds., 2006); John Q. Barrett *The Nuremberg Roles of Justice Robert H. Jackson*, 6 WASH. U. GLOBAL STUDIES L. REV. 511-25 (2007).

in The Hague in 1899, continued there in 1907, continued in Paris following the first World War, and so forth. It was an international discussion of legal progress and shared principles.

I will mention the Nuremberg trial itself only briefly. The Allies went to Nuremberg after London and conducted a fair, public trial before an independent tribunal. Perhaps some of the charges that they prosecuted were based in theories and definitions of criminality that were formally *ex post facto*, although even the allegedly “new” charges were based in concepts and declarations that long predated Hitler.<sup>11</sup> Regardless, each Nuremberg charge became, with the International Military Tribunal’s 1946 judgment, precedent—henceforth, the waging of aggressive war, the commission of war crimes, the perpetration of crimes against humanity, and common planning and conspiracy to engage in any or all of those crimes would be

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<sup>11</sup> See, e.g., REPORT TO THE PRESIDENT BY MR. JUSTICE JACKSON, JUNE 6, 1945 (describing Nazi atrocities and persecutions within Germany as “the deepest offenses against that International Law described in the Fourth Hague Convention of 1907 as including the ‘laws of humanity and the dictates of the public conscience’”), reprinted in U.S. DEPARTMENT OF STATE, INTERNATIONAL CONFERENCE ON MILITARY TRIALS, LONDON, 1945, at 42, 49 (Publication 3080, released Feb. 1949); cf. Robert H. Jackson, *Nuremberg in Retrospect: Legal Answer to International Lawlessness*, 35 AM. BAR ASSN. J. 813, 886 (1949) (noting that the Treaty of Versailles “recognized the right of the allied power to try persons accused of violating the laws and customs of war, although the Hague Conventions, which forbid such conduct, do not expressly name such conduct criminal, nor set up courts to try such offenses nor fix any penalties”).

violations of international law, and individuals up to the level of head of state could be held accountable for their commission.

### **Forward from Nuremberg**

A sixth and final phase runs from 1946 to our time: looking forward from Nuremberg. As the trial culminated sixty-one years ago, what had been accomplished and what would Nuremberg come to mean? In the second half of the twentieth century and, later, in our twenty-first century, could the fact of Nuremberg redeem or at least begin the process of redeeming the war and bloodshed that had characterized the first half of the twentieth century?

On these weighty and enduring questions, which are part of what international leaders, including prosecutors, address every day in their work, some relevant thoughts are Justice Jackson's, expressed during his eight years following Nuremberg.<sup>12</sup> In his October 7, 1946, final report to President Truman that was the predicate to Jackson resigning his responsibilities as United States Chief of Counsel, he summarized what he believed had been accomplished at Nuremberg for the future:

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<sup>12</sup> Jackson's notable speeches about international law, Nuremberg and its legacy included, in addition to those discussed here, his 1945, 1949 and 1952 addresses to the American Society of International Law. They recently were republished in "A DECENT RESPECT TO THE OPINIONS OF MANKIND...": SELECTED SPEECHES BY JUSTICES OF THE U.S. SUPREME COURT ON FOREIGN AND INTERNATIONAL LAW 27-72 (Christopher J. Borgen, ed., 2007).

The Nürnberg<sup>13</sup>] trial has put th[e] handwriting on the wall for the oppressor as well as the oppressed to read.

Of course, it would be extravagant to claim that agreements or trials of this character can make aggressive war or persecution of minorities impossible, just as it would be extravagant to claim that our federal laws make federal crime impossible. But we cannot doubt that they strengthen the bulwarks of peace and tolerance. The four nations, through their prosecutors and through their representatives on the Tribunal, have enunciated standards of conduct which bring new hope to men of good will and from which future statesmen will not lightly depart. These standards by which the Germans have been condemned will become the condemnation of any nation that is faithless to them.

By the [London] Agreement and this trial we have put International Law squarely on the side of peace as against aggressive warfare, and on the side of humanity as against persecution. In the present depressing world outlook it is possible the Nurnberg trial may constitute the most important moral advance to grow out of this war. The trial and decision by which the four nations have forfeited the

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<sup>13</sup> “Nürnberg” is the German spelling.

lives of some of the most powerful political and military leaders of Germany because they have violated fundamental International Law, does more than anything in our time to give International Law what Woodrow Wilson described as “the kind of vitality it could only have if it is a real expression of our moral judgment.”<sup>14</sup>

That was Jackson’s fairly optimistic, high, and perhaps self-congratulatory assessment of his own Nuremberg work. Of course he was writing to President Truman and articulating this perspective at a moment when the Cold War had already begun (perhaps literally in the courtroom at Nuremberg). Indeed, the prospect of a World War III, this time pitting the United States against the Soviet Union, was palpably real. Jackson thus knew well, and directly, the grounds for pessimism about the prospects for international cooperation and law-building in the post-Nuremberg world—Great Britain and the United States recently had decided, at Jackson’s direct recommendation, not to participate in any additional international trial of Nazi defendants. Thus while Truman optimistically was asking the United Nations in Fall 1946 to adopt a new code of international law based on the Nuremberg judgment,<sup>15</sup> Jackson was

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<sup>14</sup> REPORT TO THE PRESIDENT BY MR. JUSTICE JACKSON, OCT. 7, 1946, *reprinted in* U.S. DEPARTMENT OF STATE, INTERNATIONAL CONFERENCE ON MILITARY TRIALS, LONDON, 1945, at 432, 439 (Publication 3080, released Feb. 1949).

<sup>15</sup> See Felix Belair, Jr., *Truman Endorses World Crime Code*, N.Y. TIMES, Nov. 13, 1946, at 14.

less sanguine. His uncertainty is captured in a November 16, 1946, private letter to newspaper columnist Walter Lippmann, who had visited Jackson in Nuremberg and observed the trial earlier in the year:

I am fearful that in the present temper of things more ground may be lost than gained by going to the United Nations for a vote. I hope my fears aren't grounded.<sup>16</sup>

(In the short term, those Jackson fears were misplaced: On December 11, 1946, the United Nations General Assembly, unanimously and Hague-like, did affirm the legal principles recognized in the August 1945 London Charter and the September 1946 judgment of the International Military Tribunal at Nuremberg and directed a newly-created committee to use those principles and the Nuremberg judgment as the basis for an international criminal code.<sup>17</sup>)

The next summer, Justice Jackson publicly addressed Nuremberg, its legacy and the prospect of world war when he delivered the Fourth of July lecture here at Chautauqua Institution, just up the hill from this Hotel in Chautauqua's famous Amphitheater. Speaking against the backdrop of his personal dealings with senior Soviet

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<sup>16</sup> Robert H. Jackson letter to Walter Lippmann (carbon copy), *available in* Robert H. Jackson Papers, Library of Congress, Manuscript Division, Washington, D.C., Box 15, Folder 6.

<sup>17</sup> *See* G.A. Res. 32/95(I) (Dec. 11, 1946), *reprinted in* 1 UNITED NATIONS RESOLUTIONS 175 (Dusan J. Djonovich, ed., 1972).



leaders Molotov, Vyshinsky, Nikitchenko, Rudenko and others, Jackson discussed ideological difference and danger in the new nuclear age. He expressed his hope and belief, based in experience and drawing on international cooperation and successes at The Hague, Nuremberg and the United Nations, that war was not inevitable.<sup>18</sup>

In late summer 1949, Justice Jackson again addressed, in an international venue, the legacy of Nuremberg. He told the Canadian Bar Association that three disabling years of escalating world tension made it all the more important to regard Nuremberg as a lawful accomplishment by and among the nations:

[M]achinery to make new international law is so inadequate, inertia is so great, conflict and suspicion today are so paralyzing, that we can foresee no time when aggressive wars will be outlawed or their perpetrators legally punishable if the Nuremberg basis for doing so was not valid.<sup>19</sup>

Finally, on November 2, 1953, less than one year before the early end of his life, Justice Jackson spoke hopefully about the meaning, force, and legacy of Nuremberg. He participated in and delivered an address

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<sup>18</sup> See *Jackson Deplores Forecasts of War*, N.Y. TIMES, July 5, 1947, at 9; *New War Is Not Inevitable Avers Justice Jackson*, CHAUTAUQUAN DAILY, July 5, 1947, at 1, 5.

<sup>19</sup> Robert H. Jackson, *Nuremberg in Retrospect: Legal Answer to International Lawlessness*, *supra* note 11, at 813-14.

at the laying of the cornerstone of the new American Bar Center in Chicago. This project was spearheaded by the American Bar Association's executive director Whitney R. Harris, who had served as a Nuremberg prosecutor with Jackson during 1945-46 and of course is here with us this morning.

Jackson's Chicago speech hopefully and explicitly connected international legal processes such as The Hague conferences, Nuremberg and their modern descendants to the professional personnel, including national leaders, lawyers and diplomats, who brought them into being:

[B]asic ideas of just dealing and civilized living are so strikingly alike that we may foresee a mutual understanding and co-operation between the professions of the Western world greater than has existed in the past. And if a peaceful and stable international order is ever reached, it is not rash to predict that it will result from acceptance by the professions of all nations of an international rule of law as a curb on lawless power in control of great states.<sup>20</sup>

Nuremberg was, in other words, an asset that professionals, including international lawyers, had developed and conserved.

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<sup>20</sup> Robert H. Jackson, *The American Bar Center: A Testimony to Our Faith in the Rule of Law*, 40 AM. BAR ASSN. J. 19, 21 (1954).

We are here today with prosecutors who share and grow that precious asset. They pursue it in their investigative and prosecutorial work and embody it in their personal commitments. They carry on the Nuremberg project, which is also The Hague project and, really, humanity's project. These lawyers sought in the past, and they seek today, right conduct, accountability, fairness, deterrence and world-building. And their project is young.

## **The Legacy of Nuremberg**

**Whitney R. Harris\***

In all of history, the Twentieth Century, and especially its first half, witnessed the gravest inhumanities and killings that man has ever perpetrated on man. It is hard to believe that the long road toward civilization which man has trod since the dawn of history could have led to the dreadful conflicts of World War I, from 1914 to 1918, and of World War II, from 1939 to 1945. The tragedies of these wars passed from battlefields of Verdun, where thousands of soldiers died in miserable muddy trenches under unremitting rifle and cannon fire, to Hiroshima and Nagasaki, where hundreds of thousands of civilians were pulverized by atomic bombs. There must be an end to war, or there will be an end to civilization. The Nuremberg Trial of 1945-46 was man's first effort to subject tyranny and war to the rule of law.

On the first day of October, 1946, the eight judges constituting the International Military Tribunal took their seats at the bench in the courtroom of the Palace of Justice in Nuremberg, Germany where, during the preceding ten months the major German war criminals had been tried for committing wars of aggression, war crimes and crimes against humanity during the second Great War of the Twentieth Century.

The judges faced the prisoners' dock, which was empty. Before it the defense counsel occupied their

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\* Prosecutor, International Military Tribunal (Nuremberg).

chairs. To the left were the prosecution tables, occupied by the four Allied prosecutors and their staffs. I sat at the American table. Behind us the visitor's gallery was packed with members of the press and observers. The defendants were to be brought into the courtroom, one at a time, to hear the sentences pronounced against them.

At ten minutes before three, the paneled door in the back of the prisoners' dock slid silently open. The defendant Hermann Goering stepped out of the elevator which had brought him from the ground floor where the defendants waited. Goering put on a set of headphones which had been handed to him by one of the white-helmeted American guards. The president of the Tribunal began to speak. Goering signaled that he was unable to hear through the headphones, and there was an awkward delay while the technicians sought to correct the difficulty. A new set of headphones was produced and once again Goering quietly awaited the words which were to decide his fate.

“Defendant Hermann Wilhelm Goering, on the counts of the Indictment on which you have been convicted, the International Military Tribunal sentences you to death by hanging.”

The number two Nazi turned on his heel and passed through the paneled door into the waiting elevator. The door closed, and there was a hum of whispered voices in the courtroom as those present awaited the arrival of the next defendant, Hess. Rodolf Hess, who had flown his Messerschmitt to England in a futile effort to persuade the British to abandon the fight with Germany, was

sentenced to imprisonment for life. The other defendants appeared in turn and received their sentences. Twelve, including Martin Bormann who had been tried *in absentia*, and my defendant, Ernst Kaltenbrunner, received death sentences; three were acquitted; and the remaining seven received varying terms of imprisonment. The Tribunal declared as criminal organizations the Leadership Corps of the Nazi Party, the Gestapo and SD, and the SS.

Appeals were taken by all the defendants to the Allied Control Council, except Kaltenbrunner. The appeals were uniformly denied at a meeting of the Council on October 10. I had been designated by the United States Chief of Counsel Justice Jackson as his personal representative at the executions and was present in the Palace of Justice on the fateful night of October 15-16, 1946. Shortly before midnight the electrifying word was released that Goering had cheated the hangman by taking poison while lying, ostensibly asleep, upon the bed in his cell. Death thus came to Goering, by his own hand, as it had come to Hitler, Himmler and Goebbels, before him, even as a prison officer was walking to the cell block to give formal notice of the executions to take place that night.

At eleven minutes past one o'clock in the morning of October 16, the white-faced former foreign minister, Joachim von Ribbentrop, stepped through the door into the execution chamber and faced the gallows on which he and the others condemned to die by the tribunal were to be hanged. His hands were unmanacled and bound

behind him with a leather thong. Ribbentrop walked to the foot of the thirteen steps leading to the gallows platform. He was asked to state his name, and answered “Joachim von Ribbentrop.” Flanked by two guards and followed by the chaplain, he slowly mounted the stairs. On the platform he saw the hangman with the noose of thirteen coils and the hangman’s assistant with the black hood. Asked to state any last words, he said: “God protect Germany, God have mercy on my soul...My last wish is that German unity be maintained, that understanding between East and West be realized, and there be peace for the world.” The trap was sprung and Ribbentrop died at 1:29. In the same way, each of the remaining defendants approached the scaffold and met the fate of common criminals. All, except the wordy Nazi philosopher, Rosenberg, uttered final statements. After the executions the body of each man was placed upon a simple wooden coffin. A tag with the name of the deceased was pinned to coat, shirt, or sweater. With the hangman’s noose still about the neck, each hanged man was photographed. The body of Hermann Goering was brought in and placed upon its box, to be photographed with the others.

In the early morning hours two trucks, carrying the eleven caskets, left the prison compound at the Palace of Justice bound for the crematory at Dachau Concentration Camp near Munich. There, during all of that day, the bodies were cremated. It was reported that the urns containing the ashes were taken away to be emptied into the River Isar. The dust of the dead was carried along the currents of the stream to the Danube – and hence to the sea.

The defendants who had received sentences of imprisonment were transferred to Potsdam prison which had been designed for some six hundred prisoners, but was now reserved for the seven from Nuremberg. As the years passed, the defendants completed their terms and were released. The last prisoner was Rudolf Hess, who had been sentenced for life. On August 17, 1987, forty-one years after the final judgment of the Tribunal, Hess managed somehow to commit suicide. With his death the Hitler tyranny ended.

The tyrant and his chief cohorts were gone. They had sought to achieve greatness in history. But they inscribed their names in sand, and clean waters fell upon the beach and washed them out. They had intended to establish a new order for Europe. But they built upon pillars of hate, and what they stood for could not stand.

Hitler and his confederates who led Germany to disaster in the Twentieth Century are all dead. They were the principal actors in a fearsome drama. But as Prospero foretold, “they were all spirits, and melted into air, into this air...” The tyrant Hitler and his associates in crime will someday be forgotten; forgotten, too, may be their crimes. It is enough that tomorrow’s world remembers what today’s world has learned through the bitter experience of this fallen regime – that tyranny leads to inhumanity, and inhumanity to oblivion.

The legacy of the trial of the major German war criminals before the International Military Tribunal at Nuremberg is a law-ordered world in which nations live



at peace. It is not the fault of the Tribunal or its judgment that this legacy has yet to be fully accepted in the world. If Nuremberg had not occurred, and the anger of the Allies had been assuaged by the executions of alleged war criminals without trial, world society would not have advanced an iota toward a peaceful world. It is the legacy of Nuremberg that war crimes, crimes against humanity committed in war, and aggressive war, itself, shall never again be tolerated in a peaceful world in which all disputes among nations are to be resolved under the rule of law.

The world in which we live is subject to the overwhelming fact of force. Nature speaks to us in that idiom. The hurricane that rises from the sea and spreads havoc on the land, the earthquake that shatters the stillness of the day and brings buildings tumbling to the ground, the erupting volcano that sends boiling lava over green fields and quiet homes – are forces which Nature may unleash in angry mood. Against these forces man has yet to prove his greater power. No mortal has shown the way to still the voice of the mighty hurricane or quell the mysterious shifts of subterranean mountains, or stop the red lava in its flow to the sea. And yet, these forces of destruction, dominant though they may be, have not the threat to humankind which man himself has devised. The atomic age burst in fury upon the world. We are caught in the peril of that age. Manmade forces can not destroy man. Perhaps civilization is in its decline, and barbarism its due.

Rudolf Hess, the Commandant of Auschwitz Concentration Camp, confessed to me at Nuremberg: “I

commanded Auschwitz until December, 1943, and estimate that at least two and a half million victims were executed and exterminated there by gassing and burning...”

After hearing this confession, the defendant Hans Frank, the Governor-General of Occupied Poland, declared: “That was the low point of the entire trial – to hear a man say out of his own mouth that he exterminated two and a half million people in cold blood – that is something people will talk about for a thousand years.”

The spirit of Hitlerism was one of the greatest factors for evil in history. For Hitler had the incomparable advantage, over tyrants of earlier times, of modern technology through which his propaganda could be constantly pounded into the German people and his war machine could be made to strike his enemies with shattering force.

The consequence of that spirit was the commission of crimes against humanity that stagger comprehension. The people of Europe and America became aware that the Hitler regime had committed acts of great wickedness, but not until these crimes had been exposed to the searching light of truth in an open judicial forum did the world gain comprehension of their enormity.

The Nuremberg trial marked the close of the Hitler era, but it did not mark the end of the struggle for peace. The case of Tyranny versus Justice had been pending in

the courts of mankind since the dawn of history. The issue is whether humanity shall realize its right to freedom or whether mankind shall forever suffer the last of autocratic power. Nuremberg gave meaning to the rule of law in international relations. If its principles were to gain universalism a permanent international judicial forum had to be established in which future cases involving war crimes, crimes against humanity in war, and the waging of aggressive war had to be resolved without resort to military force.

The General Assembly considered the proposal for an international criminal court when drafting the Convention on the Prevention and Punishment of the Crime of Genocide, but failed to approve it. On the day it adopted the Genocide Convention, December 18, 1948, however, the General Assembly requested the International Law Commission to undertake a study of a permanent international criminal court. Thus began a long period of international negotiations culminating in a General Assembly resolution of December 16, 1996 calling for a diplomatic conference of plenipotentiaries to meet in 1998.

The Conference convened in Rome on June 15, 1998. Deliberations concluded on the following July 17 with the adoption of the statute for an International Criminal Court by a vote of 120 in favor to 7 against, with 21 abstentions. Voting against the statute were Iraq, Libya, Qatar, Yemen, China, Israel, and the United States. The Arab countries opposed the statute primarily because it omitted the death penalty. China was concerned with the possibility of charges of offenses

against human rights. Israel believed that the shifting of population into occupied territory should not have been included as a war crime. The United States feared that its role as primary peacekeeper with American military forces deployed around the world might be adversely affected by spurious charges of war crimes. But the overwhelming majority of the nations represented at the Rome Conference endorsed the statute as constituting the primary international document for peace and justice in the latter half of the Twentieth Century. It is fitting that it should have been adopted in Rome. For as Virgil observed in the Aeneid so long ago:

*The Greeks shape bronze statues so real they seem to  
breathe,  
And carve cold marble until it almost comes to life.  
The Greeks compose great orations, and measure  
The heavens so well they can predict the rising of the stars.  
But you, Romans, remember your great arts:  
To govern the peoples with authority.  
To establish peace under the rule of law.  
To conquer the mighty, and show them mercy once they  
are conquered.*

--Aeneid VI, 847-853

The Rome Statute is a treaty document establishing for the first time in world history an international criminal court, complementary to national criminal law jurisdictions, capable of bringing to justice persons guilty of aggressive war (yet to be defined), war crimes, and crimes against humanity, including genocide. It

recognizes that crimes occur in the world which require the availability of an international judicial forum for trial and punishment.

The International Military Tribunal was created more than half a century before the Conference. But fifty years is just an hour in mankind's struggle for justice. Revision of the Rome Treaty must be considered after seven years of trial with its law and procedures. Seven hundred years may pass before mankind is able to eliminate war in the world and establish a system of universal justice.

Law is the means to justice. The first world-wide conflict led to the conviction that civilization can no longer tolerate war as a method of settling international disputes. The second world war turned that conviction into law. Aggressive war has long been morally condemned; it has now become the foremost crime against humanity.

## **Spirit of Nuremberg - Idealism**

**Henry T. King Jr.\***

Harold Nickelson, a British journalist, came to Nuremberg to have a look at the proceedings before the International Military Tribunal. Later he wrote "...in the courtroom at Nuremberg something more important was happening than the trial of a few captured prisoners. The inhuman is being confronted with the humane, ruthlessness with equity, lawlessness with patient justice, and barbarism with civilization." In a few words, Nickelson captured the idealism that gave Nuremberg its forward thrust. Under the leadership of Robert Jackson we had the vision of a better world and we moved through Nuremberg to achieve it.

It wasn't easy because there were those, including Winston Churchill and Joseph Stalin, who wanted to avoid a trial and expedite matters through summary executions. Such a procedure would not have been a benchmark for a better world. Summary execution would have meant that the world had stood still morally and that its leaders had not tried to build a better future for all of mankind. But a public trial held significant risks. Germany had surrendered unconditionally, but there was fear that the defendants could use the trials to incite violence against the victorious powers.

There was also a big element of personal risk for those, such as myself, who participated in Nuremberg. In my case, I gave up a secure legal position on Wall

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\* Prosecutor, International Military Tribunal (Nuremberg).

Street to participate in an undertaking whose outcome and impact on the future were unknown. The American public did not seem ready for Nuremberg. Isolationists and those just tired of the war saw Nuremberg as prolonging U.S. involvement. There were, in fact, many who attempted to dissuade me from going to Nuremberg because “You will lose your place in life on the avenue of success.” The question each of us had to ask was, “Are those risks greater than the need to stand up against Nazi atrocities and the possibility that they would be repeated?” Our answer was, as still is, No!

Let’s take a look at how Nuremberg became a reality. As World War II was drawing to a close, the allied leaders needed to settle the question of what to do with the former leaders of Nazi Germany, most of whom were in the custody of the United States. As I have indicated previously, two important leaders favored summary executions but – on the advice of his Secretary of War, Henry L. Stimson, President Franklin Roosevelt leaned strongly toward a trial until his unanticipated death on April 12, 1945. The very next day, April 13, 1945, Justice Robert H. Jackson of the United States Supreme Court gave a speech before the annual meeting of the American Society of International Law in which he advocated a trial – a fair trial. In his address, Jackson indicated that he wanted no part of a “show” trial designed only to convict. Convictions, Jackson said, should be based solely on fully supported evidence. If the evidence was not there to support a conviction, the individual should be acquitted.

Jackson's observations on a prospective trial of the Nazi war criminals were acknowledged by the White House on May 2, 1945, when President Truman appointed him as his plenipotentiary in the planning with the Allies for the trial of the Nazi war criminals.

On June 6, 1945, Jackson reported back to the President outlining his plans for the substantive aspects of the trial. In his report, Jackson outlined the charges he felt should be the basis for the trial.

The first crime was aggressive war, which was styled as crimes against peace. Jackson felt that this was a fundamental crime and it consisted of planning, preparation, and waging wars of aggression and wars of violation of international treaties.

The second charge recommended by Jackson was war crimes. These were crimes against civilians and prisoners of war in violation of the laws and customs of war. This charge was based substantially on The Hague and the Geneva Conventions governing conduct of warfare, which most nations of the world had adhered to.

The third charge was crimes against humanity which dealt with multiple types of assaults on civilians, including, in particular, murder and persecution of individuals on racial, religious, or national origin grounds. This was, indeed, a sweeping charge which was designed to reach all assaults on civilians not covered by the war crimes count. Hitler was once asked by his generals what the world would think if they killed



every man, woman and child in Poland. His response was, “Who remembers the Armenians?” referring to the Turkish army’s genocide of 1.5 million Armenians beginning in 1915. The crimes against humanity charge gave notice that the world would no longer turn a blind eye to crimes against civilians just because they were committed by a sovereign state.

Jackson also advocated a conspiracy charge to reach those who conspired to commit the foregoing crimes. He recognized that these atrocities did not happen in a vacuum. Those most responsible often did not get their own hands dirty, but that should not prevent their being held accountable.

By stressing the treaties and customary international law the Nazis violated, Jackson preempted the defense that Nuremberg was applying *ex post facto* laws. This accomplished two things. It helped codify existing international law, laying the ground work for modern prosecutions in the *ad hoc* tribunals and the ICC. But more important to those of us at Nuremberg, it reinforced Jackson’s vision of a fair trial, not victors’ justice.

In his report to President Truman, Jackson also advocated the elimination of two prospective defenses by the Nazi war criminals. These were sovereign immunity and superior orders. Jackson felt that if these two defenses were allowed in combination, then no one could be convicted at the prospective trials because no one could be held responsible. As regards to the sovereign immunity defense, Jackson thought there

should be the fullest responsibility where the authority was of the highest. No longer, he felt, should those who exercise authority in the name of the nation, escape responsibility for their deeds. He recommended that they be called to full account.

The second defense that Jackson wanted to eliminate was superior orders. He felt that the Nazi leaders who would be subject to trial should not be able to hide behind the defense that they were just obeying their superiors to justify their criminal acts. He felt that those who committed criminal acts should be called to account and punished for their actions. He exercised great foresight in eliminating this defense because in Nazi Germany, an absolute dictatorship, most important orders were issued in Hitler's name. Moreover, Hitler was nowhere to be found, having, as we later determined, committed suicide in his Berlin bunker on April 30, 1945.

The Allies met in London in early summer of 1945 to discuss Jackson's draft of a proposed procedure for the trials. The British and French did not request substantive changes in Jackson's draft, although the French disliked the conspiracy charge because they felt that conspiracy, to the extent it existed, merged with the substantive crime itself. With the USSR it was a different story. Their representative argued that the aggressive war count should apply only to Nazi actions. The Russians wanted no generic approach to this count because they felt that it could be extended to cover some of their own activities. Jackson, to a considerable extent, held the line on this

one. The compromise reached in the London Agreement and Nuremberg Charter called only for the prosecution of the Axis powers' war criminals, but the definitions were stated in generic terms so as to be universally applicable in the future.

Another issue that was debated in London was the presumption of guilt or innocence. The Soviet representative wanted a presumption of guilt with regard to the defendants, while Jackson wanted a presumption of innocence. By insisting on a presumption of innocence, the burden fell on the prosecutor to prove the defendants' guilt and gave each defendant the benefit of the doubt, elements that are now widely considered essential for a fair trial. Here again, Jackson prevailed and his foresight on this issue gave much increased credibility to the results of the trials.

The next issue faced was the locale of the trial. The USSR representative wanted the trial to be held in Berlin. Justice Jackson dissented and argued for Nuremberg which had the largest undamaged courthouse in Germany. Moreover, Nuremberg was of great symbolic significance. It was the site of the Nazi party headquarters and of the huge Nazi party rallies where Hitler held forth in his challenges to the world. Nuremberg symbolized Nazism at its Zenith and it was important to correct the record as to the true implications of Nazism, which were, indeed, criminal.

The next issue was the selection of the prospective defendants. Most of the defendants were in US custody. On this issue, Jackson felt that for precedential reasons,

they should be the leaders of each walk of German life, whether they be military or diplomatic, police or industrialists. Here, Jackson again prevailed and it was he, working with the other allies, who targeted the individuals to be tried at Nuremberg. Joachim von Ribbentrop, the Nazi Minister of Foreign Affairs, found guilty on all four counts. Reichmarschall Herman Goring, Commander of the Luftwaffe, guilty on all four counts. Gustav Krupp von Bohlen und Halbach, chairman of the Association of German Industrialists and major arms manufacturer using slave labor from occupied countries and concentration camps, indicted on all four counts but not tried for health reasons. Julius Streicher, a publisher who used his newspaper and children's books to incite anti-Semitism, convicted of crimes against humanity.

In the matter of defense counsel, Jackson took the view that the defendants should be well represented. He arranged for the Allied Control Commission to assume the costs of defense counsels and also for such counsel to be largely of the defendants own choosing.

The outcome of these negotiations was the London Charter of August 8, 1945, which provided the basis for the trials.

One further point is important with regard to the presentation of the case against the defendants at Nuremberg. Jackson felt that as far as the US prosecution was concerned, the evidence against the Nazi's should be largely documentary from the

German's own files. He felt that through this approach, the Nazi's would convict themselves and that the result would have greater long-term credibility.

Nuremberg officially began on November 20, 1945, but the real opening was on November 21, 1945, when Justice Jackson delivered the opening statement for the United States of America. In that statement, he set forth what Nuremberg was all about. Some high points are worthy of particular note. I should like to share them with you here today.

First, Jackson stated that "the complaining party at the bar here today is civilization." By this he meant that the trial was to make a break with the barbarism of the past – barbarism on so great a scale that it had cost 50 million lives in World War II and reached new limits of degradation never before experienced in history.

Second, Jackson stated that the trial was "one of the most significant tributes ever paid by power to reason." By this he meant that reason was not to be the order of the day and that the guilt of the defendants would be determined through the use of reason in a fair trial. Summary execution of the defendant by the Allied powers based on their military dominance was not to be permitted. The force of law was, indeed, to replace the law of force.

Third, Jackson stated that "as we pass a poison chalice to the lips of these defendants we pass it to our lips as well." This meant that the trial was to represent equity and that the Allies themselves who brought the

charges against the Nazi defendants were to be governed in their future behavior by the standards established at Nuremberg. Jackson felt that if Nuremberg was to have lasting meaning, the principles of Nuremberg should encompass benchmarks for the behavior of all peoples of the world, then and in the future – that, indeed, they should have universal application in the interest of fairness and equity.

In sum, what Jackson wished to convey through the opening statement was that Nuremberg was to mark the beginning of a new era in human history. After all, he was, indeed the architect of Nuremberg and that was his vision – which is as valid today as it was 60 years ago.

Jackson's foresight in focusing on documents from the Nazi's own files as proof of their guilt bore fruit in the judgment of the Tribunal. In commenting on this, the International Military Tribunal said in effect that the Nazi's had convicted themselves with the evidence submitted. The judgment was equitable in that three defendants were acquitted because the evidence was not there to support their convictions. The fears people had before the trials had not been realized. Granting the defendants a fair trial, the right to publicly defend their actions, had not resulted in destabilizing the Allied occupation and rebuilding efforts. Herman Goering is seen by many as having gotten the better of Jackson during cross-examination, and yet he was still convicted, condemned not by clever words but by the weight of the evidence.

I came home from Nuremberg filled with the spirit of Nuremberg but the public was not enthusiastic and the bar turned its back on the recognition of Nuremberg for what it was – a complete break with the past. Despite having done well at Yale Law School, then, as now a top-ranking law school, I had trouble getting a job when I returned. This was in part because of Senator Robert Taft of Ohio and others of his ilk who excoriated Nuremberg. In addition, the Cold War had intervened and the US and USSR were engaged in a deep conflict on the issues of the day.

With the ending of the Cold War in the late 1980s Nuremberg has, to a considerable extent, achieved the recognition it has always deserved. The Nuremberg Principles are being followed in UN-sponsored and other tribunals, and an international court has been established and charged with the enforcement of what was substantively established at Nuremberg. In a number of areas of the world a new regime of international human rights is the order of the day.

Much progress has been made, but the United States, which through Jackson created Nuremberg, is fighting a rear-guard action against the advances of the Nuremberg principles. Jackson's position that the Nuremberg principles should be applied in judging the conduct of all nations and their leaders is being disregarded by the United States today. The US has turned its back on the International Criminal Court which would institutionalize Nuremberg, and the US has disregarded the Geneva Conventions of 1949 governing the treatment of prisoners taken in the course of hostilities

by holding them without trial and subjecting them to torture. Progress is using our resources to create a better, more just world, not manipulating language and digging for loopholes to lower the minimum standards of decency.

The fears the world faces today are not new. Even courageous people such as Winston Churchill feared that providing Nazi leaders a fair and public trial would undermine the fragile security brought about by the Allied victory. Nuremberg faced those fears and proved that the rule of law is not such a fragile thing, that it strengthens democracies even when applied to those who would deny it to others. Fortunately, the mistakes this administration has made do not need to be permanent. Relations with our allies have become strained because of the war in Iraq, but they are still strong alliances. France and Germany did not join us, but they have not attacked us either. We continue to work together in many ways for a better world. The abuses at Abu Ghraib revolted the civilized world just as they did Americans across the country, but the overwhelming response was not a call for America's destruction, but a plea for us to return to our core American values. The lessons are clear. While some countries will hate us for the democratic values and freedom we represent, most of the world respects and looks up to the United States when we live up to the values we claim to hold so dear!

What is needed now is a revival of the spirit of Nuremberg. A better and more peaceful world based on justice is within our grasp. With the major powers at



peace, no longer staged at the brink of war, we have a golden opportunity to build a more secure future for generations to come. This was in effect our goal at Nuremberg and we engaged, at considerable self-sacrifice, in our attempt to achieve it. I hope that there will be those among the current generation who will take it upon themselves to follow in our footsteps.

So – let idealism and vision be the order of the day. We should always remember that committed individuals can and do make a difference. Let us use conferences such as this as a means to rekindle the enthusiasm that brought about Nuremberg. We can, indeed, achieve a better world if we will it to be our future.

# **The Legacy of the Modern Era**



## **The Second Cold War: The Rule of Law in the Age of Islamic-Fascism**

**David M. Crane\***

We are in an ideological struggle against a criminal element with a radical ideology that nibbles on the fringes of international peace and security and keeps us off balance as a civilization. This type of ideological struggle has surfaced several times in the 20<sup>th</sup> century.

The Bolshevik Revolution in Russia and the subsequent creation of the Soviet Union brought fear to western industrial nations in the early 1920's. The so-called "red scare" caused a reaction that stressed the legal fabric of many nations. Liberal democracies began to re-examine the legal framework to counter what appeared to be a real-world manifestation of the works of Karl Marx.

This threat simmered in the background as the world tried to establish some sense of international order, even attempting to create a "league of nations" to resolve disputes peaceably and to consider outlawing war. As the world plunged toward the abyss in World War II, the western industrial nations were faced with a far greater challenge than communist ideology in the form of a very real fascist and imperialistic axis bent on subjugating whole peoples and controlling the political destiny of the

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world. The United States and Great Britain were forced into an unholy alliance with Joseph Stalin and the Soviet Union to counter the world-wide advances of Germany, Japan, Italy and their associated allies. It was a dark time indeed.

After this orgy of war that saw the death of over 55 million human beings world-wide, the scab that was the alliance that defeated the Axis Powers was ripped off as Stalin cynically moved to gobble up half of the European continent subjugating whole nations to his own imperialistic designs.

Despite a few years of hope, where the international community came together to form a United Nations, draft its charter, issue the Universal Declaration of Human Rights, codify the laws of armed conflict into the Geneva Conventions, and even outlaw a particularly heinous crime—genocide; the world was slipping down the dark and murky road of the nuclear age and mutually assured destruction.

With strategic military might neutralized by this ability to end civilization as we know it, the struggle for world domination by the Soviet Union under the banner of communism settled into an ideological struggle that lasted over four decades. This cold war, the First Cold War, saw its skirmishes, atrocity, and political upheaval as the West maneuvered politically to contain communism, yet avoiding direct confrontation militarily with the Soviet Union, fearing world destruction.

During the First Cold War the West, in fear of a possible internal communist threat, began to adjust their concept of civil liberties in the name of “national security.” In the United States, our national security structure began nibbling away at our freedoms out of this fear, in the shadows, and in many instances counter to law. In the 1950’s the McCarthy era gave Americans a taste of this fear run amok with the paranoia of world communist domination that saw the ruining of lives, reputations, attempts to limit various liberties, and the chilling of free speech.

During the First Cold War the whole world feared a complete victory by the world communist conspiracy. The 1960’s began with the chilling words of then Soviet leader, Nikita Khrushchev, who bellowed out during an address to the United Nations General Assembly that “we will bury you!” National security organizations moved to counter this threat internally by seeking changes in the law, and if not able to, ignoring the law to ensure that a society did not fall to the communists.

During the 1970’s the American press exposed a widespread operational program by US intelligence agencies to spy on Americans, all in the name of “national security”. Stunned by the allegations and their reach, the US President and the Congress passed various statutes to ensure that the civil liberties of US persons were not violated, despite the continued and apparent threat of the Soviet Union. In an age of extremes the law won out.

Over time it truly became an ideological struggle that was won by the West based on several factors to include freedom under the rule of law. The Soviet Union could not counter or offer a better ideology than the universal desire to be free from want, fear, to express oneself, and to worship according to ones cultural traditions under the protection of law. The Soviet model rotted from within collapsing into the dustbin of history as a failed ideology.

While the dust settled in the 1990's, a new threat was emerging in various dark corners of the world, a threat that played upon the frustrations of the disaffected, unemployed, and marginalized religious sects, that was bent on lashing out against the boogeyman that was Western capitalism, democracy, and the global world economy.

There were various hints of this desire to attack the West in the 1990's with the first attack on the World Trade Center in New York City, 1993, the destruction of Khobar Towers in Saudi Arabia, the attack on the USS Cole near Yemen, and the destruction of the two US embassies in Kenya and Tanzania. The West, blinded by the supposed "new world order," failed to connect the dots of this developing criminal conspiracy.

It was only with the crashing of three airplanes into the World Trade Center and the Pentagon in the United States that the world woke up to a new threat to the fabric of international peace and security, a group of Islamic-fascists bent on world wide criminal activity to achieve a world caliphate. As the flames burned out in

those buildings, from the ashes rose the Second Cold War.

As in earlier times of extremes, the world reacted in various ways. Use of military force was both used legally in Afghanistan and illegally, as in Iraq, to defeat these terrorists in the so-called global war on terror, a tragically misnamed effort by President George W. Bush to rally world support and focus that effort kinetically to defeat this small band of criminals.

As the Second Cold War develops, various Western nations have taken great liberties with the rights of their citizens by changing the very law that was put into place in the First Cold War to check executive power in the name of national security. Fear once again drifted into the fabric of American society. The boogeyman was no longer the Soviet Union, but Islam and any and all persons who worshipped this great religion, persons of Arab descent.

Declarations by President Bush and his administration that “the rules have changed”; “dead or alive”; they’ll have flies on their eyeballs”; and “the Geneva Conventions are outdated and quaint” have come to embody the world’s only super power’s strategy to defeat these criminals by force and not by the law.

With this strategy we will most assuredly lose this ideological struggle. This strategy plays right into the hands of this small band of thugs who know that by swinging a bludgeon internationally the West, and the



United States in particular, will continue to drive the disaffected youth of Islam and the Middle East into their arms for a generation. We cannot defeat these terrorists with force, but with the same weapon we defeated the first threat to international peace and security during the First Cold War, with the law.

Every time we limit or do away with a civil liberty a small victory is won by these criminals. They want us to change the very freedoms they envy and do not enjoy as they surely know that they cannot defeat freedom under the rule of law. As we weaken those liberties, we play right into their hands and at this point it appears to be working.

Since September 11, 2001, the United States has lost all its moral authority in fighting this threat. In places like Abu Ghraib, Haditha, and Guantanamo, we have stepped away from the very constitutional fabric that has made the American experiment the envy of the world. Torture, aggression, and outright murder have become symbols of the US administration's global war on terror.

The United States, the original drafter of the Nuremberg Charter, the creator of the United Nations, the champion of using law in conflict during the First Cold War, is now in violation of the laws of armed conflict and has opened itself up to charges by the international community to war crimes and crimes against humanity. Justice Jackson would blanch at this state of affairs.

The rule of law is the weapon that will defeat a criminal, not the commission other crimes to neutralize the threat. Crime versus crime is essentially one step from anarchy. Once that happens ideologically the terrorists have won. In some ways our worst enemy is not this sordid ban of criminals and fascist, but us! If we stand by and watch our law change to the point that it threatens our way of life enjoyed by all, then we have been defeated.

We must hold fast to the law and its consequential freedoms. The Second Cold War is a decades-long struggle where law, diplomacy, dialog, and constructive social, economic, and political initiative by the global community are the tools to counter-balance efforts by these individuals who will become increasingly marginalized until political extinction as we attempt to resolve our disputes peaceably under law and not by force. At no time has the rule of law, and specifically the laws of armed conflict, been more relevant and needed. During times of stress we should hold fast to the law, not let go. Should we do so it may be difficult to take it back without further stress and struggle. As Plato admonished us all, “Democracy passes into despotism”.<sup>1</sup>

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<sup>1</sup> Plato, c. 428-348 B.C. *The Republic*, book 10 at 601.



## **Relevance of the Law of War to Contemporary Conflicts**

**Hassan Jallow\***

The Law of War is also known as international humanitarian law, the law of armed conflicts or the laws and customs of war. The Law of War comprises the 1899 and 1907 Hague Conventions and Regulations, the four 1949 Geneva Conventions and Additional Protocols I and II of 1977, as well as subsequent treaties, judicial decisions and customary international law. The Law of War defines and regulates the conduct and responsibilities of belligerent nations, neutral nations and individuals engaged in armed conflicts in relation to each other (combatants vis-à-vis combatants) and of combatants in relation to protected persons, namely, persons or civilians who are not, or are no longer, taking part in hostilities.

The basic principles of the Law of War include obligations to respect the means and methods of conducting wars and the treatment of captured combatants, who, as prisoners of war are protected by the Third Geneva Convention. Captured combatants and other persons whose freedoms have been restricted are to be treated humanely. They shall be protected against all acts of violence, in particular against torture. If a captured combatant is charged and put on trial, he shall enjoy the fundamental guarantees of a regular judicial procedure. The right of parties to an armed conflict to choose methods or means of warfare is not unlimited. No

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superfluous injury or unnecessary suffering shall be inflicted by combatants on protected persons. In order to spare the civilian population unnecessary suffering, members of the armed forces shall at all times distinguish between the civilian population and civilian objects on the one hand, and military objectives on the other. Neither the civilian population as such nor individual civilian objects shall be the target of military attacks.

The Law of War regulates not only the conduct of international wars in a formal sense, but also other types of armed conflicts that are not classical wars. This approach is in conformity with the legal expressions in the four 1949 Geneva Conventions<sup>1</sup> and the general principles of the “Law of Geneva.”<sup>2</sup> The Law of War covers traditional wars regulated by the laws and customs of war as incorporated in The Hague Conventions and the Regulations of 1899<sup>3</sup> and 1907.<sup>4</sup>

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<sup>1</sup>See Article 2 common to all the four 1949 Geneva Conventions.

<sup>2</sup>The “Law of Geneva” is represented by the four 1949 Geneva Conventions.

<sup>3</sup> Hague Convention (II) Respecting the Laws and Customs of War on Land, The Hague, 29 July 1899, 26 Martens Nouveau Receuil (Series 2)949, 187 Consolidated Treaty Series 429, entered into force 4 September 1900.

<sup>4</sup>The “Law of the Hague” encompasses the Conventions concluded at The Hague, and customary international law. The “Law of the Hague” lays down the rights and duties of belligerents and limits the method of warfare. See, Hague Convention (IV) Respecting the Laws and Customs of War on Land 1907, The Hague, 18 October 1907, 3 Martens Nouveau Recueil (Series 3), 461; 187 Consolidated

The normative “Law of Geneva” and the “Law of the Hague” are intended to protect combatants, non-combatants, including civilians, women, children, the old and the weak.

The jurisprudence of the Law of War makes a distinction between the laws governing resort to force (*jus ad bellum*), and laws regulating wartime conduct (*jus in bello*).<sup>5</sup> Examples of *jus ad bellum* include the General Treaty of Renunciation of War of 1928, (the Kellogg-Briand Pact, also known as the Pact of Paris) and the UN Charter.<sup>6</sup> The former condemns the use of war as an instrument of national policy and the latter prohibits the threat or use of force against any State<sup>7</sup> subject to the right of self-defence as stipulated in Article 51 of the Charter of the United Nations.

*Jus in bello* is further divided into the Law of Geneva and the Laws of The Hague. The Law of Geneva extends protection to the wounded, sick and

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Treaty Series 227, entered into force 26 January 1910. See also, Hague Regulations Respecting the Laws and Customs of War on Land, Annex to the Convention (IV) Respecting the Laws and Customs of War on Land, The Hague, 18 October 1907; 3 Marten Nouveau Recueil (Series 3) 461; 187 Consolidated Treaty Series 227, entered into force 26 January 1910.

<sup>5</sup>Sydney D. Bailey, *Prohibitions and Restraints in War* (1972); Geoffrey Best, *Humanity in Warfare: The Modern History of the International Law of Armed Conflicts* (1983).

<sup>6</sup> Articles 2(4) of the Charter of the United Nations.

<sup>7</sup>See Article 2(4) of the Charter of the United Nations.

shipwrecked, prisoners of war, civilians and civilian populations. The Law of The Hague, on the other hand, regulates means and methods of combat. Non-compliance with the Law of The Hague can have great impact on the lives of those concerned. The objective of the Law of The Hague is to humanize war by balancing the means and methods of warfare under the principle of *military necessity* with the *idea of respect for humanity*.

The main difference between the Law of Geneva and the Law of The Hague is that the Law of Geneva is characterized by strict non-derogable prohibitions while the Law of The Hague comprises vaguely worded provisions with limited and discretionary procedures for its implementation. The *Martens* clause is a good example.<sup>8</sup>

The 1899 and 1907 Hague Conventions and regulations are the first international treaties to regulate the means and methods of warfare. However, the Law of The Hague limited its scope to regulating armed conflicts between the armed forces of sovereign States. The experience of the pre-1899 and 1907 armed conflicts demonstrated that the majority of persons killed were combatants, hence the adoption of a legal regime that required the means and methods of war to be limited in

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<sup>8</sup> The *Martens* clause in the 1907 Hague Convention reads: “Until a more complete code of the laws of war has been issued, the High Contracting Parties deem it expedient to declare that, in cases not included in the Regulation adopted by them, the inhabitants and belligerents remain under the protection and the rule of the principles of the laws of nations, as they result from the usage established among civilized peoples, from the laws of humanity, and the dictates of the public conscience.”

order to reduce casualties among members of the armed forces. The 1899 and 1907 Hague Conventions were not intended to protect civilians.

During World War II a disproportionately high numbers of civilians were killed while the numbers of combatants killed or injured were comparatively few. The experience of World War II led to the adoption of the four 1949 Geneva Conventions with the objective to minimize casualties among the civilian population in times of armed conflict. However, the Geneva Conventions, like the two Hague Conventions, continued to regulate the conduct of the armed forces of sovereign States only.

After the adoption of the four 1949 Geneva Conventions, the nature of the war, and the parties to the armed conflict began to change as non-State actors increasingly engaged armed forces of sovereign States in armed conflicts. In the conduct of liberation wars waged against the colonial powers, soldiers of non-State organisations fought against soldiers of sovereign States.

The Law of The Hague and the Law of Geneva did not recognize non-State actors as combatants. This anomaly was addressed by adopting Additional Protocols I and II of 1977 to the four 1949 Geneva Conventions. Article 1(4) of Additional Protocol I of 1977 recognised fighters of liberation wars as combatants in international armed conflicts while Additional Protocol II of 1977 complemented Common Article 3 of the four 1949 Geneva Conventions



recognising guerrilla fighters in internal armed conflicts as combatants, thus bringing the regulation of such conflicts within a legal framework.

Since the adoption of Additional Protocols I and II of 1977, the means and methods of combat and the nature of combatants have continued to change, particularly from the 1980s when individuals for various political motives have engaged in acts of violence and other acts termed terrorism. Some States now hire private military companies or individuals to wage wars in addition to using conventional armed forces of States. This development has led to the use of private military companies in contemporary armed conflicts, for example, in Sierra Leone, Democratic Republic of the Congo (DRC), former Yugoslavia, etc. Members of these private military companies are often recruited from amongst former soldiers from different countries.

As private military organisations continue to play an increasingly significant role in the prosecution of contemporary warfare, it is necessary that legal steps are taken to address this development. Traditionally, an analysis of the law applicable to each organisation in armed conflict commences with inquiry into the law as it applies to mercenaries. To that extent, private military organisations are akin to mercenaries. However, private military organisations are not necessarily mercenaries under international law but, like mercenaries, they are perceived to act according to commercial or private interests in armed conflicts. In other words, conducting war is a business and private military organisations are available for purchase by the highest bidders. They fight

for profit and not for a cause or political objectives. Their existence and activities, for example, have given rise to questions about *accountability* and the *criminal responsibility* of their leaders and members for serious violations of international humanitarian law.<sup>9</sup>

Progressive but incremental development of the Law of War has focused on two main areas. First, drawing from the 1899 and 1907 Hague Conventions and Regulations, the objective of the Law of War was to regulate means and methods of warfare. Regulation of types of weapons used, where and when the weapons were used remained the main focus of the law. Both weapons of wars and combatants were subject to State control.

Second, the Geneva Conventions focused on the protection of the civilian population. The State had the responsibility to search for, arrest and prosecute persons who violate the “grave breaches” of the Geneva Conventions.<sup>10</sup> Additional Protocol I of 1977 brought guerrilla fighters in international armed conflicts within a legal framework<sup>11</sup> and Additional Protocol II

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<sup>9</sup> Katherine Fallah, “Corporate actors: the legal status of mercenaries in armed conflict” in *International Review of the Red Cross*, Volume 88 Number 863, September 2006, p.599-611.

<sup>10</sup> See Articles 49 to 52 of the First Convention, 50 to 53 of the Second Convention, 129 to 131 of the Third Convention, and 146 to 149 of the Fourth Convention.

<sup>11</sup> Article 1(4) of Additional Protocol I of 1977.

established legal mechanism for the protection of combatants and civilians in an internal armed conflict. Combatants and civilians were subject to State control.

The legal status of private military organisations is, however, unclear. Private military organisations have tended to assert that, in the absence of a specific legal framework to deal with corporate actors; their industry is ‘self-regulated’.<sup>12</sup>

Even if it were correct that in the absence of a specific legal framework to deal with such contractors, their industry is ‘self-regulated’, there is no provision for States to control their activities. It remains the responsibility of sovereign States to control and regulate the use of force and to prosecute persons who violate the Law of War. It is therefore pertinent that a private military organisation whose primary objective is the waging of wars for profit must be brought within a legal framework. There is therefore a need for adoption of an international convention to regulate or prohibit the use of private military organisations in international and non-international armed conflicts, as the case may be.<sup>13</sup>

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<sup>12</sup> Katherine Fallah, “Corporate actors: the legal status of mercenaries in armed conflict” in *International Review of the Red Cross*, Volume 88 Number 863, September 2006, p.601.

<sup>13</sup> Linda Cameron, “Private military companies: their status under international humanitarian law and its impact on their regulation.” *International Review of the Red Cross*, volume 88 Number 863, September 2006, pp.573-598. See also Emanuela-Chiara Gillard, “Business goes to war: private military/security companies and international humanitarian law” in *International Review of the Red Cross*, volume 88 Number 863, September 2006, pp.526-572.

Beyond the activities of private military organisations, there are general acts of terror committed by diverse people including organisations whose motives include political, religious or ideological reasons. This state of affairs continues to haunt humanity during the twenty-first century. Acts of violence and terror directed against civilians, whether committed during ‘war’ or ‘peacetime,’ and for whatever reasons, offend common universal norms and tenets of humanity. They violate the rule of law and constitute an affront to human dignity. All such acts are criminal. They must be condemned. Their perpetrators must be punished.

In responding to acts of terror, respect for the rule of law must guide humanity – governments and the international community in general must not respond to violence and acts of terror by resorting to further acts of terror but must be guided by the rule of law, as enshrined, for example, in the Law of War, international and domestic criminal law, human rights law and refugee law. Response to acts of terror must include identifying and addressing their root causes. These responses will reinforce respect for the rule of law.

The rule of law has value not only in peacetime; it becomes paramount in situations of crisis. Lord Atkin, in his dissenting opinion in *Riverside v. Anderson* – a judgement delivered during the darkest days of the Second World War- captured in the following memorable words the necessity for law in times of war: “...amid the clash of arms, the laws are not silent. They

may be changed, but they speak the same language in war as in peace.”<sup>14</sup>

Unquestionably, responding to terrorism presents dilemmas to civilization and democracy, and often involves somewhat difficult choices. Indeed, the principles articulated by Lord Atkin may attract criticism. Some would argue that the rule of law is often an obstacle in the struggle against terrorism. In essence, the rule of law prohibits us from emulating the odious methods and strategies of those who seek to undermine democracy and the rule of law. A system based on democracy and the rule of law may often seem to have weaknesses that are exploited by those who strive for a different system. But therein lays the strength of the democratic rule of law system. Based on the true will of the people and on the standards of decency and fairness it will in the end prevail despite the efforts of those who would seek to undermine it.

In prosecuting the heinous crimes of genocide, war crimes (including acts of terrorism), and crimes against humanity, international criminal tribunals have similarly underscored the importance of the respect for the rule of law, including the norms of fair trial and due process rights of the accused. In the words of the Appeals Chamber of the International Criminal Tribunal for Rwanda: “... the Tribunal, as a court valuing human rights of all individuals – including those charged with

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<sup>14</sup> [1942] AC 206 [English House of Lords].

unthinkable crimes - must not place its imprimatur on [the violation of the accused's pre-trial rights]."<sup>15</sup>

In responding to every form of criminality, however heinous, respect for the rule of law must remain supreme at all times. It is only in this way that the criminality which is our common enemy can be confronted and defeated.

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<sup>15</sup> *Jean-Bosco Barayagwiza v. The Prosecutor*, ICTR-97-19 (Appeal Chamber) Decision of 3 November, para. 109 (paraphrased).



# Preserving the Rule Of Law in the Age of the “War On Terror”: Lessons from the Experience of International Criminal Tribunals

Robert Petit and Neha Jain \*

## Introduction

For most of the history of inter-State relations, Cicero’s statement *inter arma silent leges* (in times of war, the laws are silent) expressed a truism. With growing recognition of the barbarity of war as a method of conflict resolution by the international community, there were attempts to develop the law regulating the conduct of war that sought to ensconce war-making in an ethical garb so that states could not resort to the use of force arbitrarily: the development of *jus ad bellum* reflects over the circumstances under which war becomes necessary, while *jus in bello* outlines the conditions governing warfare.

However the manner in which the “war on terror” has been conducted ominously echoes Cicero’s statement. The war on terror is said to have generated an entirely new set of challenges in preserving peace, justice and order for the international community. It is alleged that the world as we knew it, has changed dramatically after 9/11, and our existing laws are archaic (“quaint” in the language of one commentator) and completely inadequate in facing up to this unique threat

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posed to our hitherto relatively secure world. The “Rules” are no longer adequate and must be re-written or ignored.

While the impact of 9/11 on international and national security and peace cannot be underestimated, the reaction to the threat posed by terrorism certainly warrants close scrutiny. The argument for suspending basic rights and liberties in the face of the terrorist threat is a simple one: when vital security interests of the State are affected, the usual limits on the coercive powers of the State do not apply, and the State is not only justified in, but must act outside the parameters of the law that applies in times of peace, in order to preserve itself.

It is perhaps ironic that this erosion of safeguards in fundamental individual protections in the conduct of war should come at a time when these same protections have become recognised as non-derogable in another area of law that deals with similar situations and indeed ones which might give rise to more pressing temptations to suppress them – that of international prosecutions of crimes considered the most heinous by the international community. Tribunals prosecuting those responsible for war crimes, crimes against humanity and genocide function in at least comparable circumstances to State institutions confronted with the threat of terrorism: both deal with situations where there is a severe attack on individual or State security; acts of violence against large numbers of people, and where those responsible for these attacks have acted in complete disregard of all tenets of law or morality. Yet while the war on terror has steadily encroached upon and severely truncated some of

the most fundamental rights available to suspects, the jurisprudence of international criminal tribunals displays a concern that such denial negates the very premise on which these processes are based and ultimately undermines the credibility of its whole enterprise.

### **Developments in International Criminal Jurisprudence**

At Nuremberg and in the nascent phase of the ad hoc tribunals for Yugoslavia and Rwanda, rules of evidence and procedure were considered to be more of a technical nature and in some cases, dispensable. The Charter of the International Military Tribunal at Nuremberg provided for only very basic due process guarantees to the accused such as the right to be furnished with the indictment and supporting documentation; the right to conduct his own defence or with the assistance of counsel; the right of cross-examination and of presenting evidence; and the right to have proceedings in a language understood by the accused. The IMT procedure also suffered from some serious shortcomings— it had a liberal policy on the use of affidavit evidence to expedite trials; trials *in absentia* were permissible; there was no right to remain silent or a right of provisional release; there was no protection against double jeopardy; and there was no right to appeal.

Nonetheless, the IMT was conscious of the importance of at least a skeletal form of due process, as is evident from Chief Prosecutor Robert Jackson's oft-quoted opening:

There is a dramatic disparity between the circumstances of the accusers and the accused that might discredit our work if we should falter in even minor matters, in being fair and temperate . . . We must never forget that the record on which we judge these defendants is the record on which history will judge us tomorrow. To pass these defendants a poisoned chalice is to put it to our lips as well. We must summon such detachment and intellectual integrity to our task that this trial will commend itself to posterity as fulfilling humanity's aspirations to do justice.<sup>1</sup>

To some extent, the somewhat underdeveloped state of due process rights in the proceedings of the IMT is not surprising. The advent of the human rights movement, that led to the development of due process guarantees that we now take for granted, was very much a post Second World War phenomenon. The international criminal tribunals set up in the 1990s and later have therefore only naturally been more sensitive to the need to incorporate these protections.

At the time of creation of the ICTY, the UN Secretary-General stated that it “is axiomatic that the International Tribunal must fully respect internationally recognized standards regarding the rights of the accused at all stages of its proceedings.” The due process guarantees incorporated into the ICTY Statute roughly reflect those found in Article 14 of the ICCPR, which is reflective of the internationally recognized standards of

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<sup>1</sup> TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 101 (1949).

the rights of the accused. These rights (which may be limited by concerns over victim/witness protection) include the right to be informed promptly and in detail of the charges against him; trial without undue delay; adequate time and facilities for the preparation of the defence; right to counsel; no trials *in absentia*; right to examine witnesses; and protection against self-incrimination. The procedural and evidentiary rules of the internationalized tribunals largely mirror these protections.

There have been some areas of tension in the jurisprudence of international criminal tribunals between the need to protect the rights of the accused and the obligation to protect the rights of witnesses and victims during the trial process. These are reflected in provisions dealing with the admissibility of certain kinds of evidence such as affidavit testimony, the potential for allowing anonymous witness testimony, and the limitation of responsibility assumed by the court when a suspect is detained on behalf of the court. Nonetheless, the general trend has been in favour of incorporating more stringent human rights standards into the due process protections available to the accused:

The jurisprudence is now clear: “[S]uspects held at the behest of the Tribunal . . . are entitled, at a bare minimum, to the protections afforded under these international [human rights] instruments.”<sup>2</sup> and “these

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<sup>2</sup> *Prosecutor v. Barayagwiza*, Case No. ICTR-97-19-AR72, A. Ch., Decision, 3 November 1999, para. 79.

norms [provisions from ICCPR and ECHR] only provide for the absolute minimum standards applicable.”<sup>3</sup> The ICTR has even favoured granting of compensation to the accused if his human rights are violated during the trial process: “Human rights treaties provide that when a state violates fundamental human rights, it is obliged to ensure that appropriate domestic remedies are in place to put an end to such violations and in certain circumstances to provide for fair compensation to the injured party. Although the Tribunal is not a State, it is following such a precedent to compensate the Appellant for the violation of his human rights....”<sup>4</sup>

### **Erosion of Liberties by the War on Terror**

The measures undertaken in the name of an efficient response to the challenges of post-9/11 seem incompatible with the status accorded to accused in the war on impunity.

#### *Extraordinary Renditions*

The war on terror has spawned an entire range of extralegal transfers of detainees or suspects by the United States, for instance the repatriation of detainees held at Guantanamo; the transfers of secret detainees into

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<sup>3</sup> *Prosecutor v. Nikolic*, Case No.: IT-94-2-PT, Decision on Defence (Motion Challenging the Exercise of Jurisdiction by the Tribunal), 9 October 2002, para. 110.

<sup>4</sup> *Prosecutor v. Barayagwiza*, Case No. ICTR-97-19-A, Decision (Prosecutor's Request for Review or Reconsideration), 31 March 2000, para. 28.

unnamed US detention centres; and the practice of “extraordinary rendition” – transferring a suspect to a country where he is at risk of being tortured, without the possibility of any recourse to a legal proceeding in which he may challenge the transfer. According to various sources, about 100-150 persons have been subjected to extraordinary rendition and sent to countries such as Syria and Egypt. The suspects are blindfolded and shackled before being transported to the destination country, where they are detained, interrogated, and more often than not, tortured. The practice of extraordinary rendition, on the face of it, is contrary to prohibitions against arbitrary arrest and detention, and due process rights that give the suspect the right to challenge the detention. The United States has attempted to demonstrate that this practice is lawful by suggesting that human rights treaties to which the US is signatory, such as the ICCPR and the Torture Convention, do not apply outside US territory; that it has received diplomatic assurances from the receiving countries before transferring the suspect to obviate the risk of torture; and that rendition falls into the gap between the law of armed conflict and international human rights law and is not specifically prohibited.

*Restrictive Interpretation of the Geneva Conventions*

The US gave an extremely limited interpretation to the applicability of the Geneva Convention (GC) guarantees in its war on terror. While it acknowledged that the Conventions applied in principle to the conflict with the Taliban as a de facto State party, it denied that

its members could be conferred with POW status under GC III. The conflict with Al-Qaeda was deemed a completely separate conflict, and since Al-Qaeda was a non-State entity, GC III was stated to be wholly inapplicable. Moreover, the US resisted applying the fundamental protections in Common Article 3 of the Geneva Conventions by arguing that the war on terror was international in scope and therefore not within the Article which was applicable only to conflicts “not of an international character”.

Thus, through its classification of the war on terror as a situation of “armed conflict” the US could obtain several legal advantages in prosecution: detention of combatants without trial during the conflict, and trial by military commissions under open-ended rules of procedure and evidence. At the same time, by introducing a limited reading of the Geneva Convention guarantees, it could avoid the fundamental protections that would traditionally accrue to the suspects upon classification of the situation as an armed conflict.

### *Military Commissions and the Rights of Suspects*

In 2006, the US passed the Military Commissions Act 2006 (MCA) which provides for military commissions to try ‘alien unlawful enemy combatants’ for specified offences. The Act was precipitated by the US Supreme Court’s decision in *Hamdan v Rumsfeld* declaring the previous setup of US Military Commissions under the President’s Military Order of 13 November 2001 inconsistent with fundamental rules of humanitarian law. The Commissions under the MCA

however, also contain several provisions that violate fundamental fair trial guarantees.

The MCA deprives alien unlawful combatants of habeas corpus rights before civilian courts; prevents them from invoking the Geneva Conventions as a source of rights; denies the right of speedy trial; and allows judges to admit evidence obtained by coercion that even rises to the level of “cruel, inhuman, or degrading treatment,” so long as the judge finds it probative and “under the totality of the circumstances” reliable. Under the provisions of the MCA, accused persons are denied full access to the evidence used against them at trial, as well as adequate means of obtaining exculpatory evidence and witness testimony. The MCA also vests the President with exclusive authority to issue interpretations of the Geneva Conventions that are authoritative as a matter of domestic law and retrospectively immunizes breaches of the law of war sanctioned by the State.

It is of course important to note that tasked with the objective of countering the threat of terrorism, the MCA must balance the rights of the accused against the challenges involved in prosecuting crimes such as terrorism, for which traditional legal mechanisms may sometimes prove wanting. The MCA however, grants almost unrestrained powers to prosecuting authorities while sanctioning dramatic erosion in fundamental human rights and due process guarantees.

## **Conclusion**



Preserving the rule of law and maintaining respect for individual rights is a much more challenging task in times of war, than in times of peace. Nonetheless, this is a challenge that the war on terror must tackle, and tackle successfully if it is to retain any moral legitimacy. The rule of law functions as the bulwark of any civilised democracy, and the erosion in fundamental due process guarantees in the face of the threat posed by terrorism only undermines the preservation of the very democracy that the war on terror is being fought on behalf for. The practice of international criminal tribunals and their adherence to fundamental individual human rights protections in equally trying situations can serve as a useful reminder that it is possible to confront grave threats to individual and State interests, without compromising on obedience to principles enshrined in the rule of law. In the words of Aharon Barak, former President of the Supreme Court of Israel:

“We are aware that this decision does not make it easier to deal with that reality. This is the fate of democracy, as not all means are acceptable to it, and not all methods employed by its enemies are open to it. Sometimes, a democracy must fight with one hand tied behind its back. Nonetheless, it has the upper hand. Preserving the rule of law and recognition of individual liberties constitute an important component of its understanding of security. At the end of the day, they strengthen its spirit and strength and allow it to overcome its difficulties.”

## **Whither the Rule of Law in an Age of Terror?**

**David Tolbert\***

Terrorism, along with a few other key issues, such as global climate change, has emerged in the late 20<sup>th</sup> and early 21<sup>st</sup> Centuries as one of the great challenges on the international agenda. In the wake of the attacks of September 11, 2001 on New York and Washington and subsequent terror incidents in various parts of the world, the question is what response should be made to prevent future attacks. The issue is a particularly important one because many of the attacks have been in countries that have previously shown a strong commitment to the rule of law, e.g., the United Kingdom, Spain, the United States of America. In wrestling with this renewed threat on innocent lives, how should international and domestic authorities respond? What is the role of law in that response?

One of the responses that has emerged is to disregard or water down certain key elements of international human rights treaties and obligations that have emerged since the adoption of the Universal Declaration of Human Rights (UDHR) in 1948 on the grounds that the exigent circumstances caused by terror are so great that governments cannot be “hamstrung” by such rules. Moreover, it is argued that this body of rules, and

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\* Deputy Prosecutor, International Criminal Tribunal for the former Yugoslavia (ICTY). The views expressed herein are those of the author alone and not those of the United Nations or the ICTY. The author would like to thank Vincent Lunny for his valuable assistance in the preparation of this article.

particularly the restraints put on states by international humanitarian law, has become passé in the face of these “new” threats and, therefore, the law may be modified or simply ignored. Thus, in addition to the thousands of innocent victims who have been killed or injured by terrorist attacks in recent years and the fear that these attacks have caused in millions of others, the rule of law has also been undermined and is at least metaphorically a victim of terrorism, or more accurately, the response to terrorism.

In addressing the legitimate concerns that arise in the face of terrorism and whether international law should be modified or disregarded, it is important to first examine what is at stake in making such changes to the law. Only then can we clearly look at the question of whether the law should change and, if so, in what manner. Despite the rise of terrorism, there remains an almost continuous mantra coming from governments and commentators that the “rule of law” is essential to peace and stability in the world and that modern problems cannot be addressed without the rule of law. While these generic references to the rule of law are commonplace, little effort is made to give shape to this ubiquitous term.

While there are various definitions of the rule of law, as I have argued elsewhere<sup>1</sup>, international human rights law, as set forth in the International Covenants of Civil and Political Rights and Economic, Social and Cultural Rights, are now almost universally accepted. While

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<sup>1</sup> David Tolbert with Andrew Solomon, “United Nations Reform and Supporting the Rule of Law in Post-Conflict Societies”, *Harvard Human Rights Journal* 29 – 62, 30 – 33 (Spring 2006).

different countries will have their own legal systems and specific laws, virtually all of them have assumed the same human rights obligations. Thus, at a minimum, it can be persuasively argued that the rule of law at least encompasses those rules and standards, including such precepts as the right to fair trial, the right to an adequate defense, the right to know the charges against oneself, restrictions on search and seizure, etc. It is these fundamental rules, rather than more elaborate laws and rules, that are most directly under pressure and scrutiny in many efforts to combat terrorism. I would also strongly argue, however, that the rule of law is not simply faithful adherence to these and other rules but also what Gerhard Casper has called an “interconnected cluster of values”<sup>2</sup> that inform and guide the creation and application of the law as well as legal practitioners and those societies generally. It is not only the specific rules encompassed by human rights treaties that are at stake but also the underlying “cluster of values” that must be taken into account in addressing terrorism.

Measured against this standard, what has been the response to terrorism by those countries that have previously prided themselves as being guided both by the letter and the spirit of the rule of law? While it is difficult and perhaps somewhat unfair to generalize, it is clear that some countries have, in effect, opted out or failed to comply in a significant number of cases with

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<sup>2</sup> Gerhard Casper, “Rule of Law? Whose Law?”, Keynote Address, 2003 CEELI Award Ceremony and Luncheon, San Francisco, Cal. (Aug. 9, 2003), available at [http://iis-db.stanford.edu/pubs/20677/Rule\\_of\\_Law.pdf](http://iis-db.stanford.edu/pubs/20677/Rule_of_Law.pdf).

certain of their international human rights and humanitarian law obligations by adopting approaches that restrict and/or eliminate certain fundamental rights. The most notorious of these are the restrictions on the right to counsel, confinement without recourse to habeas corpus and/or non-disclosure of relevant classified material that form the basis of the charges that have been taken regarding certain persons in the United States under the Bush Administration following the September 11<sup>th</sup> attacks. The rules of humanitarian law have also been partly or wholly discarded with respect to certain classes of persons (e.g., “enemy combatants”) who have come into the custody of the United States in other countries. There are also widely reported incidents of “extraordinary renditions”, that is the transfer without legal process of suspected individuals to countries known to commit torture and other human rights abuses. Moreover, other basic rules of international humanitarian law, such as prohibitions against torture and mistreatment of prisoners, appear to have been ignored by the United States as well as other countries previously known for the commitment and belief in the rule of law.

Other steps have been taken which are narrowly legal in the sense that laws have been properly adopted but which provide for the application of special procedures in terrorism cases that arguably run contrary to the spirit of human rights principles if not the actual letter of the law. In the United Kingdom, for instance, holding individuals in detention without charge has been extended to questionable lengths of time and the government has pressed for legislation to expand these limits even further. A great deal of legislation has been

passed in a number of countries that extends the powers of the state in terms of surveillance and monitoring of its citizens which do not appear to be consistent with human rights obligations.

These approaches are hardly novel, one need only think of some of the steps taken by the United Kingdom in the 1970s with respect to the IRA and the subsequent litigation in the European Court of Human Rights. Moreover, there has been a strong push back by courts and by human rights groups. In the United States, for example, decisions by the United States Supreme Court, e.g., *Hamdan*<sup>3</sup>, have nullified a number of the actions of the Bush Administration. Nonetheless, the deviations from these basic international humanitarian law and human rights norms appear to be disregarded with an ease and on a scale without precedent since the adoption of the UDHR, particularly by states previously closely identified with the rule of law and a commitment to human rights generally.

While there may be some short-term benefits to jettisoning these principles e.g., the collection of evidence not obtainable by legal means, these gains are ultimately illusory. At the heart of the argument that states are forced to take steps that break or undermine human rights and humanitarian law rules and principles for the sake of security lies a contradiction. In essence, the argument is that in order to protect our society that is based on the rule of law we must undermine the rule of law. This is a dangerous and slippery road, with the

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<sup>3</sup> 126 S.Ct. 2749 (2006)

result that without the protection of the law certain individuals have been wrongly detained and/or ill treated. Moreover, the moral and political authority of the state that breaks its own legal commitments is tarnished and damaged, thus endangering its own legitimacy both at home and particularly abroad. It is clear that when such abuses happen on a systematic scale as in, e.g., Rwanda, former Yugoslavia and currently in Darfur, the consequences are severe, with deep damage to those societies that will take generations to overcome. However, even abuses on a much smaller scale, as in the case of the actions of the United States at Guantanamo Bay, undermine the rule of law and have significant consequences for long periods of time. The benefits to a society that follows the rule of law are immense, but there is a price to pay when a deviation is taken from that path. Finally, the actual practical benefits of disregarding human rights and humanitarian norms are actually quite suspect. Torture does not usually produce reliable information, and it dehumanizes the one committing torture as much as the one being tortured. Thus, the implicit bargain that is made in the trade off of deviating from the rule of law by violating human rights and humanitarian law obligations is a bad one, much is lost and little is gained – it is at heart fraudulent, we give up much in terms of our values for little, if any, additional security.

Fortunately, in societies that take the rule of law seriously, there are institutions that check such abuses by the state. Thus, in the case of the UK's actions relating to the IRA in the 1970's, decisions by the European Court of Human Rights ultimately largely prevailed and

the practices of the state were modified. On the domestic front and more recently, the UK government has been ordered by the House of Lords<sup>4</sup> to reconsider how it uses “control orders” (including 18 hour curfews without trial) to deal with terror suspects for whom there is evidence of involvement in terrorism but insufficient evidence for prosecution. Presently in the United States decisions by the courts have addressed some of the abuses and caused the government of the day to change some of its policies. Civil society groups, such as human rights organizations and bar associations, play a key role in protecting the cluster of values that underlie the rule of law. These other institutions and actors are critical to ensuring that the rule of law survives intact even though the current government may be undermining it for the time being.

There is thus much to be lost and little to be gained by deviating from the baseline human rights principles that are essential to the rule of law. Nonetheless, terrorism is and will continue, probably for generations to come, to pose real threats to societies that try to follow the rule of law. It is, therefore, not enough to say simply that governments should act in accordance with the rule of law. Terrorism does create new and difficult challenges, and new tools – consistent with the rule of law and international obligations – need to be developed. This process has already begun, and governments have found ways to prosecute terrorism just as they have previously had to develop new approaches to organized

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<sup>4</sup> Secretary of State for the Home Department v JJ & MB & E and others, [2007] UKHL 45-47, 31 October 2007.



crime on the domestic level and war crimes in newly formed international courts.

Such analogies are not meant to imply that we can simply look back to previous challenges and import methods from these areas of the law, but the past does show that with innovation rules and procedures can be developed that are both consistent with the rule of law generally as well as effective practically. There are several challenges that are particularly acute in the case of terrorism. One aspect of terrorism that is more critical than in law enforcement generally is the issue of immediacy. That is to say that unless there is constant and vigilant oversight of potential terrorists and quick reactions to their actions, attacks may not be stopped. Law enforcement officials need the tools to be able to accomplish these tasks, but while this implies a modernization of the law to take account of these realities – changes that have already largely occurred in the United States and a number of other countries – it does not imply dispensing with judicial oversight or review, as required by international human rights norms. These processes do require more steps and additional scrutiny, but they need not cause important actions to be delayed. The additional steps ensure that we live in a society based on the rule of law and guarantee that we do not slide down the slippery slope towards lawlessness.

A second aspect of combating terrorism is more troubling. I write in the wake of the ending of the trial in Madrid for the 2004 bombings that wreaked such havoc and loss of innocent life. While in many respects the proceedings were apparently a model of how such a case

should be conducted, certain of the accused were not convicted because the evidence was largely circumstantial. There have been similar results in war crimes prosecutions in that judges are reluctant to make inferences that, given the context of the armed conflict in the respective region, prosecutors and victims find to be straightforward. The judges, depending on the case, may well have been simply following the law and procedural law in their respective jurisdiction, but it raises the question of whether fact finders need more leeway in making inferences in cases that relate to war crimes and terrorism, given that these types of cases frequently are based on circumstantial evidence. I do not propose a solution to this problem, but it seems that this is an issue that warrants further study, reflection and consideration. There needs to be an approach that is consistent with the rule of law but which takes into account the realities of these kinds of cases and also the special circumstances in which they arise.

In closing, I have been only able to highlight a few issues connected to terrorism and the rule of law, but I would strongly argue that certain key elements of the path that has been taken in the so-called “war on terror” have been flawed in that the approach has been to evade or disregard fundamental rights provided for by international human rights law and international humanitarian law. This flawed approach looks at the law as part of the problem, rather than part of the solution. If states are guided by the rule of law and the cluster of values that it represents, they will be in a much stronger position to battle terror. Fighting terror with lawless acts

is like the old adage, “fighting fire with fire”. Governments and the people for whom they are responsible for protecting are much better served by fighting terror with the rule of law, thus preserving the rule of law at the same time as countering terrorism more effectively.

## **Commemorative Speeches and Papers**



## **Preventing, Implementing and Enforcing International Humanitarian Law**

**Juan E. Méndez\***

I am very grateful to the American Society of International Law, The Robert H. Jackson Center, The Chautauqua Institution, Syracuse University Law School, The Whitney Harris Center at the Washington University in St. Louis, and the Planethood Foundation for the invitation to speak at this important conference. It is a great pleasure to be here tonight in front of such a distinguished audience.

My presentation will concentrate on the importance of the prevention of mass violence and international crimes, including war crimes, and I will do so mainly from the perspective of programs the ICTJ carries on in several countries, and also from my experience as the former Special Advisor to the Secretary General on the Prevention of Genocide.

Breaking impunity and fostering accountability is a crucial component in the prevention of future violence and mass atrocities: no prevention efforts can take place without a serious attempt to break the cycle of impunity for past human rights violations, especially if they are so widespread or systematic as to constitute war crimes, crimes against humanity, or genocide. The failure to do justice to the victims can lead to the desire to obtain

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revenge, and thus to more crimes. Accountability is essential to halt the vicious cycle of revenge, to enable the victims, their families and communities to live peacefully with the communities that the perpetrators of atrocities claimed to represent, and to avoid blaming descendants for the crimes committed in earlier generations.

Accountability for such crimes must be comprehensive, balanced and holistic, meaning that policies and practices must address the need to discover and disclose the truth, to bring perpetrators to justice, to offer reparations to the victims, and to promote deep reform in the institutions through which State power is exercised. While criminal prosecutions should not be the sole response to impunity, there is no doubt that they must play a central, indispensable role in any policy of accountability.

Prosecutions also represent the States' fundamental obligation to give victims access to justice. In addition, concerning international crimes, States have a clear international legal obligation to ensure that justice is done. This is particularly the case for serious violations of international humanitarian law. For war crimes, international humanitarian law, as defined notably in the Geneva Conventions and their Additional Protocols, establishes a duty for States to prosecute and punish those responsible or to hand them over to be prosecuted by another State-Party (under the *aut dedere aut judicare* principle). As such, in the late 1940s international humanitarian law created a new set of obligations, which

in turned paved the way for the enforcement of these norms.

Therefore, to fully foster accountability for such crimes, a dual approach should be favored. On the one hand, the international community must pay more attention to helping States live up to this obligation by building independent, impartial judiciaries that can prosecute mass atrocities with full respect for due process of law and fair trial guarantees. On the other, our support of the role of the International Criminal Court and other international or hybrid criminal jurisdictions must also be oriented towards supplementing the absence of will or capacity to produce fair trials domestically, but also to help generate that capacity in the future.

This year we celebrate the 100<sup>th</sup> anniversary of the 1907 Hague Rules, as well as the 30<sup>th</sup> anniversary of the 1977 Additional Protocols to the Geneva Conventions. In the 70 years that elapsed between these two dates, 1907 and 1977, the world suffered two World Wars, the Holocaust and other genocides, and many terrible war crimes. But these years have also marked the codification of the body of international humanitarian law, the materialization of the principle of individual criminal responsibility at the international level, and the strengthening of all forms of accountability for these crimes. The near-universal ratification of the Geneva Conventions -- as well as the recognition that many of their key provisions have the status of customary international law -- bears witness to this reinforcement of



international law, and in particular of international humanitarian law.

If we only just look back to less than fifteen years ago, we see how far we have come from the pervasiveness of impunity for grave human rights crimes and from the permissive attitude towards that impunity by the international community. Many of you present here tonight have personally and professionally played a big part in these developments. Since 1993, we have notably witnessed the establishment of the International Criminal Tribunals for the former Yugoslavia and for Rwanda, of the Special Court for Sierra Leone, of the Extraordinary Chambers in the Courts of Cambodia, and of other hybrid mechanisms in East Timor, Bosnia-Herzegovina, Kosovo, and recently Lebanon and Guatemala. Important too are efforts to prosecute these crimes at the domestic level in Argentina, Chile, Peru, Colombia, Rwanda, and Ethiopia. The creation of the International Criminal Court in 1998 was the high point of this evolution, signaling that accountability for war crimes, crimes against humanity and genocide is now paramount. But the Rome Statute is not only the culmination of a clear historical trend, it is also the means to establish an instrument that makes justice possible even when the national domestic jurisdictions are unable or unwilling to afford it. And yet, for each situation in which the ICC has acquired jurisdiction, we hear voices calling for amnesty, withdrawal of indictments or other forms of exercising discretion and avoiding prosecutions, supposedly in the name of peace.

With the best of intentions, some are urging measures that implicitly give in to the blackmail of the parties to the armed conflict: peace can only come if those accused of atrocities are given guarantees that they will not be touched. We are concerned by the revival of this debate that some of us had hoped was more settled. To those who have followed the evolution of human rights in the last 25 years, the debate rings of earlier discussions as to whether fragile democracies could really afford to investigate and disclose – let alone prosecute – the major crimes of the preceding era. The alleged antinomy between justice and democracy, often rephrased today as the tension between peace and justice, is debated among academic circles and also among practitioners. A major conference was recently co-organized in Nuremberg by ICTJ to discuss this tension and to explore possible ways in which peace and justice indeed can be mutually reinforcing.

In Northern Uganda, while there is a broad recognition that the ICC arrest warrants have assisted in bringing the LRA to the negotiating table, some have portrayed these warrants as obstacles to progressing further with the peace process. We believe, however, that the warrants act as an incentive to keeping the LRA involved in the peace talks. We also welcome the signature of an Agreement on Accountability and Reconciliation by the LRA and the Government of Uganda on 29 June. The Agreement proposes that Uganda should implement its international obligations to prosecute senior leaders of the LRA under national law. Depending on what is proposed and implemented, we

believe this may be consistent with the Rome Statute. A thorough national accountability process, respecting international standards, could have a wide-reaching impact in Ugandan society. We believe the robust approach taken in this peace agreement to accountability is an important improvement over past peace accords, and that the pressure brought to bear by the ICC has assisted to achieve this. At the same time, the international community must stand ready to continue its support to the ICC if either side renege on the agreement.

There are many examples of the impact that prosecutions – or even the threat of prosecutions – have in preventing crimes, including war crimes.

In Cote d’Ivoire, the prospect of an ICC prosecution of those who use hate speech to instigate and incite to commit international crimes has arguably kept those actors under some level of control. It is also an important example of the possible preventive role of the ICC.

In Colombia, the provisions on alternative sentencing and demobilization of the paramilitary groups under the Peace and Justice Law, even as strengthened by Colombia’s Constitutional Court, would have left victims with even less prospect of justice for the harms they have suffered if it were not for the need to offer a semblance of compliance with the international standards set forth in the Rome Statute. At the same time, while the peace and justice law shows important innovations, it also shows some of the tremendous

challenges in dealing with large numbers of perpetrators and victims through a system that encourages cooperation with law enforcement and disclosure as an alternative to full-fledged trials.

In Darfur, which I visited in 2004 and 2005 in my role as Special Advisor to the Secretary General on the Prevention of Genocide, impunity for earlier crimes, notably the massacres of 2003 that cost at least 200,000 lives, has been for too long a factor of instability and a hindrance to prevention of future crimes. That is why early on I joined those who called for a referral of the case to the ICC by the Security Council, a measure of historic significance that was adopted on April 1, 2005. What continues to be essential to the international community's strategy is a multi-pronged approach of protection, humanitarian assistance, promoting a peaceful settlement of the conflict, and criminal accountability.

Unfortunately I come away with the impression that we were not always strategic or sufficiently persistent in pursuing those goals. It has now been over two years since the Security Council resolution referring the case to the ICC, and the Government of Sudan has repeatedly stated that it does not recognize it and that it will not cooperate with the OTP's investigations or the arrest warrants issued against Harun and Kushayb. In that long period, the Security Council made no effort to remind the Government of Sudan that this was a decision adopted under Chapter VII of the Charter, and therefore binding on all States. Instead, we have let the regime get

away with defiance of a resolution adopted in furtherance of international peace and security. As far as I can see, only the High Commissioner for Human Rights and my office of Prevention of Genocide have raised this point from time to time. The result is not only that we do not offer the ICC the support it needs; it is also that we have given away cards that we could have used in negotiating with Khartoum to better protect and assist the 4 million Darfuris who are now totally dependent on international assistance.

In the DRC, reports of crimes are also still surfacing, as for instance the massacre of Kasika. Many crimes are still being committed, particularly against women and girls, in a widespread manner, notably in the Kivus. Thus, the fight against impunity has barely started in this huge country. We hope that the trial of Thomas Lubanga Dyilo will soon be followed by other cases, so as to give an account of the many horrific crimes committed in this country since 2002. But there is also an acute need in the DRC to foster accountability for the many crimes committed before 2002. It is critical that domestic courts be enabled and empowered to try those responsible, including those bearing the highest level of responsibility. ICTJ is currently co-undertaking a survey so as to better understand the extent to which people have been victimized in the DRC. Another project that will pave the way to fostering accountability in the DRC has been developed by the UN Office of the High Commissioner for Human Rights with the United Nations Mission in the Democratic Republic of the Congo: it concerns the mapping of serious violations of international humanitarian law and of massive human

rights violations that have taken place in the DRC over the last few years. Such mapping will not only gather and preserve crucial evidence, but also undoubtedly generate a new impetus to advocacy on the need to bring those responsible to justice. The long-term stability of this vast country situated at the heart of Africa is at stake and much more needs to be done to ensure that the plight of the Congolese is addressed in accountability terms.

What all these cases demonstrate is that, ultimately, the interests of justice and the interests of peace cannot and should not be divorced. Justice is an important component of the prevention of future crimes. It is only through justice and through enforcement of the law that long-term respect for the rule of law can be built.

This provides us with an important lesson for all international and hybrid jurisdictions: they must seek more pro-actively to build their legitimacy in affected regions, so as to build their own relevance in the lives of those most affected. Most importantly, these jurisdictions are judged on the basis of their impartiality and professionalism. To be seen as legitimate and respectful of universal standards, there should be no perceptions of selective justice in the prosecutions.

Those of us who support these jurisdictions should learn to identify their impact and successes in ways that go beyond the strict confines of the judicial process. In cases such as Cambodia, this will depend on the legitimacy and transparency of the Extraordinary Chambers in the eyes of both Cambodians who suffered

under the Khmer Rouge and the international community. This broader impact is all the more important for those international or hybrid jurisdictions that are being prompted to “complete” their work in the coming years. Now is the time to assess their work, and also to review their legacy and what remains to be done, with a view to help generate domestic capacity to further their work.

Of paramount importance is to bring to justice the leaders, those who bear the greatest responsibility in the commission of international crimes. Even heads of States are not beyond the reach of the law. These principles are reflected throughout international humanitarian law, on the one hand, the principle of command responsibility, and, on the other hand, the fact that the official position of individuals does not relieve them of criminal responsibility.

Of essential importance too is the need to continue to support domestic actors as they seek to bring justice outside of the spotlight of international attention or through the medium of the UN. In this respect I want to mention again important efforts in places such as Chile, Peru and Argentina.

To conclude, the conduct of modern wars affects greater numbers of innocent victims than ever before, and the importance of condemning breaches of international humanitarian law, and finding ways to enforce these norms, is greater than ever. But one must recognize that preventing violations of international humanitarian law is an ideal that may never be attained.

Justice, accountability and punishment play important preventive functions, but they should not be overestimated. The fact that murders have been prosecuted domestically for centuries has not resulted in the cessation of murders. But the fear individuals have of being possibly punished may have a strong psychological impact, correlated with the likelihood of being punished. And this may be one of the fundamental problems of international justice: it is not yet systematic, and there are still too many ways to escape it. This in turn shows the importance of the complementarity approach: the need to foster accountability at both the domestic and the international levels, so that they ultimately reinforce each other. Situations such as Uganda and Colombia are showing us new ways in which this may be done.

Thank you very much for your attention.





## **Echoes of Nuremberg**

**Michael A. Newton\***

“Nuremberg.” The very name conjures up grainy black-and-white images of defeated Nazis gathered before the bar of justice to face accountability for their crimes. Robert Jackson understood the iconic nature of the International Military Tribunal perhaps more clearly than any of his contemporaries, but also believed that the prosecutions were a pragmatic necessity in defeating what he termed “unregenerate and virulent” Nazism.<sup>1</sup> The First Chautauqua Declaration,<sup>2</sup> within the larger context of the International Humanitarian Law Dialogs, represents a foundation of shared principles by the men who have sacrificed and sweated to serve the ends of justice. The physical proximity and shared consensus of the prosecutors who were present to sign the Chatauqua Declaration embodies the reality that the era of accountability begun at Nuremberg is irreversibly underway.

One of the enduring aspects of the Nuremberg legacy is the truism that authentic justice is not achieved on the wings of societal vengeance, innuendo, or external manipulation; rather, the very essence of a fair trial is

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<sup>1</sup> ROBERT H. JACKSON, *THAT MAN: AN INSIDER’S PORTRAIT OF FRANKLIN D. ROOSEVELT 170-71* (ed. John Q. Barrett 2003).

<sup>2</sup> [http://www.asil.org/chaudec/index\\_files/frame.htm](http://www.asil.org/chaudec/index_files/frame.htm)

one in which the verdict is based on regularized process and on the quantum of evidence introduced in open court. When given a copy of his indictment before the International Military Tribunal at Nuremberg, Herman Göring stroked the phrase “[t]he victor will always be the judge and the vanquished the accused” across its cover.<sup>3</sup> In truth, the Allied nations suffered terribly during the war, and the Russian jurists represented a system that murdered millions of Stalinist opponents and hence had no greater moral authority than Nazi Germany itself.<sup>4</sup> Since allegations of so-called “victor’s justice” have haunted virtually every accountability process since Nuremberg,<sup>5</sup> there is a visceral power in their invocation that could corrode every facet of the trial. If the truth

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<sup>3</sup> JOSEPH E. PERSICO, *INFAMY ON TRIAL* 83 (1994). For another articulation of this highly debatable proposition, see generally RICHARD H. MINEAR, *VICTOR’S JUSTICE: THE TOKYO WAR CRIMES TRIAL* (1971).

<sup>4</sup> Christian Tomuschat, *The Legacy of Nuremberg*, 4 *J. OF INT. CRIMINAL JUST.* 830, 834 (2006).

<sup>5</sup> Richard May & Mariëka Wierda, *Trends in International Criminal Evidence: Nuremberg, Tokyo, The Hague, and Arusha*, 37 *COLUM. J. TRANSNAT’L L.* 725, 764 (1999). The perception of victor’s justice was also a strong motivating factor in the movement to establish a permanent international criminal court. See, e.g., M. Cherif Bassiouni, *The Time Has Come for an International Criminal Court*, 1 *IND. INT’L & COMP L. REV.* 1, 34 (1991) (“We cannot rely on the sporadic episodes of the victorious prosecuting the defeated and then dismantle these ad hoc structures as we did with the Nuremberg and Tokyo tribunals. The permanency of an international criminal tribunal acting impartially and fairly irrespective of whom the accused may be is the best policy for the advancement of the international rule of law and for the prevention and control of international and transnational criminality.”).

seeking process of trials is overcome by externally imposed limits on judicial independence or politically motivated revenge, the entire process would suffer from a crisis of perceived illegitimacy. In purely legalistic terms, authentic justice must be the product of an “impartial and regularly constituted court respecting the generally recognized principles of regular judicial procedure.”<sup>6</sup>

One distinguished scholar has used the phrase “Potemkin Justice” to describe enforcement efforts aimed at achieving only a shadow of justice while undermining the core human rights of those who will face charges under its authority.<sup>7</sup> A distinguished Iraqi jurist unconsciously echoed Jackson’s aspiration for the International Military Tribunal when he indignantly told me in response to unwarranted and unknowing external criticism from those who were not by his side to share his hardships and challenges -- “I am a judge, not a murderer.”<sup>8</sup> Despite the range of protections afforded defendants and the judges’ efforts to maintain the focus on the presentation and evaluation of the actual evidence during the Al-Dujail trial in Baghdad, the “speechifying”

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<sup>6</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts 1977, (Protocol I), Art 75 (4).

<sup>7</sup> M. CHERIF BASSIOUNI, INTRODUCTION TO INTERNATIONAL CRIMINAL LAW 703 (2003).

<sup>8</sup> Author’s personal notes from discussion with unnamed Iraqi judge, December 2002.

and political diatribe ultimately caused some Iraqis to conclude that a “far more suitable outcome would have been to ... hold the trials outside Iraq even if a capital sentence could not have been passed.”<sup>9</sup> The prosecutors who assembled in Chautauqua dedicated themselves to achieving actual justice in lieu of the pretense of preordained process. The prosecutor bears the public challenge of presenting a transparent process that facilitates the widespread *perception* of justice that is integral to the “expressive value” of the trial, which is an altogether different task from the reality inside the courtroom.<sup>10</sup> The common commitment of the Chautauqua signers means that they share much more than titles; they share a commitment and character as well as the difficulties experienced in actualizing justice.

Another echo of Nuremberg lies in the very creation of systematized justice. The evolving discipline now termed “international criminal law” has been described as “the gradual transposition to the international level of rules and legal constructs proper to national criminal law or national trial proceedings.”<sup>11</sup> Modern international criminal law is an integrated discipline that is far more than the “codeless myriad of precedent” that Tennyson famously described as a “wilderness of single

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<sup>9</sup> DR. ALI ALLAWI, *THE OCCUPATION OF IRAQ: WINNING THE WAR AND LOSING THE PEACE* 434-5 (2007).

<sup>10</sup> MARK A. DRUMBL, *ATROCITY, PUNISHMENT, AND INTERNATIONAL LAW* 179 (2007).

<sup>11</sup> ANTONIO CASSESE, *INTERNATIONAL CRIMINAL LAW* 18 (2003).

instances.”<sup>12</sup> Quite apart from its legal firsts,<sup>13</sup> Nuremberg presaged the inauguration of the holistic system of principles and practices that we today term “international criminal law.” It is worth recalling that the original intent of the Moscow Declaration, issued by the Allied Powers on October 30, 1943,<sup>14</sup> was the preference for punishment in the national courts of the countries where the crimes were committed.<sup>15</sup> Although international mechanisms provide a necessary forum in circumstances where domestic courts are unable or unwilling to enforce individual accountability for serious

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<sup>12</sup> Alfred, Lord Tennyson, *Aylmer's Field* (1793), available at [http://www.everypoet.com/archive/poetry/Tennyson/tennyson\\_contents\\_aylmers\\_field.htm](http://www.everypoet.com/archive/poetry/Tennyson/tennyson_contents_aylmers_field.htm)

<sup>13</sup> See generally Henry T. King, *Robert Jackson and the Triumph of Justice at Nuremberg*, 35 CASE WES. RES. J. INT. L. 263 (2003).

<sup>14</sup> MARK A. DRUMBL, ATROCITY, PUNISHMENT, AND INTERNATIONAL LAW 146-47 (2007). The text of the Moscow Declaration is available at <http://www.yale.edu/lawweb/avalon/wwii/moscow.htm> (last visited Oct. 31, 2007).

<sup>15</sup> IX Department of State Bulletin, No. 228, 310, reprinted in REPORT OF ROBERT H. JACKSON UNITED STATES REPRESENTATIVE TO THE INTERNATIONAL CONFERENCE ON MILITARY TRIBUNALS 11 (1945) The Moscow Declaration was actually issued to the Press on November 1, 1943. It purported to put criminals on notice that they would be “brought back to the scene of their crimes and judged on the spot by the peoples whom they have outraged.” For an account of the political and legal maneuvering behind the effort to bring this stated war aim into actuality, see PETER MAGUIRE, LAW AND WAR: AN AMERICAN STORY 86-110 (2001).

violations of international norms, the domestic courts of sovereign States retain primacy for the enforcement of those norms.<sup>16</sup> Indeed, the United Nations Secretary-General concluded that “no rule of law reform, justice reconstruction, or transitional justice initiative imposed from the outside can hope to be successful or sustainable.”<sup>17</sup> Today, the field of international criminal law embraces a sweep of jurisprudence<sup>18</sup> and careful articulation from which an identifiable group of professional advocates has emerged from all corners of the world.

One of the core objectives of the Assembly of States Parties to the Rome Statute is to create a system of universality that helps to “guarantee respect for and

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<sup>16</sup> Michael A. Newton, *Comparative Complementarity: Domestic Jurisdiction Consistent with the Rome Statute of the International Criminal Court*, 167 MIL. L. REV. 20, 24-5 (2001).

<sup>17</sup> Report of the Secretary-General, “The rule of law and transitional justice in conflict and post-conflict societies”, 23 Aug 2004, UN Doc S/2004/616, available at <<http://daccessdds.un.org/doc/UNDOC/GEN/N04/395/29/PDF/N0439529.pdf?OpenElement>> (last visited Oct. 27, 2007).

<sup>18</sup> Al-Waqa’i Al-Ivaqiya [The Official Gazette of the Republic of Iraq], Law of the The Iraqi Higher Criminal Court, Oct. 18, 2005, 4006 No. 10, art. 17 (Second) (expressly permitting the Iraqi judges to “resort to the decisions of international criminal tribunals” when needed to interpret and apply the provisions punishing genocide, war crimes, and crimes against humanity as incorporated into Iraqi law), available at [http://law.case.edu/grotian-moment-blog/documents/IST\\_statute\\_official\\_english.pdf](http://law.case.edu/grotian-moment-blog/documents/IST_statute_official_english.pdf) [hereinafter Statute of the Iraqi High Criminal Court].).

lasting enforcement of international justice.”<sup>19</sup> The 1907 Hague Regulations modernized the detailed provisions of the laws of war related to the rights and obligations assumed by persons and nations participating in conflict. For its time, the Hague treaty encompassed the full range of applicable legal norms related to the lawful conduct of hostilities. However, the enforcement of those precepts in the post World War II trials was the essential step needed to bring life and substance to the legal principle that “the right of belligerents to adopt means of injuring the enemy is not unlimited.”<sup>20</sup> In the same manner, the Nuremberg prosecutors helped to create a universalized awareness of the need to enforce criminal provisions that initiated what Richard Falk has described as a “normative architecture.”<sup>21</sup> Built on the core premise

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<sup>19</sup> Report of the International Criminal Court for 2006-7, U.N. Doc. A/62/314, para. 41-42 (Aug. 31, 2007), *available at* [http://www.iccnw.org/documents/Report\\_of\\_the\\_ICC\\_Nov\\_01\\_20\\_07.pdf](http://www.iccnw.org/documents/Report_of_the_ICC_Nov_01_20_07.pdf).

<sup>20</sup> Regulations annexed to Hague Convention (IV) Respecting the Laws and Customs of War on Land, October 18, 1907, Jan. 26, 1910, *reprinted in* Documentation on the Laws of War 73 (Adam Roberts & Richard Guelff eds., 3d ed. 2000) [hereinafter 1907 Hague Regulations]. The modern formulation of this foundational principle is captured in Article 35 of Protocol I as follows: “In any armed conflict, the right of the Parties to the conflict to choose methods or means of warfare is not unlimited.” 1977 Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims Of International Armed Conflicts, Dec. 12, 1977, 1125 U.N.T.S. 3, 23 [hereinafter Protocol I].

<sup>21</sup> See Raymond M. Brown, *The American Perspective on Nuremberg: A Case of Cascading Ironies*, in THE NUREMBERG



that the individual human rights of any perpetrator<sup>22</sup> require a criminal process that is a “fair and public hearing by a competent, independent and impartial tribunal established by law,”<sup>23</sup> nations around the world now have a distinctive and detailed set of principles that can be incorporated into domestic systems to maximize the uniformity of the substantive body of atrocity law.<sup>24</sup> The substantive criticisms of the International Military Tribunal helped to facilitate recognition that the simple phrase “international criminal law” needed to have nearly ubiquitous applicability and content or lose its criminal enforceability by remaining too ill defined and vague to have any practical meaning. The bare provisions of law would remain disembodied today unless effectuated through the proscription and effective enforcement of the most egregious crimes known to humanity – war crimes, genocide and crimes against humanity – while simultaneously balancing human rights norms, state sovereignty, and the interests of justice. To

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TRIALS – INTERNATIONAL CRIMINAL LAW SINCE 1945, 21 (Herbert R. Reginbogin & Christoph J.M. Safferling eds. 2006).

<sup>22</sup> After extensive debate over the relative merits of the terms “perpetrator” or “accused,” the delegates to the Preparatory Commission (PrepComm) ultimately agreed to use the former in the finalized draft text of the Elements of Crimes, U.N. Doc. PCNICC/2000/INF/3/Add.2 (2000).

<sup>23</sup> International Covenant on Civil and Political Rights 1966, Art. 14(1), entered into force 23 March 1976.

<sup>24</sup> For a listing of the domestic legislation of national implementing legislation for the crimes of most serious concern to the international community, see <http://www.iccnw.org/?mod=romeimplementation>.

that end, Article 9 of the Rome Statute of the International Criminal Court requires Elements of Crimes that are designed to “assist the Court in the interpretation and application” of the modern body of crimes derived from international law.<sup>25</sup> Furthermore, the treaty stipulates that the Court “shall apply” the Elements of Crimes during its decision-making.<sup>26</sup>

The Elements of Crimes are enshrined in a single, accessible document that takes otherwise amorphous crimes and delineates the conduct, consequences, and circumstances for every offense, along with the *mens rea* that attaches to each component of each crime. After extensive debate, the nations of the world joined consensus on the Final Draft Elements of Crimes, and today they represent a crosscut of legal norms that are an off-the-shelf source of accessible detail to assist domestic jurisdictions throughout the world, in addition to serving as a resource for judicial activities in the international arena. Iraqi jurists, for instance, modeled their Elements of Crimes<sup>27</sup> on the International Criminal Court Elements, and the judges repeatedly used the Arabic version of the official International Criminal

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<sup>25</sup> Rome Statute of Int’l Crim. Ct., art. 9, July 1, 2002, 2187 U.N.T.S. 90.

<sup>26</sup> *Id.* art. 21.

<sup>27</sup> Iraqi Special Tribunal, Elements of Crimes, *available at* [http://law.case.edu/grotian-moment-blog/documents/IST\\_Elements.pdf](http://law.case.edu/grotian-moment-blog/documents/IST_Elements.pdf).

Court Elements<sup>28</sup> as the basis for their probing questions to international advisors regarding the fit between Iraqi domestic crimes and those recognized under international law.

The growing consistency between the international and domestic forums does not mitigate the need for modifying domestic procedural practices to permit cooperative endeavors on the international plane. In the aftermath of his eighteen months of labor alongside lawyers from other legal systems, Justice Jackson observed that “trial methods and techniques are very dissimilar, but as we proved at Nuremberg, the differences are not insuperable.”<sup>29</sup> German lawyers at the IMT grappled with the details of cross-examination grounded in the practice of common law nations;<sup>30</sup> in the more recent past, the legal standards for guilty pleas

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<sup>28</sup> See Preparatory Comm’n for the Int’l Crim. Ct., Finalized Draft Text of the Elements of Crimes, U.N. Doc. PCNICC/2000/1/Add.2 (Nov. 2, 2000) (establishing the “Elements of Crimes” for the International Criminal Court). Article 9 of the Rome Statute states that the Elements shall “assist the Court in the interpretation and application” of the provisions related to war crimes, genocide and crimes against humanity. Rome Statute of Int’l Crim. Ct. July 1, 2002, 2187 U.N.T.S. 90 *available at* [http://www.icc-cpi.int/library/about/officialjournal/Rome\\_Statute\\_120704-EN.pdf](http://www.icc-cpi.int/library/about/officialjournal/Rome_Statute_120704-EN.pdf).

<sup>29</sup> Robert H. Jackson, *Lawyers Today: The Legal Profession in a World of Paradox*, 33 AMERICAN BAR ASS’N J. 24, 89 (Jan. 1947).

<sup>30</sup> See generally WHITNEY R. HARRIS, MURDER BY THE MILLIONS: RUDOLF HESS AT NUREMBERG (2005).

have provided fertile grounds for appeals.<sup>31</sup> The International Military Tribunal set the lasting precedent for simplifying evidentiary requirements in favor of a full airing of available facts before a panel of judges. Justice Jackson noted that “peculiar and technical rules of evidence developed under the common law system of jury trials to prevent the jury from being influenced by improper evidence constitute a complex and artificial science,” and accordingly accepted that rules of evidence at Nuremberg should put the premium on the probative value of the evidence.<sup>32</sup> This evidentiary freedom also put the premium on the educative and ameliorative function of the trial process. The procedures for the introduction of evidence and the consideration of verdicts are perhaps the most enduring aspect of the commingling of common and civil law traditions.

Although dispensing with rigid rules of evidence gave the International Military Tribunal “a large and somewhat unpredictable discretion,” it also permitted

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<sup>31</sup> See, e.g., *Prosecutor v. Drazen Erdemovic*, Case No. IT-96-22, Sentencing Judgment ¶ 7 (Trial Chamber II March 5, 1998), available at <http://www.un.org/icty/erdemovic/trialc/judgement/erd-tsj980305e.htm>

<sup>32</sup> REPORT OF ROBERT H. JACKSON UNITED STATES REPRESENTATIVE TO THE INTERNATIONAL CONFERENCE ON MILITARY TRIBUNALS 11, DEPARTMENT OF STATE PUBLICATION 3080, WASHINGTON D.C., Preface at xi (1949). Interestingly, as a matter of historical record, the teams of international prosecutors at Nuremberg did not develop detailed Elements of Crimes that have become an accepted feature of every subsequent international process.

both the prosecution and defense to select evidence on the basis of “what it was worth as proof rather than whether it complied with some technical requirement.”<sup>33</sup> Since 1945, rather than operating under restrictive rules of evidence, all of the tribunals applying international humanitarian law have permitted evidence so long as it is “relevant and necessary for the determination of the truth.”<sup>34</sup> As one Iraqi investigative judge put it, “in our system, only the evidence speaks.”<sup>35</sup> Rather than developing a straitjacket set of rules related to the introduction of evidence, the Dujail Trial Chamber had the broader mandate to “apply rules of evidence which will best favour a fair determination of the matter before it and are consonant with the spirit of the Statute and general principles of law.”<sup>36</sup>

Although Nuremberg effectuated the 1907 Hague Regulations in a manner and spirit that created enduring truths and literally changed the world, some of its most signal achievements also represent its most threatened

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<sup>33</sup> *Id.*

<sup>34</sup> United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, July 17, 1998, U.N. Doc. A/CONF.183/9 (1998), art. 69(3), *reprinted in* 37 I.L.M. 999 (1998).

<sup>35</sup> Interview with Judge Ra’id Juhi, Chief Investigative Judge, Iraqi High Criminal Court, in Baghdad ( Aug. 2, 2006).

<sup>36</sup> Rules of Procedure and Evidence of the Iraqi Special Tribunal, The Official Gazette of Iraq. No. 4006, Rule 79 (Oct. 18, 2005), *available at* [http://law.case.edu/grotian-moment-log/documents/IST\\_rules\\_procedure\\_evidence.pdf](http://law.case.edu/grotian-moment-log/documents/IST_rules_procedure_evidence.pdf).

legacy. The principle of personal accountability is the very heart of the Nuremberg achievement, yet paradoxically its most potent and politically controversial dimension. Herman Göring complained about the “damned court – the stupidity,” and asked his American psychiatrist, “Why don’t they let me take the blame and dismiss these little fellows – Funk, Fritzsche, Kaltenbrunner? I never head of most of them until I came to this prison!”<sup>37</sup> Justice Jackson recognized that a modern era of accountability would of necessity confront the dual realities of sovereign immunity and superior orders. He had enough insight to recognize that with the doctrine of official immunity or head of state immunity “usually is coupled another, that orders from an official superior protect one who obeys them. It will be noticed that the combination of these two doctrines means that nobody is responsible. Society as modernly organized cannot tolerate so broad an area of official irresponsibility.”<sup>38</sup>

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<sup>37</sup> LEON GOLDENSOHN THE NUREMBERG INTERVIEWS: AN AMERICAN PSYCHIATRIST’S CONVERSATIONS WITH THE DEFENDANTS AND WITNESSES 101 (2004) .

<sup>38</sup> <http://www.roberthjackson.org/documents/060745/> (going on to opine that “superior orders cannot apply in the case of voluntary participation in a criminal or conspiratorial organization, such as the Gestapo or the S.S. An accused should be allowed to show the facts about superior orders. The Tribunal can then determine whether they constitute a defense or merely extenuating circumstances, or perhaps carry no weight at all.”).

Paraphrasing Justice Jackson's assessment of the International Military Tribunal at Nuremberg, "no history" of a modern conflict that includes mass atrocities will be "entitled to authority"<sup>39</sup> if it ignores the factual and legal conclusions engendered by the work of a court that investigates and prosecutes the officials who orchestrate the power of the state into a concerted criminal enterprise. The revocation of immunity stands for the principle that personal immunity flowing from the official position of an accused is property of the state and cannot be perverted into an irrevocable license to commit the most serious crimes known to mankind. Not only does a sovereign state have the right to revoke immunity flowing from its constitution or statute, the Iraqi Cassation Decision upholding Saddam Hussein's death sentence even concluded that

it is the duty of the state to exercise its criminal jurisdiction against those responsible for committing international crimes since the crimes of which the defendants are accused of in the Dujail case form both international and domestic crimes and committing them constitutes a

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<sup>39</sup> REPORT TO THE PRESIDENT BY MR. JUSTICE JACKSON, Oct. 7, 1946, *quoted in* 49 AM. J. INT'L L. 44, 49 (1955), *reprinted in* REPORT OF ROBERT H. JACKSON UNITED STATES REPRESENTATIVE TO THE INTERNATIONAL CONFERENCE ON MILITARY TRIBUNALS 11, DEPARTMENT OF STATE PUBLICATION 3080, WASHINGTON D.C. 432, 438 (1949)(Justice Jackson also wrote that "We have documented from German sources the Nazi aggressions, persecutions, and atrocities with such authenticity and in such detail that there can be no responsible denial of these crimes in the future and no tradition of martyrdom of the Nazi leaders can arise among informed people).

violation of the International Penal Code and the Law of Human Rights while at the same time violating Iraqi laws.<sup>40</sup>

Furthermore, in perhaps the clearest jurisprudential statement regarding the specific liability attaching to a head of state found guilty of serious breaches of international humanitarian law, the Cassation Panel wrote that crimes committed while subject to a grant of immunity should be subject to more severe punishment. This principle is worthy of emulation in other tribunals as other nations strive to apply the substantive content of international law, and may over time represent the single most important legal concept to come out of the Al-Dujail verdicts. The cloak of official immunity is a factor for aggravating the sentence because in the words of the Iraqi jurists:

a person who enjoys it usually exercises power which enables him to affect a large number of

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<sup>40</sup> Cassation Panel, Iraqi High Criminal Court, al-Dujail Final Opinion, at 18, *available at* <http://www.iraq-iht.org/ar/doc/ihtco.pdf>. For the unofficial English translation of the Appeals Decision see [http://www.law.case.edu/saddamtrial/documents/20070103\\_dujail\\_appellate\\_chamber\\_opinion.pdf](http://www.law.case.edu/saddamtrial/documents/20070103_dujail_appellate_chamber_opinion.pdf). The brevity and timing of the appeals decision has been the subject of heavy criticism. HUMAN RIGHTS WATCH, THE POISONED CHALICE A HUMAN RIGHTS WATCH BRIEFING PAPER ON THE DECISION OF THE IRAQI HIGH TRIBUNAL IN THE DUJAIL CASE 32 (2007), *available at* <http://hrw.org/backgrounder/ij/iraq0607/iraq0607web.pdf> (“The speed of the decision, the brevity of the opinion (17 pages) and the cursory nature of the reasoning make it difficult to conclude that the Appeals Chamber conducted a genuine review as required by international fair trial principles.”).



people, which intensifies the damages and losses resulting from commitment of crimes. The president of the state has international responsibility for the crimes he commits against the international community, since it is not logical and just to punish subordinates who execute illegal orders issued by the president and his aides, and to excuse the president who ordered and schemed for commitment of those crimes. Therefore, he is considered the leader of a gang and not the president of a state which respects the law, and therefore, the head chief is responsible for crimes committed by his subordinates, not only because he is aware of those crimes, but also for his failure to gain that awareness.<sup>41</sup>

For the future, the world must confront the challenge of achieving justice that can overcome the political power of perpetrators who believed themselves above any moral or legal accountability. Summarizing the International Military Tribunal at Nuremberg, one preeminent international jurist opined that “despite certain shortcomings of due process rules at Nuremberg ... Nuremberg was neither arbitrary nor unjust ... that victors sat in judgment did not corrupt the essential fairness of the proceedings.”<sup>42</sup> Just as the Security Council has the “primary responsibility” for maintaining

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<sup>41</sup> *Id.* at 9-10.

<sup>42</sup> THEODOR MERON, WAR CRIMES LAW COMES OF AGE—ESSAYS 198 (1998).

international peace and security,<sup>43</sup> the Coalition Provisional Authority (CPA) had a concrete legal duty to facilitate the return of stability and order to Iraq after the fall of the regime. Security Council Resolution 1483 was passed unanimously on May 22, 2003, and called upon the members of the CPA to “comply fully with their obligations under international law including in particular the Geneva Conventions of 1949 and the Hague Regulations of 1907.”<sup>44</sup>

The combination of the legal authority for the formation of future tribunals with the political muscle needed to achieve the ends of justice remains a critical necessity in perpetuating the systematized justice that originated at Nuremberg. The Iraqi High Criminal Court and the ICTY share the same jurisprudential underpinnings because the U.N. Security Council established the *ad hoc* tribunal with a ground-breaking 1993 resolution<sup>45</sup> premised on the legal authority of the Security Council to “maintain or restore international peace and security.”<sup>46</sup> Both Tribunals were founded on the assessment by the officials charged with preserving

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<sup>43</sup> UN Charter art. 24, para. 1.

<sup>44</sup> S.C. Res. 1483, ¶ 5, S/RES/1483 (May 22, 2003).

<sup>45</sup> S.C. Res. 827, U.N. Doc. S/RES/827 (May 25, 1993).

<sup>46</sup> UN Charter art. 39 (giving the Security Council the power to “determine the existence of any threat to the peace, breach of the peace, or act of aggression” and it “shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security”).

stability and the rule of law that prosecution of selected persons responsible for serious violations of international humanitarian law would facilitate the restoration of peace and stability. This finding must of necessity be accompanied by a relentless and vigorous pursuit of the evidence and means to do justice, culminating in the surrender of perpetrators to the tribunal.

The Chautauqua Declaration implicitly acknowledges this linkage with the pronouncement that “justice is not an impediment to peace, but in fact is it’s most certain guarantor.” The dedicated lawyers whose sacrifices made Nuremberg a reality are growing older by the day. The Nuremberg legacy is, in reality, their legacy. Their signatures alongside those of the other prosecutors are visible proof that their successors are confronting the challenges of lawlessness and tyranny. Far from being “lawless,” genocide and widespread crimes against humanity require “law;” indeed, one might say perpetrators must hijack the power of law as an indispensable aspect of their crimes. So long as principled servants of the law rise to the challenge of confronting such egregious crimes, Nuremberg will continue to resonate. The Chautauqua Declaration represents a tangible step towards perpetuating that legacy and aiding that worthy objective.

## Terrorism and the Rule of Law

Leila Nadya Sadat\*

*Nature hath made men so equal, in the faculties of body, and mind; as that though there bee found one man sometimes manifestly stronger in body, or of quicker mind then another; yet when all is reckoned together, the difference between man, and man, is not so considerable, as that one man can thereupon claim to himself any benefit, to which another may not pretend, as well as he. For as to the strength of body, the weakest has strength enough to kill the strongest, either by secret machination, or by confederacy with others . . . .*

—Thomas Hobbes, *Leviathan*, Ch. XIII

### Introduction: Tragedy and its Response

Ever since the murderous attacks on the World Trade Towers, the Pentagon, and U.S. Airlines flight 93, scholars have wrestled with their legal ramifications.<sup>1</sup>

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1. Daryl A. Mundis, *The Use of Military Commissions to Prosecute Individuals Accused of Terrorist Acts*, 96 AM. J. INT'L L. 320, 320-58 (2002); M. Cherif Bassiouni, *Legal Control of International Terrorism: A Policy Oriented Assessment*, 43 HARV. INT'L L.J. 83, 83-103 (2002); Jordan J. Paust, *Antiterrorism Military Commissions: Courting Illegality*, 23 MICH J. INT'L L. 1, 1 (2001).

Although much of the early writing on the subject was largely reactive in nature, it is now appropriate to pause and consider the broader implications of the September 11th attacks for international law and international relations in general. In this regard, it has become apparent that not only were the attacks devastating in terms of loss of human life and their impact on the United States, but that they, and the U.S. response they evoked, have the potential to irreparably damage international law and international institutions, with deeply troubling and even dire consequences for world peace, stability, and the international rule of law.

It is the premise of this essay that by characterizing the September 11th attacks as acts of war rather than as international crimes, the United States lost an extraordinary opportunity to strengthen international legal norms and combat international terrorism. Instead, the U.S. government relied upon these terrorist acts to justify the pursuit of a unilateralist agenda that, contrary to the language and the spirit of the United Nations Charter, appears to reject any legal constraints on the use of American power abroad. It is worth considering, as an aside, that this departure from the Charter framework, without anything to substitute in its place, may lead to increasing and even catastrophic violence on a global scale.<sup>2</sup> A full discussion of this potentially dismal future is beyond the scope of this Essay, which confines itself to suggesting that rather than viewing the attacks of

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2. See Tom J. Farer, Editorial Comment, *Beyond the Charter Front: Unilateralism or Condominium?*, 96 AM. J. INT'L L. 359, 364 (2002).

September 11th as acts of war, they should have been treated as international crimes for which the direct perpetrators, and their accomplices, should be apprehended, tried and, if convicted, punished. Moreover, to the extent the military action which followed the attacks clearly created a state of international armed conflict, that “war” is properly governed by traditional rules, not some new legal paradigm (or at least not the one proposed by the Bush administration.) Finally, the Essay concludes that only by increasing efforts to strengthen international norms and institutions will the United States ultimately achieve its goal of successfully combating international terrorism.

### **Terrorism and the Rhetoric of War**

Shortly following the horrific attacks on the twin towers, the Pentagon, and U.S. Airlines flight 93, President Bush, addressing a Joint Session of Congress, outlined the policy of the government to conduct a “war on terror” that will “begin[] with al-Qaeda, but . . . does not end there. It will not end until every terrorist group of global reach has been found, stopped and defeated.”<sup>3</sup> With regard to the Taliban specifically, the President spelled out several ultimatums, none of which were “open to negotiation or discussion.”<sup>4</sup> In particular, the

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3. President George W. Bush, Address to a Joint Session of Congress and the American People (Sept. 20, 2001).

4. *Id.*

Taliban regime was to “hand over the terrorists, or . . . share in their fate.”<sup>5</sup>

As a matter of international law, the government’s position with regard to the terrorist attacks was less clear, but appeared to be essentially as follows. First, the attacks amounted to an “armed attack” against the United States of America, which entitled the United States to invoke article 51 of the U.N. Charter in self-defense and take military action against those who had committed the attacks, any regime that harbored them, or other terrorists that have in the past or could in the future attack the United States.<sup>6</sup> Additionally, the attack created a state of “war” between the United States and some other entities, although it is not entirely clear whether the war was with the al Qaeda terrorist network, the Taliban regime, the State of Afghanistan, or some combination

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5. *Id.*

6. There appears to have been a certain consensus on September 11th and immediately after that the acts of September 11th amounted to an “armed attack” against the United States, within the meaning of article 51 of the United Nations Charter due to their scale and effect, although the implications of that finding are unclear given that they were carried out by non-state actors. Confirming a speech given the day after the attack, Lord Robertson, NATO Secretary General, stated that

it has now been determined that the attack against the United States on 11 September was directed from abroad and shall therefore be regarded as an action covered by article 5 of the Washington Treaty, which states that an armed attack on one or more of the Allies in Europe or North America shall be considered an attack against them all.

Secretary General Lord Robertson, Statement at NATO Headquarters (Oct. 2, 2001); NATO Press Release No. 124, Statement by the North Atlantic Council (Sept. 12, 2001).

thereof.<sup>7</sup> Finally, President Bush articulated in the September 2002 National Security Strategy Statement what has now become known as the “Bush Doctrine;” namely, that the United States will act “preemptively” to “forestall or prevent” hostile acts by its adversaries. This was the rationale invoked in support of the military operation (“Operation Enduring Freedom”) in Afghanistan which began on October 7, 2001,<sup>8</sup> and

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7. For example, Section 1(A) of the President’s Military Order of November 13, 2001, provides: “International terrorists . . . have carried out attacks on United States diplomatic and military personnel and facilities abroad and on citizens and property within the United States on a scale that has created a state of armed conflict that requires the use of the United States Armed Forces.” Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833 (Nov. 13, 2001). Subsequently, the administration suggested that the state of armed conflict may have commenced a decade ago, and reiterated its position that an “armed conflict” existed between the U.S. government and the al Qaeda organization. Pierre-Richard Prosper & Michael A. Newton, *The Bush Administration View of International Accountability*, 36 NEW ENG. L. REV. 891, 898-99 (2002).

8. The operation was initially code-named “Infinite Justice,” but was changed to Operation “Enduring Freedom” on September 25, 2001 after Muslim clerics objected that only Allah could mete out infinite justice. Operation Infinite Justice, <http://globalsecurity.org/military/ops/infinite-justice.htm> (last visited Aug. 1, 2007). The terminology used by the administration to describe the war has often had religious overtones and some have suggested that the code name “Infinite Justice” was deliberately chosen as a reference to the “fundamentalist Christian doctrine of retribution.” *Notes from the Editors*, MONTHLY REVIEW Nov. 2001, <http://www.monthlyreview.org/nfte1101.htm> (last visited Sept. 7, 2003). *But see* Operation Infinite Justice, *supra* (stating that “the name [Infinite Justice] can be traced back to the 1998 Operation



presumably was also the basis upon which the administration asserted the right to pursue military operations in the Philippines, and subsequently against the three so-called “axis of evil” countries:<sup>9</sup> Iran,<sup>10</sup>

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Infinite Reach air strikes against Osama bin Laden’s facilities in Afghanistan and Sudan . . .”).

9. These three countries were named in the State of the Union Address of President George W. Bush on January 29, 2002. In the *National Security Strategy of the United States of America*, published by the White House in September 2002, the “Bush Doctrine” was expanded to include not only responses to terrorism after the fact as a matter of self-defense, but cases of preemptive self-defense to prevent terrorists from “doing harm against our people and our country.” The White House, *The National Security Strategy of the United States of America* (Sept. 15, 2002), available at <http://www.whitehouse.gov/nsc/nss.pdf> (last visited Aug. 1, 2007).

10. In March 2003, the Bush Administration expressed its “deep concern” that Iran’s nuclear program was for the purpose of developing atomic weapons, and not for peaceful purposes. *White House Distrusts Iran on Nuclear Power*, ST. LOUIS POST-DISPATCH, Mar. 11, 2003, at A7. The Bush Administration has also encouraged internal dissent within Iran, hoping that protests will lead to a change of government and ultimately to abandonment of Iran’s potential nuclear program. Jonathon Wright, *Bush Takes Risks in Iran Policy, Analysts Say*, REUTERS NEWS, June 20, 2003. This desire for a regime change in Iran has continued, now reportedly including “significant air attacks on their countermeasures and anti-aircraft missiles,” as well as other military options, being planned by the U.S. government. See Seymour M. Hersh, *The Iran Plans*, THE NEW YORKER, Apr. 17, 2006. More recently, Secretary of State Condoleezza Rice has pursued a diplomatic strategy, which calls for the U.S. to join forces with Europe, Russia and China in attempts to pressure Iran to suspend its uranium enrichment activities. Helen Cooper & David E. Sanger, *Strategy on Iran Stirs New Debate at White House*, N.Y. TIMES, June 16, 2007, at A1. This announced strategy has not stopped others in the Bush administration from

Iraq,<sup>11</sup> and North Korea.<sup>12</sup> The U.S. position was formally communicated to the United Nations in a letter dated October 7, 2001:

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calling for “greater consideration of military strikes against Iranian nuclear facilities,” however. *Id.*

11. Following the refusal of the United Nations to approve action against Iraq, on March 18, 2003 President Bush declared that among other things, Iraq has “a deep hatred of America . . . [a]nd has aided, trained and harbored terrorists, including operatives of al Qaeda.” The President issued an ultimatum at the same time to the effect that “Saddam Hussein and his sons must leave Iraq within 48 hours,” or war will result. President George W. Bush, Remarks by the President in Address to the Nation (Mar. 17, 2003). Subsequently, in a letter to the Security Council, John Negroponte, U.S. Ambassador to the United Nations announced that “[C]oalition forces have commenced military operations in Iraq.” Letter from the Permanent Representative of the United States of America to the United Nations addressed to the President of the Security Council, Mar. 20, 2003, at [http://www.un.int/usa/s2003\\_351.pdf](http://www.un.int/usa/s2003_351.pdf) (last visited Sept. 7, 2003). The U.S. relied on Iraq’s breaches of Security Council Resolutions 678, 687, 1411. *Id.* Negroponte states that the “actions . . . are necessary steps to defend the United States and the international community from the threat posed by Iraq and to restore international peace and security in the area.” *Id.*

12. Relations between the United States and North Korea became particularly tense after North Korea admitted in October 2002 that it had an illicit uranium enrichment program, repudiated the Nuclear Non-Proliferation Treaty, fired two test missiles into the Sea of Japan, and demanded a non-aggression pact from the United States. *North Korea: Expecting Trouble?*, THE ECONOMIST, Mar. 2003, at 37. The Bush Administration was initially divided on how to proceed in response. U.S. intelligence believed at the time that North Korea was developing technology for nuclear warheads small enough to fit atop the country’s arsenal of missiles, and the U.S. unsuccessfully pressed the U.N. Security Council to approve a statement condemning North Korea for reviving its nuclear weapons

The attacks on 11 September 2001 and the ongoing threat to the United States and its nationals posed by the Al-Qaeda organization have been made possible by the decision of the Taliban regime to allow the parts of Afghanistan that it controls to be used by this organization as a base of operation.

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program. The North Korean government continued to insist instead on bilateral talks with the United States. Irwin Arief, *North Korea Complains to U.N. About U.S. "Hostile Acts,"* REUTERS NEWS, July 14, 2003. The U.S., on the other hand, insisted on six-party talks that would also include China, Russia, Japan and South Korea. Eventually North Korea conceded and, in the fourth round of meetings, the parties signed a Joint Statement agreeing to the "verifiable denuclearization of the Korean Peninsula in a peaceful manner." Joint Statement of the Fourth Round of the Six-Party Talks, Sept. 19, 2005. However, in July 2006, North Korea performed another nuclear test, which produced strong threats from the U.S, including the statement that North Korea "can have a future or it can have these weapons. It cannot have both." Dafna Linzer, *Pyongyang Warned on Weapon Testing*, Wash. Post, Oct. 5, 2006, at A20. The UN Security Council also condemned the tests and imposed sanctions on North Korea. S.C. Res 1718, U.N. Doc. S/Res/1718 (Oct. 14, 2006). Talks were soon resumed and on February 13, 2007, North Korea agreed to freeze its production of plutonium in Yongbyon and eventually disable all of its nuclear facilities in return for food and fuel aid from the U.S., Russia, China and South Korea. Jim Yardley & David E. Sanger, *In Shift, a Deal Is Being Weighed by North Korea*, N.Y. Times, Feb. 13, 2007, at A1. In July, monitors from the International Atomic Energy Agency confirmed that North Korea had shut down its sole working reactor at Yongbyon, as well as four other nuclear sites. *N. Korea Closes More Nuclear Sites*, BBC News, July, 18, 2007, <http://news.bbc.co.uk/2/hi/asia-pacific/6903894.stm>. Six-party talks are scheduled to restart in September 2007, with one issue being the U.S.'s allegation that North Korea possesses a secret uranium enrichment program, something North Korea has consistently denied. *Id.*

Despite every effort by the United States and the international community, the Taliban regime has refused to change its policy. From the territory of Afghanistan, the Al-Qaeda organization continues to train and support agents of terror who attack innocent people throughout the world and target United States nationals and interests in the United States and abroad.

In response to these attacks, and in accordance with the inherent right of individual and collective self-defence, United States armed forces have initiated actions designed to prevent and deter further attacks on the United States. These actions include measures against Al-Qaeda terrorist training camps and military installations of the Taliban regime in Afghanistan.<sup>13</sup>

There have been suggestions for some time by senior officials of the U.S. government that the rubric of war should apply to acts of international terrorism, although President Bush has capitalized on this war rhetoric to a greater degree than prior administrations. For example, in her response to the attacks on the two U.S. Embassies in Tanzania and Kenya, then Secretary of State Madeline Albright suggested that international terrorism would be

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13. *Letter dated 7 October 2001 from the Permanent Representative of the United States of America to the United Nations addressed to the President of the Security Council*, U.N. Doc. S/2001/946 (Oct. 7, 2001) [hereinafter Letter of October 7, 2001].

the “war of the future.”<sup>14</sup> Ten years earlier, Abraham Sofaer, legal advisor to the U.S. Department of State, argued that the legal rules surrounding the use of force, the concept of armed attack, and respect for territorial integrity impose “serious limits on strategic flexibility,” and could not be permitted to “interfere with legitimate national security measures.”<sup>15</sup>

Although using the language of war and describing the September 11th attacks as war crimes may be a convenient rhetorical device to describe the struggle to cripple international terrorist organizations, it is not consonant with existing and well-established principles of international law.<sup>16</sup> As I have noted in earlier

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14. Tyler Raimo, *Winning at the Expense of Law: The Ramifications of Expanding Counter-Terrorism Law Enforcement Jurisdiction Overseas*, 14 AM. U. INT’L L. REV. 1473, 1484 n.57 (1999) (quoting Tim Butcher & Hugh Davies, *U.S. Strike Was “First Blow in the War of The Future”*: Washington Seeks Support for Long Campaign Against Global Terrorism, WASH. POST, Aug. 22, 1998, at A1).

15. Abraham D. Sofaer, *Terrorism, the Law and National Defense*, 126 MIL. L. REV. 89, 90-122 (1989).

16. The U.S. position also permitted the President to argue that any foreigners captured as a result of the military operations could be tried as war criminals in military tribunals established for that purpose, which would have been impossible had they been charged with violations of “ordinary” criminal laws against terrorism and mass murder. Somewhat inconsistently, the Bush administration, having established military jurisdiction by declaring the terrorist attacks to be constitutive of a state of armed conflict, subsequently sought to deprive any individuals captured as a result of Operation Enduring Freedom of the protection of the Geneva Convention Relative to the Treatment of Prisoners of War by arguing that they were “unlawful combatants.” This Essay will not address this

writings, under the international law instruments criminalizing violations of the laws and customs of war, including the Rome Statute for the International Criminal Court, an individual cannot legally commit a “war crime” unless a state of “armed conflict” exists.<sup>17</sup> As the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia (ICTY) found in the *Tadić* case, “an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State.”<sup>18</sup> It is apparent from this definition that a transnational group of terrorists is not engaged in “armed conflict,” in the legal sense of the word, but is engaging in a particularly pernicious form of organized crime.

Requiring the existence of an armed conflict for the application of the laws and customs of war is not simply a legal technicality that may be casually brushed aside. Prior to reaching that threshold, internal or even cross border disturbances do not become the province of international humanitarian law, but must be resolved

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particular ramification of the treatment of the September 11th attacks as acts of war.

17. Leila Nadya Sadat & Richard S. Carden, *The New International Criminal Court: An Uneasy Revolution*, 88 GEO. L.J. 381, 434 (2000).

18. Prosecutor v. Tadić, Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, ¶ 70 (Oct. 2, 1995).

internally if they occur within a State,<sup>19</sup> or by diplomacy or other means if they occur transnationally.<sup>20</sup> The laws

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19. In fact, during the Rome Diplomatic Conference, states were adamant in insisting that sporadic acts of violence or rebellion would not trigger the application of international humanitarian law, and article 8(d) reinforces that view. It provides that the provisions of the Statute on non-international armed conflict falling within common article 3 of the four Geneva Conventions would not apply to “situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature.” Rome Statute of the International Criminal Court art. 8(d), United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, July 17, 1998, U.N. Doc. A/CONF.183/9 (1998) [hereinafter Rome Statute]. *See also id.* art. 8(f) (providing that for other violations of the laws and customs applicable in “armed conflicts not of an international character,” the Statute only applies “when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups.”). *See also* Islamic Republic of Iran v. United States (I.C.J.) (*Oil Platforms Case*), Nov. 6, 2003.

20. The Geneva Conventions refer, in common article 2, to their application “to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties.” *See, e.g.*, Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 2, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287. Hague Convention (No. IV) Respecting the Laws and Customs of War on Land, and Annex, provides that “the provisions contained in the Regulations referred to in Article 1, as well as in the present Convention, do not apply except between Contracting Powers . . . .” Hague Convention (No. IV) Respecting the Laws and Customs of War on Land, and Annex, art. 2, Oct. 18, 1907, 36 Stat. 2277, T.S. No. 539. Certain scholars have raised the novel claim that the war on terror is an article 3 conflict. *See, e.g.*, Brief of Professors Ryan Goodman, Derek Jinks, and Anne-Marie Slaughter as Amicus Curiae Supporting Reversal (Geneva - Applicability), *Hamdan v. Rumsfeld*, 126 S.Ct. 2749 (2006) (No. 05-184), 2006 WL 53970.

of war do not apply to such disorders, nor are individuals potentially criminally liable under the laws of war for crimes they may commit during them. (These same individuals could be answerable for crimes against humanity, provided that the elements of the crime are present, because it is an offense not predicated on the existence of an armed conflict for its application.) Ironically, the administration's suggestion that the members of al Qaeda are engaged in "armed conflict"<sup>21</sup> could be interpreted to imply that the "conflict" waged by al Qaeda is not itself illegal in nature, but that it is the means used which are problematic, a thesis with which most observers would disagree.<sup>22</sup> Additionally, reducing or eliminating the "armed conflict" threshold for the application of the laws of war would not appear to be in the best interests of the United States. For example, the United States often conducts military actions, such as the 1998 bombing raids in the Sudan and Afghanistan, without real concern as to allegations that they amount to a tacit declaration of war, because those uses of force, which are both short in duration and limited in scope, do not rise to the level of an armed conflict.<sup>23</sup> Eliminating

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21. *See supra* note 7.

22. When the U.S. military invaded Afghanistan on October 7, 2001, a state of armed conflict was established, and international humanitarian law applied, "from the initiation of such armed conflict[] . . . until a general conclusion of peace is reached." *Tadić*, Case No. IT-94-1-AR72 at ¶ 70.

23. For this reason, the 1998 bombing raids on the Sudan and Afghanistan would not fall within the prohibitions of the Rome Statute for the International Criminal Court, even though some might characterize them as illegal uses of force under article 2(4) of



the “armed conflict” threshold for the application of the laws of war could also suggest that covert operations, if discovered, could either initiate a state of armed conflict within the target country, or, at the very least, be subject to the laws of war.

Setting aside the question whether the use of force by the United States in Afghanistan was a lawful measure of self-defense under the U.N. Charter, the question remains whether the Bush Doctrine is supported by international law.<sup>24</sup> The obvious difficulty of the doctrine is that it posits the use of armed force in self-defense, without the constraints of Security Council authorization, against criminal organizations operating in the territory of a sovereign State when that State has not, as a matter of law, perpetrated an armed attack against the United States. Moreover, if the attacks of September 11th were considered armed attacks by a State for purposes of the U.N. Charter that could justify the U.S. military response against Afghanistan, this fact alone would not support attacks against other States as preventive measures. Indeed, the pre-emption doctrine advocated by the Bush administration is in direct contravention of article 2(4) of the U.N. Charter, and

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the Charter. Sadat & Carden, *supra* note 17, at 429 n.294, 434-36. Cf. W. Michael Reisman, *International Legal Response to Terrorism*, 22 HOUS. J. INT’L L. 3, 8 (1999). Those supporting the use of force argue that the criminal enforcement model is part of the problem, not the solution. Abraham D. Sofaer, *Playing Games with Terrorists*, 36 NEW ENG. L. REV. 903, 904 (2002).

24. The letter to the United Nations refers to any terrorist organization “of global reach.” Letter of October 7, 2001, *supra* note 13.

undermines the most fundamental principles of the international legal order—the prohibition on the use of force and the sovereign equality and territorial integrity of States.

It is also not difficult to imagine the corrosive effect that adopting the U.S. view as a matter of international law would have on international peace and security. Under the Bush doctrine, if the government decided to prosecute the “war” against al Qaeda operatives worldwide, it could potentially result in military incursions in any of the sixty countries in which al Qaeda members are reportedly found,<sup>25</sup> and was, in fact, invoked as a *causus belli*, to justify the invasion of Iraq. Yet it cannot seriously be argued that the U.N. Charter envisaged that a country would be able to use force on such a basis against nearly one-third of the United Nations’ member states without prior Security Council authorization.<sup>26</sup> International law is largely a product of State practice and reciprocity. To put it neatly, should the U.S. view prevail, the doctrine of unilateral self-defense against terrorist attacks could presumably be applied by any country, including, for example, Indonesia, India, Israel, Lebanon, Spain, the United

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25. James Dao, *A Nation Challenged: The Threats; Defense Secretary Warns of Unconventional Attacks*, N.Y. TIMES, Oct. 1, 2001 (late ed.), at B5; Robert D. McFadden, *A Nation Challenged: An Overview: Nov. 18, 2001; Seeking a Kabul Coalition, Killings in Kunduz and Bodies in the Rubble*, N.Y. TIMES, Nov. 19, 2001 (late ed.), at B1.

26. See, e.g., Oscar Schachter, *Self-Defense and the Rule of Law*, 83 AM. J. INT’L L. 259, 273 (1989).

Kingdom, Pakistan, Russia, and China, each of which has recently suffered terrorist attacks. The potentially destabilizing effect of the Bush doctrine, if taken to its logical extension, is therefore quite substantial. As Professor Schachter wrote some years ago:

The right of self-defense, “inherent” though it may be, cannot be autonomous. To consider it as above or outside the law renders it more probable that force will be used unilaterally and abusively. No state or people can face that prospect with equanimity in the present world . . . . [S]elf-defense must be regarded as limited and not only legitimated by law . . . . The political will that is necessary depends on understanding both the danger of unbridled force and the necessity of legal and institutional control . . . . It is through such concrete measures that international law may in time strengthen the national security of all states.<sup>27</sup>

It is true that the lack of any real objection to the military campaign initiated on October 7, 2001 suggests that the world community viewed the United States’ actions in Afghanistan as legitimate acts of war and may lend some implicit support for the Bush Doctrine, writ large. However, the vociferous objection of most of the United Nations’ membership to subsequent U.S. proposals to effectuate “regime change” in Iraq,<sup>28</sup> an action justified

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27. *Id.* at 277.

28. The Turkish Parliament rejected the U.S. request to stage troops on the Iraqi border; the Arab League agreed on a final statement rejecting any war against Iraq; France and Russia indicated their intent to veto a Resolution calling for the use of force against Iraq, and the U.S. therefore decided to proceed to war without a

at least in part as a question of “self-defense,” suggests that no such new understanding was established either by the attacks of September 11th or “Operation Enduring Freedom” itself. Moreover, although the rhetoric of a legal “war against terrorism” was well-accepted by many leading academics and policy makers in the United States (particularly right after September 11th), foreign commentators, particularly in Europe and the Middle East, have been much more skeptical of this claim. Indeed, many Europeans find the American use of the term unsupported by law and have expressed alarm at the implications of a “global war” against terrorism, even if they have supported the military response against the Taliban and al Qaeda in Afghanistan.<sup>29</sup> Finally, even if the

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Resolution from the Security Council. Joel Brinkley, *Turkey’s ‘No’ Frustrates War Plans: Arab Leaders Add to Setbacks for U.S. Policy*, INT’L HERALD TRIB., Mar. 3, 2003, at 1; Jon Sawyer, *Bush: Exile or War; President Gives Saddam Hussein 48 Hours to Leave Iraq, or else U.S. Will Invade*, ST. LOUIS POST-DISPATCH, Mar. 18, 2003, at A1. According to press reports, the countries appearing to back the use of force were Albania, Bulgaria, Croatia, Czech Republic, Denmark, Estonia, Hungary, Italy, Latvia, Lithuania, Macedonia, Poland, Portugal, Romania, Slovakia, Slovenia, Spain and the United Kingdom. Geoffrey Kemp, *Colin Powell and the Gangs of Europe*, IN THE NAT’L INTEREST, Feb. 12, 2003, <http://www.inthenationalinterest.com/articles/vol2issue6/vol2issue6kempfv.html>.

29. See generally Georges Abi-Saab, *There Is No Need to Reinvent the Law*, in A DEFINING MOMENT—INTERNATIONAL LAW SINCE SEPTEMBER 11, CRIMES OF WAR PROJECT, <http://www.crimesofwar.org/sept-mag/sept-abi.html>; Antonio Cassese, *Terrorism Is Also Disrupting Some Crucial Legal Categories of International Law*, 12 EUR. J. INT’L L. 993 (2001); Luigi Condorelli, *Les Attentats du 11 Septembre et leurs suites: où*

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meaning of article 51 can be stretched to encompass armed attacks by non-state actors, a proposition that is neither self-evident nor without controversy,<sup>30</sup> there is no

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*va le droit international?*, 105 REVUE GÉNÉRAL DE DROIT INTERNATIONAL PUBLIC 829 (2001); Frédéric Mégret, 'War'? *Legal Semantics and the Move to Violence*, 13 EUR. J. INT'L L. 361 (2002).

30. The argument for suggesting that article 51 supports military attacks against non-state actors rests upon the differences in wording of article 51 and article 2(4). Because article 51 does not include the words "Member State," whereas article 2(4) does, they are asymmetric. This asymmetry has led some writers to conclude that this difference implies that although article 2(4) only forbids attacks against *Member States*, article 51 permits military responses in self-defense even against non-state actors. *See, e.g.*, Sean D. Murphy, *Terrorism and the Concept of "Armed Attack" in Article 51 of the U.N. Charter*, 43 HARV. INT'L L. J. 41, 50 (2002). However, although articles 2(4) and 51 are indeed asymmetric, there appears to be no textual support in the Charter or its *travaux préparatoires* for the proposition that criminal actions committed by non-state actors fall within article 51 of the Charter. None of the major commentaries on the U.N. Charter appear to support this reading of articles 2(4) and 51. *See, e.g.*, THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 106-28, 661-78 (Bruno Simma ed., 1994); CHARTER OF THE UNITED NATIONS 43-55, 342-53 (Leland M. Goodrich et al. eds., 1969); LA CHARTE DES NATIONS UNIES 115-28, 771-95 (Jean-Pierre Cot & Alain Pellet eds. 2d ed., 1991) [hereinafter PELLET COMMENTARY]. Indeed, Casesse's commentary on article 51 in the PELLET COMMENTARY suggests precisely the opposite. PELLET COMMENTARY, *supra* at 772. This is perhaps because such an interpretation would, in most circumstances, violate the Charter and its purposes. Any sustained military action by a State in response to a terrorist attack against a non-state actor, will violate the prohibition of article 2(4) because the territory attacked will almost always be that of a Member State. Unless the State upon whose territory the terrorist group appears to be headquartered is itself responsible for the attack, to use force against that State in response to a terrorist attack that appears to emanate from a group found in that State can be likened to the collective punishment of the

evidence, other than assertions by a limited number of countries, including the United States, that this principle permits a country to wage war against States in which terrorists are located on the grounds that the terrorists have created an armed conflict to which the U.S. is responding. That would, of course, be a complex question of State responsibility indeed.

To the extent the international community supported the U.S. military response to the September 11th attacks, I believe it did so on the understanding that a fairly classical interpretation of the doctrine of self-defense applied because the Taliban could be considered legally responsible for al Qaeda's crimes.<sup>31</sup> Alternatively, it

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citizenry of the State in question. For the view that non-state actors may commit armed attacks that trigger the application of article 51, see generally Jordan J. Paust, *Use of Armed Force Against Terrorists in Afghanistan, Iraq, and Beyond*, 35 CORNELL INTL. L.J. 533 (2003).

31. The United Kingdom published a paper on October 4, 2001, detailing the links between al Qaeda and the Taliban. Ministry of Defense, Responsibility for the Terrorist Atrocities in the United States, 11 September 2001 (Oct. 4, 2001), available at <http://www.operations.mod.uk/veritas/evidence.htm> (last visited Aug. 2, 2007). Of course, under the current law of State Responsibility, establishing Afghan liability for actions of al Qaeda, may be difficult. Although articles 4 to 11 (attribution of conduct to a state) and the holding of the International Court of Justice in the *Nicaragua* case do not appear to suggest an immediate theory of responsibility given that the Taliban did not appear to direct, control or acknowledge or adopt the actions of al Qaeda, if it can nevertheless be said that the Taliban permitted al Qaeda to engage in acts of international terrorism and that it breached its obligation to prevent al Qaeda's actions in a "gross and systematic" fashion, it could perhaps be argued that the Taliban was responsible for al

could take comfort in the adoption of Security Council Resolutions 1368 and 1373 which, although notably silent on the use of force, recognize “the inherent right of self defense.”<sup>32</sup> Support, either tacit or explicit, for the Afghanistan campaign seems to be limited to the particular facts of that case. These included two Security Council resolutions expressing support for the principle of self-defense; persistent calls to the Taliban, the de facto government of the country to “hand over” the suspected terrorists; a convincing public, prima facie case against the suspected terrorist organization; a government that was unrecognized by the United Nations and nearly every other country in the world,<sup>33</sup> and prior demands to that government from the Security

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Qaeda’s activities. See *Military and Paramilitary Activities (Nicar v. U.S.)*, 1986 I.C.J. 14 (June 27). A full discussion of this problem is beyond the scope of this Essay.

32. The meaning of the Resolutions is quite ambiguous, although at least some governments have indicated that it has provided legitimacy to the U.S. led invasion of Afghanistan. See Office of the Press Secretary, President Welcomes President Chirac to White House (Nov. 6, 2001) (statement of French President Jacques Chirac).

33. Some have argued that the U.S. did not invade Afghanistan at all but responded to an invitation from the recognized government to remove the Taliban from power. See Judy Aita, *Islamic State of Afghanistan Willing to Hunt Bin Laden*, U.N. Ambassador Says Afghans Tired of Taliban, Usama bin Laden, U.S. Department of State International Information Programs (Sept. 18, 2001), available at

<http://www.globalsecurity.org/military/library/news/2001/09/mil.010918-usia04.htm> (last visited Aug. 2, 2007).

Council demanding bin Laden's surrender for other crimes.<sup>34</sup>

### **Terrorism as an International Crime**

We have seen that although an argument can be made that the acts of September 11th may be characterized as acts of war to which States may respond in self-defense, unless very narrowly framed, that theory fits uneasily within the framework of the United Nations Charter. Moreover, particularly if it is extended beyond the facts of the particular case, it has some very negative implications for the maintenance of international peace and security. Although not the principle focus of this Essay, it is worth noting that this argument may also give rise to several additional legal consequences.<sup>35</sup>

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34. S.C. Res. 1267, U.N. SCOR, 55th Sess., 4051st mtg., U.N. Doc. S/Res/1267 (1999); S.C. Res. 1333, U.N. SCOR, 55th Sess., 4251st mtg., U.N. Doc. S/Res/1333 (2000).

35. *U.S. Asks Agency to Dismiss Complaint About Cuba Prisoners*, WALL ST. J., Apr. 18, 2002. "President George W. Bush has designated six captives suspected of involvement in terrorism as eligible to be tried before military tribunals, setting in motion the process that officials say will soon lead to the use of the first such tribunals by the United States in more than 50 years." Neil A. Lewis, *Bush Moves to Begin Military Trials of Terror Suspects*, INT'L HERALD TRIB., July 5, 2003. However, the response from overseas has created further speculation as to the Bush Administration's approach to the issue. *Just Don't Kill Them: American Military Justice, Seen From Overseas*, THE ECONOMIST, July 12, 2003, at 28. See also *Unjust, Unwise, UnAmerican—Why America's Military Tribunals Are Wrong*, THE ECONOMIST, July 12, 2003, at 9.



First, to the extent that al Qaeda is treated as an enemy state that is “at war” with the United States, it would follow that its attacks on military targets, such as the U.S.S. Cole and even the Pentagon, were arguably lawful, which they clearly would not be if they were characterized as the acts of organized international criminals. Of course, treating these acts as war crimes rather than crimes of international terrorism has certain domestic consequences that the U.S. government may see as desirable, such as the opportunity to subject the accused to military, rather than civilian courts (or kill them outright); the general enlargement of the President’s power over the investigation and prosecution of the accused, including detention abroad, rather than in U.S. jails; the avoidance of the Posse Comitatus Act,<sup>36</sup> and the continued ability to use military force to attempt

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36. 18 U.S.C. § 1385 (2002). The Posse Comitatus Act provides that “[w]hoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or the Air Force as a posse comitatus or otherwise to execute the laws shall be fined under this title or imprisoned not more than two years, or both.” *Id.*

The term, which literally means “power of the county,” refers to the common law right of the sheriff to commandeer the assistance of citizens in enforcing the law. U.S. troops were used to enforce domestic law up until the years of Reconstruction after the Civil War, when, as a result of the soldiers’ excesses, a successful movement was waged in Congress to eliminate the practice. The act was passed in its original form in 1878 and was codified at 10 U.S.C. § 15 (current version of 18 U.S.C. § 1385 (2002)). Brian L. Porto, Annotation, *Construction and Application of Posse Comitatus Act (18 U.S.C.A. § 1385), and Similar Predecessor Provisions, Restricting Use of United States Army and Air Force to Enforce Laws*, 141 A.L.R. FED. 409 (2003).

to apprehend the terrorists and attack the terrorist networks. The question that remains, however, is whether it is necessary or even desirable to bend the law in such a way both domestically and as a matter of international law for the United States to achieve its legitimate security goals.

A decade or two ago, the answer to this question might have been less clear. Although the second half of the twentieth century witnessed tremendous growth in the normative content of international criminal law with the adoption of several important counter-terrorism treaties, including a series of treaties relating to air safety and airplane hijacking, maritime navigation, fixed platforms on the continental shelf, hostage taking, and the safety of internationally protected persons,<sup>37</sup> the

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37. See Tokyo Convention on Offenses and Certain Other Acts Committed on Board Aircraft, Sept. 14, 1963, 20 U.S.T. 2941, 704 U.N.T.S. 219; Hague Convention on the Suppression of Unlawful Seizure of Aircraft (Hijacking), Dec. 16, 1970, 22 U.S.T. 1641, 860 U.N.T.S. 105; Montreal Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation (Sabotage), *opened for signature* Sept. 23, 1971, 24 U.S.T. 564, 974 U.N.T.S. 177; Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, *opened for signature* Mar. 10, 1988, 1678 U.N.T.S. 349; Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf, *opened for signature* Mar. 10, 1988, 1678 U.N.T.S. 201 (1988); International Convention against the Taking of Hostages, *opened for signature* Dec. 17, 1979, T.I.A.S. No. 11081, 1316 U.N.T.S. 205; Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, *opened for signature* Dec. 14, 1973, 28 U.S.T. 1975, 1035 U.N.T.S. 167.

international community was not united in its condemnation of international terrorism. Persistent debates remained whether there was any uniform definition of the crime. In particular, members of the non-aligned group of countries argued for the exclusion of violent actions undertaken by groups fighting in the struggle of national liberation movements.

Moreover, despite the significant progress made in criminalizing particular offenses through the adoption of international treaties, there is little doubt that enforcement of those treaties was problematic. Most anti-terrorism conventions impose a form of “universal jurisdiction by treaty”<sup>38</sup> granting any State to which the alleged terrorist travels jurisdiction to prosecute him or her. Additionally, these treaties generally impose upon States the duty to try or extradite international terrorists (*aut dedere, aut judicare*), and in this manner create a net through which the terrorist has difficulty escaping. Yet these instruments notwithstanding, legal experts vigorously debated whether terrorism could be considered a universal jurisdiction crime, due, in part, to the difficulties concerning its definition. Additionally, the crucial enforcement mechanism of the counter-terrorism treaties, *aut dedere, aut judicare*, was generally not believed to be a norm of customary international law, although certain prominent scholars argued to the contrary.<sup>39</sup> Thus, to the extent a terrorist remained on the

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38. JORDAN J. PAUST ET AL., INTERNATIONAL CRIMINAL LAW: CASES AND MATERIALS 155 (3d ed. 2006).

39. *See generally* M. CHERIF BASSIOUNI & EDWARD M. WISE, *AUT DEDERE, AUT JUDICARE: THE DUTY TO EXTRADITE OR PROSECUTE IN INTERNATIONAL LAW* (1995).

territory of a “friendly” or incompetent State, that is, a State which was either powerless or not inclined to investigate and punish the criminal in question, that terrorist could largely avoid the application of international law.

Many of these difficulties have been ameliorated in recent times, due to the progress not only with regard to the enforcement of international norms condemning terrorism, but in parallel areas of international criminal law. To begin with, in 1993 and 1994 the Security Council took the unprecedented step of establishing the two ad hoc tribunals for the former Yugoslavia and Rwanda.<sup>40</sup> Although there was initial skepticism as to whether those tribunals would be able to indict and apprehend those thought most culpable in the wars and atrocities committed in Rwanda and the former Yugoslavia, they have been effective and successful, even if not perfect, institutions. Building upon those precedents, the International Criminal Court treaty was proposed, negotiated, and adopted and entered into force decades sooner than most would have thought

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40. The ICTY was established by S.C. Res. 808 2, U.N. Doc. S/Res/808 (Feb. 22, 1993). The Tribunal’s statute appears in an Annex to the Secretary-General’s report. The Secretary-General, *Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808*, U.N. Doc. S/25704/Add. 1 (May 19, 1993). The Security Council adopted the Secretary-General’s draft of the statute without change in Resolution 827. S.C. Res. 827, U.N. Doc. S/Res/827 (May 25, 1993); The ICTR was established by Security Council Resolution 955, S.C. Res. 955, ¶2, U.N. Doc. S/Res/955 (Nov. 8, 1994).

possible.<sup>41</sup> Those institutions' jurisdiction does not encompass the crime of terrorism, except to the extent that acts of terrorism could be considered crimes against humanity. But the Lockerbie trial, which did address acts of terrorism, is an example of international enforcement that was undertaken by the international community and might serve as an example, even with its flaws.

The last decade also brought progress in achieving an international consensus on the per se illegality of attacks on civilian populations. In 1994 the General Assembly took the position that "criminal acts intended or calculated to provoke a state of terror in the general public, a group of persons or particular persons for political purposes are in any circumstance unjustifiable."<sup>42</sup> The Declaration also required States to "refrain from organizing, instigating, assisting or participating in terrorist acts in territories of other states, or from acquiescing in or encouraging activities within their territories directed towards the commission of such acts."<sup>43</sup> The 1994 Declaration was followed two years later by a second Declaration along the same lines, suggesting an increased willingness of the international

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41. See generally LEILA NADYA SADAT, *THE INTERNATIONAL CRIMINAL COURT AND THE TRANSFORMATION OF INTERNATIONAL LAW: JUSTICE FOR THE NEW MILLENNIUM* (2002); Sadat & Carden, *supra* note 17.

42. Declaration on Measures to Eliminate International Terrorism, G.A. Res. 49/60, U.N. Doc. A/Res/49/60 (Feb. 17, 1995).

43. *Id.*

community to address the problem of terrorism and terrorist havens.<sup>44</sup>

The attacks of September 11th, like the tragic wars in the former Yugoslavia, the Rwandan genocide, and the horrific bombing of Pan Am 103, presented the world with yet another opportunity to further strengthen the enforcement of international criminal law norms, and fill the gap in enforcement that has plagued efforts to control international terrorists. Indeed, if we leave aside the question whether the acts of September 11th were armed attacks or war crimes, they could clearly be characterized as acts of international terrorism<sup>45</sup> and crimes against humanity.<sup>46</sup> They involved the intentional killing (murder) of several thousand civilians and appear to have been carried out pursuant to a widespread and arguably systematic attack against a civilian population pursuant to the policy of the al Qaeda criminal organization, thus fulfilling the definition of crimes against humanity in the Rome Statute for the

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44. Declaration on Measures to Eliminate International Terrorism, G.A. Res. 51/210, U.N. Doc. A/Res/51/210 (Jan. 16, 1997).

45. This Essay, admittedly, does not address the often difficult question of terrorism's definition. For a discussion of this question, see generally James A.R. Nafziger, *The Grave New World of Terrorism: A Lawyer's View*, 31 DENV. J. INT'L. L. & POL'Y 101 (2003).

46. To the extent that the al Qaeda movement indiscriminately targets persons of particular nationalities for extermination, its actions could even be considered genocidal in character. *See also id.* at 108.

International Criminal Court.<sup>47</sup> Moreover, there is no doubt that the attacks violated several of the international terrorism conventions referred to earlier,<sup>48</sup> and that the perpetrators could be prosecuted in U.S. courts under several different federal statutes.<sup>49</sup>

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47. Rome Statute, *supra* note 19, art. 7(1)(a).

48. *See supra* note 37 and accompanying text.

49. Obviously, the death of the September 11th hijackers precludes their prosecution. However, the indictments of other notable terror suspects are instructive regarding possible criminal charges brought against their accomplices. For example, the indictment of John Phillip Walker Lindh included the following charges: conspiracy to murder nationals of the United States, in violation of 18 U.S.C. § 2332(b)(2) (2002); conspiracy to provide material support and resources to foreign terrorist organizations (Harakat ul-Mujahideen and al Qaeda), in violation of 18 U.S.C. § 2339(b) (2002); conspiracy to contribute services to al Qaeda, in violation of 31 C.F.R. §§ 595.205 and 595.204 and 50 U.S.C. § 1705(b) (2002). Lindh pled guilty to a charge of supplying services to the Taliban, in violation of 50 U.S.C. § 1705(b) (2002), 18 U.S.C. § 2 (2002). *United States v. Lindh*, 227 F. Supp. 2d 565 (E.D. Va. 2002). Richard Reid was indicted for attempted use of a weapon of mass destruction, in violation of 18 U.S.C. § 2332a(a)(1) (2002); attempted homicide, in violation of 18 U.S.C. § 2332 (2002); placing explosive devices on an aircraft, in violation of 49 U.S.C. §§ 46505(b)(3) and (c) (2002); attempted murder, in violation of 49 U.S.C. § 46506(1) (2002) and 18 U.S.C. § 1113 (2002); interference with flight crew members and attendants, in violation of 49 U.S.C. § 46504 (2002); attempted destruction of aircraft, in violation of 18 U.S.C. §§ 32(a)(1) and (7) (2002); using destructive device during and in relation to a crime of violence, in violation of 18 U.S.C. § 924(c) (2002); and attempted wrecking of mass transportation vehicle, in violation of 18 U.S.C. § 1993(a)(1) and (8) (2002). Note that Reid's motion to dismiss the final charge was granted. *United States v. Reid*, 206 F. Supp. 2d 132 (D. Mass. 2002). On October 4, 2002, Reid pleaded guilty to eight terrorism-related offenses and

The U.S. government and the international community generally characterized the attacks of September 11th as criminal acts, as evidenced by the Security Council Resolutions adopted after the fact. Security Council Resolution 1373 is extraordinary in this regard. First, building upon the experience of the past decade, the Council assumed that the offenses were crimes of universal international jurisdiction that could be defined by the international community (and presumably could be the subject of adjudication by an international tribunal) and followed by international enforcement action. That is, the Security Council, invoking its Chapter VII authority, has suggested, through its pronouncements after the fact, that the acts of September 11th amounted to international crimes over which the international community (and presumably states, a subject beyond the scope of the present Essay)

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was sentenced to serve the remainder of his life in prison. *United States v. Reid*, 369 F.3d 619 (1st Cir. 2004). Finally, Zakarias Moussaoui was indicted for the following: conspiracy to commit acts of terrorism transcending national boundaries, in violation of 18 U.S.C. §§ 2332b(a)(2) and (c) (2002); conspiracy to commit aircraft piracy, in violation of 49 U.S.C. §§ 46502(a)(1)(A) and (a)(2)(B) (2002); conspiracy to destroy aircraft, in violation of 18 U.S.C. §§ 32(a)(7) and (34) (2002); conspiracy to use weapons of mass destruction, in violation of 18 U.S.C. § 2332(a)(a) (2002); conspiracy to murder United States employees, in violation of 18 U.S.C. §§ 1114 and 1117 (2002); and conspiracy to destroy property, in violation of 18 U.S.C. §§ 844(f), (i), (n) (2002). *United States v. Moussaoui*, 333 F.3d 509, 509 (E.D. Va. 2003). In 2005, Moussaoui pled guilty to all charges and was sentenced to life in prison without the chance of parole. Neil A. Lewis, *Moussaoui Given Life Term by Jury over Link to 9/11*, N.Y. TIMES, May 4, 2006, at A1.



may assert universal international jurisdiction.<sup>50</sup> Although this is consistent with the position the Council has taken in asserting jurisdiction over the crimes committed in the former Yugoslavia and Rwanda, it is a dramatic extension of those precedents because it suggests that they now apply to acts of international terrorism.

Moreover, as alluded to above, there was substantial debate prior to September 11th, 2001, whether terrorism was a universal jurisdiction crime at all. Many national tribunals had opined that it was not, and the *Princeton Principles of Universal Jurisdiction*, adopted in January 2001, nine months prior to the attack, omitted terrorism from the list of crimes over which States could presumptively exercise universal jurisdiction.<sup>51</sup> Whether Resolution 1373 is the codification of custom, instant custom, or a new form of Security Council “legislation,”<sup>52</sup> its adoption may suggest a sea change in *opinio juris* on the issue of terrorism as a universal

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50. SADAT, *supra* note 41, ch. 5.

51. THE PRINCETON PRINCIPLES ON UNIVERSAL JURISDICTION, Principle 2(1) (Princeton Program in Law and Public Affairs, 2001). The Restatement of Foreign Relations Law (Third) suggests that certain acts of terrorism are increasingly accepted as universal jurisdiction crimes, such as “assaults on the life or physical integrity of diplomatic personnel, kidnapping, and indiscriminate violent assaults on people at large.” RESTATEMENT THIRD OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 404 cmt. (a) (1986).

52. See generally Paul C. Szasz, *The Security Council Starts Legislating*, 96 AM. J. INT’L L. 901 (2002).

jurisdiction crime, enacted against the backdrop of a custom that had already been evolving in that direction.

In addition, Resolution 1373 appears to suggest that the principle *aut dedere, aut judicare* is also a matter of customary international law. That is, to the extent a crime is a universal jurisdiction crime, this principle appears to apply as a matter of customary international law. This would represent quite an advance in the enforcement of international criminal law norms by national legal systems. Resolution 1373 also provides that States must “deny safe haven to those who finance, plan, support, or commit terrorist acts or provide safe havens,” suggesting, like General Assembly Resolutions 49/60 and 51/210,<sup>53</sup> that States may not serve as safe havens for terrorists without running afoul of international law. The question that remains is, of course, what consequences flow from a State’s breach of this obligation.

Given the general prohibition in the U.N. Charter against the unilateral use of force by States in resolving international disputes, the course of action most consonant with the existing framework of international law is to request the Security Council to intervene in cases involving terrorist attacks launched from one State against the territory of another.<sup>54</sup> Although some have

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53. See *supra* notes 42-44 and accompanying text.

54. If the Council refuses to act, the situation obviously becomes more complex. But the September 11<sup>th</sup> attacks did not present this problem.

made the case for the legality of the October 7th military response of the United States despite the absence of any explicit authorization of the Security Council, it should be noted that the facts of that case are quite unique. The Afghanistan situation involved attacks significant both in scale and symbolism, prior demands from the Security Council to the Taliban to turn over the individuals suspected of their planning, at least some evidence of complicity between the terrorist organization and the de facto government of Afghanistan, virtually universal and worldwide condemnation of the attacks themselves, and few questions as to their source. In other cases, the responsibility of a State may be much less evident, and the unanimity of the international community much less sure. In the case of September 11th, the United States should have obtained a third Security Council resolution to enforce Resolution 1373. This final Resolution, like the famous Resolution 678 that authorized Operation Desert Storm, would have required the Taliban regime of Afghanistan to turn over Osama bin Laden and his accomplices, based upon evidence establishing the equivalent of “probable cause”<sup>55</sup> that he and the al Qaeda network were responsible for the attacks of September 11th. The resolution could have set a

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55. For the argument that “clear and convincing evidence” of a state’s complicity should be the standard for a unilateral action based on self-defense in response to a terrorist attack launched from the territory of that State, see Mary Ellen O’Connell, *Evidence of Terror*, 7 J. CONFLICT & SECURITY L. 19, 21-28 (2002). This is not quite the same issue as what evidence should be required in order for the Security Council to issue the equivalent of an “arrest warrant” for the capture of a suspect in a case of international terrorism.

deadline for doing so, and authorized States to use “all necessary means” to effectuate his capture if the Taliban refused to surrender him, just as Resolution 678 did in 1990 with regard to the Iraqi invasion of Kuwait.<sup>56</sup> There is no doubt that this hypothetical international “arrest warrant” would have been issued by the Security Council at U.S. urging—the world expressed both its sorrow and solidarity with the United States in the wake of the September 11th attacks, and at the time Resolutions 1368 and 1373 were adopted, bin Laden was threatening the United Nations as a future target of his terrorist network. In this way, the U.S.-led military action and response to international terrorism would have set an important precedent and would have reinforced the normative content and institutional framework of international law.

## **Conclusion**

The temptation to jettison legal constraints is understandable when faced with a hostile enemy that does not itself obey the law. Perhaps there are times when law fails, or when civil disobedience is appropriate if law itself becomes illegal or immoral. But the attacks of September 11th did not present such a case. Indeed, the hideousness of the acts themselves so shocked the international community that they provided a unique opportunity to strengthen a growing international consensus condemning attacks on civilians whatever the

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56. S.C. Res. 678, U.N. Doc. S/Res/678 (Nov. 29, 1990). For an excellent treatment of recent Security Council practice involving Chapter VII see Mary Ellen O’Connell, *The U.N., NATO, and International Law After Kosovo*, 22 HUM. RTS. Q. 57, 67-70 (2000).

motivation.<sup>57</sup> This is not to suggest that a military response was illegal under the circumstances, only that any military actions taken must, to be effective in the long term, employ force in service of the rule of law. The ultimate test of America's strength will not be its ability to respond militarily to threats all over the world, threats that are by definition, random, designed to inflict terror, and carried out by very small numbers of individuals willing to die in the process of carrying out their criminal design. Instead, America's strength will lie in its ability to persuade others to join its cause against international terrorism and to establish international institutions and international norms to do so, norms which States are willing to enforce domestically.<sup>58</sup>

The attacks of September 11th presented the United States with an extraordinary opportunity to reshape the norms of international law to promote their effective enforcement. International conventions against terrorism that proved ineffective to the extent terrorists could take refuge in States that had either unwillingly or willingly become accomplices to their action were to be enforced by Security Council action in the event that other means proved ineffective and the terrorists' activities threatened the maintenance of international peace and security.

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57. Anne-Marie Slaughter, *The Future of International Law: Ending the U.S.-Europe Divide*, A DEFINING MOMENT—INTERNATIONAL LAW SINCE SEPTEMBER 11, Crimes of War Project, <http://www.crimesofwar.org/sept-mag/sept-slaughter.html> (last visited Aug. 2, 2007).

58. Cf. JOSEPH S. NYE, JR., *THE PARADOX OF AMERICAN POWER* (2002). See also Harold Hongju Koh, *On American Exceptionalism*, 55 STAN. L. REV. 1479 (2003).

Moreover, international military action, guided by law and explicitly authorized by a resolution of the Security Council would seemingly have proven no less effective than a military campaign launched on more ambiguous terms.

Viewing the anti-terrorism campaign in Afghanistan as an international criminal law enforcement operation, rather than an act of retribution would also have created a positive precedent for future cases. The Bush Administration's unilateralist approach provides States wishing to do so with the opportunity to eliminate dissidents and those otherwise opposed to their rule, including governments or rebels in neighboring States, by labeling them "terrorists," and therefore not subject to the normal legal constraints that govern the use of force.<sup>59</sup> This erosion of the rule of law is in the interest of no State in the world, not even the world's only superpower. While the terrorists of September 11th may have been self-styled warriors, they and their ilk are not combatants engaged in international armed conflict, but criminals that require "arrest" and deterrence.<sup>60</sup> Although it is now fashionable to suggest that we must abandon liberal regimes in favor of a new Hobbesian reality when faced with the menace of ruthless international criminals, Hobbes himself did not suggest that "going it alone" was the solution to survival in the state of nature. Instead, because even the strongest man

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59. This has occurred in Russia, China, Israel, Zimbabwe and Uzbekistan, for example.

60. *See also* Reisman, *supra* note 23, at 3.

can be felled by the weakest, with a knife in the back as he sleeps, cooperation and trust are prerequisites for survival in a world where life is, otherwise, nasty, brutish and short.<sup>61</sup>

One can only hope that, with time, the U.S. government will return to the measured process of building effective multilateral regimes, and abandon the unilateralist path it now appears to tread. There may be a place or even a need for the use of force in response to the deadly acts of international terrorists, but military power must be employed judiciously and subject to the constraints of international law. Bombing bin Laden may salve the pain of those victimized by his crimes, but it is unlikely either to bring him to bay or prevent the commission of future atrocities.<sup>62</sup> This is particularly true if the military action and subsequent policies of the U.S. government further erode respect for the rule of law, and lessen the moral leadership that the United States could otherwise provide.

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61. Of course, under Hobbes' scheme, for cooperation to work there must be some power of enforcement, which is why he has often been cited for the proposition that the state of nature is preferable to cooperation in international affairs, unless it can be argued that the current collective security mechanism of the U.N. or the new International Criminal Court can provide such an enforcement mechanism. Thanks to Professor Larry May for bringing his wonderful analysis of Hobbes to my attention. See LARRY MAY, *CRIMES AGAINST HUMANITY: A NORMATIVE ACCOUNT* (2005).

62. Cf. Michele L. Malvesti, *Bombing bin Laden: Assessing the Effectiveness of Air Strikes as a Counter-Terrorism Strategy*, 26 *FLETCHER FOR. WORLD AFF.* 17 (2002). Note that I originally authored this Essay in 2002. As of August 23, 2007, bin Laden remains at large.

# Nuremberg Trials

David Scheffer\*

## Nuremberg Trials

On November 20, 1945, six months after the surrender of Nazi Germany to allied forces, twenty one military, political, media, and business leaders of the Third Reich filed into the dock of the Palace of Justice in the devastated and occupied German city of Nuremberg. There they stood trial for the most heinous crimes known to humankind, which were committed during World War II. Over the course of the next eleven months, unprecedented trials that profoundly influenced the development of international law and how governments must treat civilian populations unfolded. There were moments of lofty rhetoric and high drama, but often there was also the tedium that has characterized most criminal trials throughout history.

The four major victorious allied powers in the European theater of World War II—the United States, the United Kingdom, France, and the Soviet Union—met

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in London during the summer of 1945. On August 8, 1945, these nations entered into an international agreement, known as the London Charter, that created a special court called the International Military Tribunal (IMT). The IMT consisted of an organizing charter and constitution “for the just and prompt trial and punishment of the major war criminals of the European Axis.” The aggressive military assaults of the German army, the criminal Nazi occupation policies in numerous conquered lands, and the Nazi-inspired extermination of millions of Jews and other victims seemed at the time to provide ample justification for establishing the IMT.<sup>1</sup>

During the height of armed combat, on November 1, 1943, the Foreign Ministers of the United States, United Kingdom, and the Soviet Union declared in Moscow that their war efforts would not prejudice “the case of the major criminals whose offenses would have no particular location and who will be punished by a joint decision of the Governments of the Allies.”<sup>2</sup> They thus established a distinction between major war criminals in leadership positions and the many thousands who committed crimes in the field.<sup>3</sup> This differentiation set the stage for the Nuremberg trials of prominent leaders in 1945 and 1946, followed by thousands of trials of war criminals of lesser

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<sup>1</sup> See ANN TUSA & JOHN TUSA, *THE NUREMBERG TRIALS* 71-84 (Atheneum 1984); TELFORD TAYLOR, *THE ANATOMY OF THE NUREMBERG TRIALS* 56-77 (Alfred A. Knopf 1992); WHITNEY R. HARRIS, *TYRANNY ON TRIAL* 11-24 (Southern Methodist University Press 1999)(1954).

<sup>2</sup> TUSA, *supra* note 1, at 23-24.

<sup>3</sup> *Id.*

stature in the courts of the four occupying powers of Germany.

### **Alternatives to Nuremberg**

During World War II, there were many competing ideas about how best to deal with the war criminals of the Third Reich, and the IMT's creation was by no means a certainty until the very end of the war. There always was an expectation that soldiers charged with conventional war crimes would be prosecuted. However, enemy leaders responsible for the atrocities of the Third Reich might have faced an entirely different fate, consistent with the Moscow Declaration. For instance, British officials, aware of a vengeful British public, advocated summary execution of the fifty to one hundred top Nazi leaders. British Prime Minister Winston Churchill wrote to Soviet leader Josef Stalin in September 1944, arguing that such leaders should be executed as "outlaws" within six hours of capture, and that "the question of their fate is a political and not a judicial one."<sup>4</sup> Such plans were kept secret, however, so as to avoid German reprisals against British prisoners of war. In late 1943, Stalin recommended to Churchill and President Franklin D. Roosevelt that 50,000 to 100,000 of the German Commanding Staff "must be physically liquidated."<sup>5</sup>

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<sup>4</sup> See, e.g., RICHARD OVERY, FROM NUREMBURG TO THE HAGUE 3 (Philippe Sands, ed., Cambridge University Press 2003).

<sup>5</sup> TUSA, *supra* note 1, at 24; HARRIS, *supra* note 1, at 496-97.

Within the U.S. government, there were strong advocates for summary execution. Treasury Secretary Hans Morgenthau, who had distinguished himself early in the war as a fierce opponent of the Nazis' anti-Jewish atrocities, was opposed to war crimes trials. In November 1944 he submitted a summary execution plan that initially targeted five million Nazi Party members but settled on 2,500 members. Roosevelt was prepared to adopt Morgenthau's plan, but Secretary of War Henry Stimson argued vigorously for war crimes trials with basic rights of due process drawn from the U.S. Bill of Rights. He believed that such trials would establish individual responsibility for the crimes of the Nazi leadership and uphold democratic notions of justice. Stimson warned, "Remember this punishment is for the purpose of prevention and not for vengeance."<sup>6</sup> The tide turned in Stimson's favor with Roosevelt's endorsement of war crimes trials on January 3, 1945. This was followed by the strong backing of Roosevelt's successor, President Harry Truman. The Soviet Union based its own belated support on their experience with show trials in the 1930s, believing that war-crimes trial verdicts would result in the public (and popular) execution of the German war criminals.

### **Victor's Justice?**

The IMT can be viewed as symbolic of "victor's justice" and its associated charge of hypocrisy, meaning that the victors in World War II judged the vanquished. The inference of such a view is that the trials might be tainted by the lack of investigation and prosecution of

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<sup>6</sup> TUSA, *supra* note 1, at 54.

any war crimes that the allied powers might have committed during the global conflict. It was no accident that aerial bombing was excluded as a war crime in the London Charter for the IMT. Including it would make prosecution of German aerial bombings (e.g., of London) appear as victor's vengeance, unless parallel investigations of American and British bombings of German cities (including the fire-bombings of Hamburg and Dresden) were also undertaken.<sup>7</sup>

The German people accepted the reality of reprisals, but they deeply resented the failure at Nuremberg to hold accountable those who inflicted so much horror upon them. German historian and journalist Jorg Friedrich has noted that 700,000 German soldiers and civilians lost their lives in the last three months of the war. During one June 1943 British bombing raid of Hamburg, 43,000 residents died, 8,000 of them young children.<sup>8</sup> In March 1945, 20,000 German refugees fleeing the advance of the Red Army were massacred by American bombers as they huddled in ships docked at the Baltic port of Swinemunde.<sup>9</sup> Allied incendiary bombs were designed to burn cities wholesale and Allied planner were award of the terrible civilian casualties such bombing would

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<sup>7</sup> OVERY, *supra* note 4, at 10; *c.f.* JORG FRIEDRICH, *THE FIRE: THE BOMBING OF GERMANY 1940-1945 Afterward for American and British Readers* (trans. Allison Brown, Columbia University Press 2006).

<sup>8</sup> FRIEDRICH, *supra* note 7, at 166.

<sup>9</sup> *Id.* at 147-51.

entail.<sup>10</sup> By the end of the war, Allied bombing had destroyed significant parts of nearly every medium and large-sized Germany city.

The Soviet advance through eastern Europe and into Germany was similarly destructive. The Soviet government had no interest in being judged for its conduct during the war, including the Soviet Army's role in massacring the Polish officer corps (in the Belorussian forests of Katyn and elsewhere). It also wished to avoid being held responsible for the Nazi-Soviet Pact of 1939 carving up Poland, the Soviet attack on Finland in 1940, and the concentration camps in Soviet-occupied regions during the war. In those camps, Soviets inflicted extreme mistreatment on civilian and military detainees, often in cooperation with German SS and Gestapo officials, and caused the deaths of tens of thousands of German prisoners of war.<sup>11</sup>

During his trial, defendant Admiral Karl Doenitz (Supreme Commander of the German navy) effectively used in his defense an interrogatory from Admiral Chester W. Nimitz, the Commander in Chief of the American Naval Forces in the Pacific Ocean during the war. His lawyer used Admiral Nimitz's testimony to confirm that it was American policy to interpret the London Submarine Agreement of 1936 "in exactly the same way as the German Admiralty," supporting his claim "that the German sea war was perfectly legal." German submarine surprise attacks against British and

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<sup>10</sup> *Id.* at 90-101.

<sup>11</sup> See HARRIS, *supra* note 1, at 251-71.

other merchant ships, which doomed to the ocean's depths the lives of passengers and crew, mirrored what the U.S. Navy had done to sink Japanese merchant ships. Doenitz escaped conviction on the charge of having breached the international law of submarine warfare, although he was convicted on other charges.<sup>12</sup>

The Nuremberg trials would not have taken place if there had been a requirement for reciprocal justice, because the allied powers could not have agreed to the intensive self-examination that such a criminal investigation would demand. However deep this apparent flaw in the process was at the time, there remains great value in what was accomplished to establish individual criminal responsibility for the atrocity crimes of senior Nazi leaders. Summary executions were avoided and crimes of great magnitude and horrific character were publicly identified with their perpetrators, who were brought to justice relatively speedily. The manner in which the Nuremberg trials were conducted achieved a lasting credibility for its attention to due process rights. Further, the lessons of Nuremberg and the justice rendered there upon German leaders probably had a positive influence on later generations of Germans, who have been less affected by what their ancestors endured during World War II than they otherwise might have been. Probably as a result of the Nuremberg legacy, Germany has become a strong supporter of human rights, the non-use of force,

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<sup>12</sup> ROBERT E. CONOT, *JUSTICE AT NUREMBERG* 417-18 (Harper & Row 1983); TUSA, *supra* note 1, at 251-52.

international justice, and the work of the permanent International Criminal Court.

### **Composition of the Tribunal**

The composition of the IMT reflected its multinational character of the victorious Allied powers. The United States, United Kingdom, France, and the Soviet Union were represented by four sitting judges and four alternate judges, one from each allied nation. All but the Soviet judge and alternate were drawn from non-military legal professions at the time of the trials.<sup>13</sup> The prosecution counsel numbered fifty-two lawyers, again drawn from each of the four allied powers.<sup>14</sup> The U.S. prosecution team was led by Justice Robert H. Jackson, on leave from the U.S. Supreme Court. Two of his American military prosecutors, Lieutenant Commander Whitney Harris and Brigadier General Telford Taylor, later wrote highly acclaimed, comprehensive histories of the Nuremberg trials.<sup>15</sup> Twenty-eight German lawyers served as counsel for the individual defendants, and eleven German lawyers defended the six organizations that were charged with criminal conduct.<sup>16</sup>

The London Charter required a fair trial for all of the defendants, and set forth fundamental rules for that purpose. These rules included the right to counsel and

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<sup>13</sup> TUSA, *supra* note 1, at 110-112.

<sup>14</sup> HARRIS, *supra* note 1, at xxiii-xxiv.

<sup>15</sup> See TAYLOR, *supra* note 1; HARRIS, *supra* note 1.

<sup>16</sup> HARRIS, *supra* note 1, at xxvii-xxviii.

the right to cross-examine any witness.<sup>17</sup> As the trials got underway, however, defense lawyers often found it difficult to obtain documents sought for the defense of their clients, and delays in the translation of key documents created difficulties for both the prosecution and defense.<sup>18</sup>

### **Selection of Defendants**

The selection of whom to indict and prosecute at Nuremberg bedeviled the four allied powers during the summer of 1945. For practical reasons, the total number of individuals who could stand trial before the IMT had to be extremely limited. Non-German Axis leaders were soon removed from the working list of targets for prosecution. Key Nazi leaders like Adolf Hitler, Joseph Goebbels, and Heinrich Himmler were already dead. The allies had to understand how power was exercised in Nazi Germany, and had to discover who wielded the most authority, and thus responsibility, for perpetrating the crimes described in the London Charter. Since first-hand information and actionable evidence about the crimes of the Holocaust had only begun to emerge, some of the obvious candidates for prosecution for the extermination of the Jews and others were not pursued. Among these were Gestapo chief Heinrich Muller and

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<sup>17</sup> TUSA, *supra* note 1, at 85; HARRIS, *supra* note 1, at 24.

<sup>18</sup> OVERY, *supra* note 4, at 23-24.



his deputy, Adolf Eichmann. In the end, notable and some far less notorious figures were selected.<sup>19</sup>

The final list of twenty-four German defendants arose from political compromises and the intent of the allied powers to arrange the defendant pool to indict several branches of the Nazi leadership: military, political, propaganda, finance, and forced labor. The military defendants were Admiral Doenitz, Hermann Goering (Chief of the Air Force), Alfred Jodl (Chief of Army Operations), Wilhelm Keitel (Chief of Staff of the High Command of the Armed Forces), and Erich Raeder (Grand Admiral of the Navy). The political defendants were Hans Frank (Minister of Interior and Governor-General of occupied Poland), Wilhelm Frick (Minister of Interior), Rudolf Hess (Deputy to Hitler), Ernst Kaltenbrunner (Chief of the Reich's Main Security Office under which the Gestapo and SS operated), Alfred Rosenberg (Minister of the Occupied Eastern Territories), Arthur Seyss-Inquart (Commissar of the Netherlands), Albert Speer (Minister of Armaments and War Production), Constantin von Neurath (Minister of Foreign Affairs and Protector of Bohemia and Moravia), Franz von Papen (former Chancellor of Germany), Joachim von Ribbentrop (Minister of Foreign Affairs), Baldur von Schirach (Reich youth leader), and Martin Bormann (Chief of the Nazi Party Chancery). Bormann was tried and convicted *in absentia*, meaning he was never located for arrest and thus did not physically appear for trial. The finance defendants were Walter Funk (President of the Reichsbank), Hjalmar Schacht (Minister of Economics prior to the war and President of

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<sup>19</sup> See HARRIS, *supra* note 1, at 28-29.

the Reichsbank) and the industrialist Gustav Krupp von Bohlen und Halbach (the aging former president of the German munitions company, Friedrich Krupp A.G.). Gustav Krupp's prosecution was postponed indefinitely due to his poor health and he died, having never stood trial, in 1950. The forced-labor defendants were Fritz Sauckel (Plenipotentiary General for the Utilization of Labor) and Robert Ley (former leader of the German Labor Front). Ley, however, committed suicide upon being indicted and thus never stood trial. The propaganda defendants were Hans Fritzsche (Ministerial Director and head of the radio division in the Propaganda Ministry) and Julius Streicher (editor of the newspaper *Der Sturmer* and Director of the Central Committee for the Defence against Jewish Atrocity and Boycott Propaganda).<sup>20</sup>

### **Criminal Organizations**

In addition to these individual defendants, the Allied prosecutors, strongly encouraged by Jackson, were determined to prosecute certain organizations in Nazi Germany, alleging that they were illegal criminal enterprises. The prosecutors believed that individual defendants could be prosecuted and convicted by virtue of their membership in such organizations. Such a finding also would make it much easier to prosecute thousands of other defendants in subsequent trials simply by identifying an individual as a member of any such criminal organization. "Guilt by association" thus became the guiding principle of the prosecution strategy

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<sup>20</sup> *Id.* at xxv-xxvi, 32.

for these later trials. The London Charter empowered the IMT to define as criminal any group or organization to which any defendant appearing before the IMT belonged. Once such a finding was reached, the national, military, and occupation courts of the Charter signatories could bring individual members of those organizations to trial for years thereafter, with the criminal nature of such groups or organizations already considered proven. Such defendants would be permitted only limited defense arguments, for example that they joined the organization in question under duress. This represented the first of several legal innovations in the Nuremberg trials. Never before had national organizations been prosecuted, particularly by an international tribunal, for criminal conduct. Their alleged criminal character was determined by the IMT only after the war, thus raising concerns about retroactive justice.<sup>21</sup>

Nevertheless, the IMT declared three of six organizations named in the indictment as criminal in character. The Gestapo, paired with the SD (*Sicherheitsdienst*), was declared criminal for its role in “the persecution and extermination of the Jews, brutalities and killings in concentration camps, excesses in the administration of occupied territories, the administration of the slave labor program, and the mistreatment and murder of prisoners of war.” The Leadership Corps of the [Nazi] Party, which included Hitler, his top staff officers, and an estimated 600,000 members, was declared criminal for “the Germanization of incorporated territory, the persecution of the Jews, the administration of the slave labor program, and

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<sup>21</sup> OVERY, *supra* note 4, at 14.

mistreatment of prisoners of war.” The IMT declared the SS (*Schutzstaffeln*), which ran the concentration camps and cleared Jews and others out of the ghettos, criminal for conducting the same activities as the Gestapo.<sup>22</sup>

### **The Indictment**

The indictment, issued on October 19, 1945, included four charges drawn from the London Charter: a common conspiracy to wage aggressive war, crimes against peace, war crimes, and crimes against humanity. The second category, crimes against peace, had no pre-existing definition in international law. It was defined in the London Charter as the “planning, preparation, initiation, or waging of a war of aggression, or a war in violation of international treaties, agreements, or assurances, or participation in a common plan or conspiracy for the accomplishment of any of [war crimes or crimes against humanity].”<sup>23</sup>

The third category, war crimes, was a well-established concept in international law. It was defined in the London Charter as follows:

violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labor or for any other purpose of civilian population of

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<sup>22</sup> HARRIS, *supra* note 1, at 29-30.

<sup>23</sup> INTERNATIONAL MILITARY TRIBUNAL, *THE TRIAL OF THE MAJOR WAR CRIMINALS*, VOL. I 11 (William S. Hein & Co. 1995)(1947).

or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity.<sup>24</sup>

The fourth category, crimes against humanity, had at best a very problematic foundation in international law. Such crimes were defined as follows:

murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.<sup>25</sup>

### **War of Aggression**

Despite the apparent injustice of the aggressive assaults by the German Army in World War II, there was no codified or even customary rule of international law in 1945 that explicitly outlawed a war of aggression. Yet Justice Jackson was determined to make “aggression” or “crimes against peace” the dominant allegation of the Nuremberg trials, and the American prosecution team assumed full responsibility for prosecuting the crime. In the aftermath of World War I, there had been a number

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<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

of initiatives to outlaw wars of aggression, giving Jackson something to work with in legislating a new legal principle in the London Charter. Article 227 of the Versailles Treaty (1919), attempted to establish individual criminal responsibility for Germany's aggression in World War I by requiring the prosecution of the German Kaiser for "a supreme offense against international morality and the sanctity of treaties." The viability of this provision, however, was never put to the test, for the Kaiser enjoyed sanctuary from prosecution in The Netherlands, which refused to surrender him for trial.<sup>26</sup>

The Kellogg-Briand Pact of 1928 was sponsored by the United States as manifesting "the outlawry of war" and signed by sixty-five nations, including such World War II aggressor nations as Germany, Italy, and Japan. This agreement expressed the intent to renounce war as a means of settling disputes. Various other pronouncements prior to World War II declared aggression to be an international crime, but no law had yet been written that prohibited a war of aggression. Justice Jackson faced opposition from legal scholars and other allied prosecutors, who challenged his effort to establish a new crime of aggression.

Justice Jackson prevailed with a bold strategic move. He argued that there had been a conspiracy to wage an aggressive war that swept within its reach war crimes and crimes against humanity (the two other major categories of crimes). He went on to assert that the entire indictment of the Nuremberg defendants would be

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<sup>26</sup> HARRIS, *supra* note 1, at 18-22.

premised on the allegation of this “master plan” that had been implemented through a conspiracy stretching back to 1933, when the Nazi Party came to power in Germany. He noted that war crimes had a relatively solid basis in existing international conventions that already required a connection with warfare. Therefore, he argued, doubts about the legality of any particular charge of aggression or crime against humanity (along with many other kinds of criminal conduct) should be overcome by implicating such crimes within the overall conspiracy to wage aggressive war. The conspiracy theory, in which all participants can be held equally responsible for criminal conduct, was established in Article 6 of the London Charter and underpinned the first count in the Nuremberg indictment:

Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan.<sup>27</sup>

Conspiracy charges were based on a legal concept that was peculiarly rooted in common law as understood in Britain and the United States. The French, Soviet, and German legal systems had no legal tradition for framing conspiracy charges. They preferred charging defendants for direct participation in specific crimes. The Soviets were extremely worried that Jackson’s formula could be used to implicate them for their own suspicious conduct

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<sup>27</sup> OVERY, *supra* note 4, at 15-18.

during the war and embarrass them as essentially unindicted co-conspirators in many of the crimes.

### **Wartime Crimes Against Humanity**

The operational compromise that emerged in the course of the trials meant that the IMT judges would entertain the charge of conspiracy only for acts of aggression by the Axis powers, and not for the commission of war crimes or crimes against humanity. The crime of conspiracy was further limited to actions closely related to the commencement of armed conflict and to those leaders who met together to plan specific acts of aggression. However, the nexus-to-war that originally drove Justice Jackson's conspiracy theory remained as a key practical requirement for the prosecution of crimes against humanity, primarily because these were crimes that had not been previously codified in international law and remained highly contentious as an example of retroactive justice by the IMT. By limiting the charges to crimes against humanity committed during wartime, the IMT could amplify the illegality of the acts within the context of the overall aggressive war. This would serve to blunt at least some of the arguments that defense counsel could raise about the legality of the charges, particularly those pertaining to the period from 1933 to 1939, even though the London Charter permitted investigation of all but one type (persecutions) of pre-war crimes against humanity.



The perspective of American prosecutor Whitney Harris reflects the general view that guided the IMT's approach at the time. He wrote:

[The limitation to wartime crimes against humanity] was a proper one in view of the status of the Tribunal as an international military body, charged with determining responsibility for war and crimes related thereto. If the Tribunal had assumed jurisdiction to try persons under international law for crimes committed by them which were not related to war it would have wholly disregarded the concept of sovereignty and subjected to criminal prosecution under international law individuals whose conduct was lawful under controlling municipal law in times of peace. Such jurisdiction should never be assumed by an ad hoc military tribunal established to adjudicate crimes of war.<sup>28</sup>

The requisite nexus-to-war required by the IMT created a precedent for examining crimes against humanity that influenced, and arguably retarded, the development of the law for decades thereafter, until it was definitively broken in the 1990s in the Statute of the International Criminal Tribunal for Rwanda.

The conspiracy theory, particularly as it applied to crimes against humanity, had its doubters. Shortly before he committed suicide, Nuremberg defendant Robert Ley wrote: "Where is this plan? Show it to me. Where is the protocol or the fact that only those here accused met and

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<sup>28</sup> HARRIS, *supra* note 1, at 512.

said a single word about what the indictment refers to so monstrously? Not a thing of it is true.”<sup>29</sup> Ley’s charges have received support from more recent scholarship on the subject. In 2003, historian Richard Overy of King’s College, London, wrote:

Subsequent historical research has confirmed that no such thing as a concerted conspiracy existed, though a mass of additional evidence on the atrocities of the regime and the widespread complicity of many officials, judges, and soldiers in these crimes has confirmed that, despite all the drawbacks of the trial and of its legal foundation, the conviction that this was a criminal system was in no sense misplaced.<sup>30</sup>

The Nuremberg prosecutors nonetheless presented much evidence to support the conspiracy theory during the trials. The fact that three defendants were acquitted on all four counts, including the conspiracy charge, does not diminish the fact that some defendants were found to be participants in a conspiracy to wage a war of aggression.

### **Retroactive Justice**

There is a general principle of law which states that individuals must not be held criminally responsible for conduct that was not illegal at the time it occurred (*nullum crimen sine lege*, also called the retroactivity

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<sup>29</sup> OVERY, *supra* note 4, at 1.

<sup>30</sup> *Id.* at 28.

rule). This principle was a very powerful presence at Nuremberg. Concerns about the credibility of the IMT arose with respect to defendants' arguments that they were only complying with German national law in the performance of their duties. Although German law under the Nazi regime became a vehicle of extreme discrimination and persecution of the Jews and other minorities, the invocation of national law as a defense, particularly regarding crimes against humanity, proved almost entirely unpersuasive to the IMT judges, who had a mandate to apply international law to the proceedings. The drafters of the London Charter struggled with these defenses; and defense counsel frequently offered them as mitigation for their clients' wartime actions.

Prosecutors and judges at the IMT found the legal basis for crimes relating to aggression and for crimes against humanity in the deep well of human experience and morality. For instance, Lieutenant Commander Harris drew upon how international law had over time criminalized acts of piracy on the high seas. He wrote:

the Nuremberg judges declared against aggressive war and related acts which they considered to have been morally condemned by the majority of nations. In the Tribunal's view these acts, like piracy, could no longer be tolerated in a civilized world, and the Tribunal concluded that the responsible individuals could be punished for their actions, just as earlier courts had resolved upon the punishment of men for acts of piracy.<sup>31</sup>

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<sup>31</sup> HARRIS, *supra* note 1, at 496.

The IMT took a judicial leap by assuming that international law had been fairly rapidly evolving toward the view that aggression and crimes against humanity should be outlawed, and that individual criminal responsibility for such crimes had become legally enforceable. In a very real sense, the IMT took the initiative to declare and act upon what it regarded as international law at a momentous period in world history, when clarity of interpretation and action was being sought. The extreme violence of World War II elicited such an exercise of discovery. Justice Jackson wrote to President Truman in June 1945 with disarming understatement:

Unless we are prepared to abandon every principle of growth for International Law, we cannot deny that our own day has its right to institute customs and to conclude agreements that will themselves become sources of a new and strengthened International Law.<sup>32</sup>

The retroactivity rule challenged the IMT's jurisdiction over the crimes against humanity set forth in the London Charter. The overlap of many of these crimes with established war crimes presented little problem to the prosecutors. However, international legal principles of sovereignty and of non-interference in the internal affairs of other nations meant that the German assaults on their own civilian population, particularly the Jewish population, and the persecution inflicted on so

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<sup>32</sup> Cf. TUSA, *supra* note 1, at 73 (describing Justice Jackson's views on customary international law).

many civilians might have been shielded from international criminal prosecution. To forestall this possibility, the IMT determined that its own self-made authority required freshly conceived jurisdiction over such “internal” crimes. Again, the IMT found strength of reason in the requirement that such crimes be committed in connection with an on-going war and another crime “within the jurisdiction of the Tribunal.” In other words, the context of aggressive war and/or a war crime was required to trigger individual criminal responsibility under international law. Having taken this leap of logic, the IMT prosecutors and judges acted prudentially in the trials to enforce a newly defined law on crimes against humanity.

### **Defense of Superior Orders**

The London Charter addressed one of the most common defenses for defendants who claimed they were only acting, and had to act, pursuant to orders from superior officers and officials: “The fact that the Defendants acted pursuant to order of his Government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment if the Tribunal determines that justice so requires.”<sup>33</sup> The Nuremberg defendants’ high rank and their direct role in formulating the policies of the Third Reich (including for some of them the plotting of a war of aggression) left them with little opportunity to credibly claim that they were acting on the orders of superiors. They usually were the superiors who drafted many of the orders; they often played a political role in decision-making; and the

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<sup>33</sup> IMT, *supra* note 22, at 12 (London Charter, Article 8).

orders they responded to came from leaders, such as Hitler, who issued commands of obvious criminal character, particularly to men of the stature in the Nazi regime as those in the dock at Nuremberg. Their individual accountability could not be extinguished by claiming obligation to follow a superior's orders. If the orders of superiors were unchallengeable when weighed against the crimes they sought to unleash, then the entire foundation for the Nuremberg trials, the laws and customs of war, and the legal principles that defined crimes against peace and crimes against humanity would crumble. The IMT pronounced that, "[t]he true test, which is found in varying degrees in the criminal law of most nations, is not the existence of the order, but whether moral choice was in fact possible."<sup>34</sup>

Defendant Wilhelm Keitel sought to explain to the IMT how the traditional training and concept of duty of the German officers "taught unquestioned obedience to superiors who bore responsibility" and "caused them to shrink from rebelling against these orders and these methods even when they recognized their illegality and inwardly refuted them." Keitel also testified that the decision to wage a war of aggression is solely political, and that the military soldier must obey orders relating to it. The IMT rejected the credibility of these arguments for an officer of Keitel's exceptionally high rank—a senior officer who knew what was at stake, played a role in the decision-making, and yet remained indifferent to the legal issues. American prosecutor Telford Taylor wrote of Keitel, "His attitude was not far from that of

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<sup>34</sup> *Id.* at 224 (Judgment).

Goering, who was not moved by ‘considerations of international law.’” Although Keitel may have criticized some of the orders he received, he enforced them.<sup>35</sup>

## **Judgment**

During the Nuremberg trials, ninety percent of the prosecution’s evidence consisted of the Third Reich’s own governmental files, which had been seized by Allied forces. Prosecutors had access to 100,000 German documents, millions of feet of video film, and 25,000 still photographs, including some taken by Hitler’s personal photographer. Court stenographers prepared 17,000 transcript pages recording the testimony and proceedings of the trials. Active and often lengthy defenses were raised, frustrating the prosecution but also strengthening the fairness of the trials. It took twenty-eight sessions to hear the defenses of just the first four accused. Defense counsel took sixteen days to make their closing arguments.

The IMT judges delivered their opinions regarding the twenty-two individual defendants and six organizations on September 30 and October 1, 1946. They did not convict all defendants on all counts of the indictment for which they had been charged. Instead, the judges found that the evidence fell short of the requirement that guilt be proven “beyond a reasonable doubt” with respect to some of the charges against the defendants.

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<sup>35</sup> TAYLOR, *supra* note 1, at 353-59.

The IMT fully acquitted three defendants of all charges: Schacht, Papen, and Fritzsche. Of the remaining nineteen defendants, all but two of them were convicted on multiple charges, and six were convicted on all four counts of the indictment. Eight defendants were convicted on the first count, charging conspiracy to wage aggressive war. Twelve defendants were convicted on the second count, crimes against peace. Sixteen defendants were convicted on the third count, war crimes. Sixteen defendants also were convicted on the fourth count, crimes against humanity. The IMT sentenced twelve defendants (including the absent Bormann) to die by hanging, and sentenced the remaining seven defendants to prison terms ranging from ten years to life. Goering committed suicide before he could be hanged. The Soviet judge dissented on each of the acquittals and on the life imprisonment (rather than hanging) sentence for Hess.

Witnesses at the Nuremberg trials confirmed the Nazi regime's own death count of the Jewish population and of others in the extermination (also known as concentration) camps and during killing operations in the field. One witness, an SS reporter who knew Adolf Eichmann, confirmed that in mid-1944 Eichmann reported to Himmler that the latter's orders for extermination of the European Jewry were being implemented. (Although he remained at large and unindicted at Nuremberg, Eichmann was later found in Argentina, abducted, and brought to trial in Israel. He was convicted in 1961 and sentenced to death.) The witness testified that Eichmann wrote, "Approximately



four million Jews had been killed in the various extermination camps while an additional two million met death in other ways, the major part of which were shot by operational squads of the Security Police during the campaign against Russia.”<sup>36</sup> Although the prosecution had initiated the Nuremberg trials with a strong focus on charging the defendants with conspiracy to wage a war of aggression and with violations of “crimes against peace,” in the end the trials also established the horrific truth of the Holocaust, namely the genocide against the Jewish population of Europe. It is that truth and the criminality arising from the charges of Nazi crimes against humanity that became the most prominent legacies of justice at Nuremberg.

### **Influence of Nuremberg Trials**

The Nuremberg trials of 1945 and 1946 influenced later developments of international law and the courts that enforce it. They underpinned the work of the Tokyo War Crimes Trials (1946–1948) and subsequent trials under Control Council Law No. 10 in occupied Germany.<sup>37</sup> They also firmly established the basis for attributing individual criminal responsibility for atrocity crimes such as genocide, serious war crimes, and crimes against humanity that would constitute the core jurisdiction of international criminal tribunals at the end of the twentieth century and beyond. The trials accelerated the further development of the principles of international criminal law and international humanitarian

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<sup>36</sup> See TAYLOR, *supra* note 1, at 242; TUSA, *supra* note 1, at 167.

<sup>37</sup> HARRIS, *supra* note 1, at 544-45.

law, as reflected in the Genocide Convention of 1948, the Geneva Conventions of 1949, the Geneva Protocols of 1977, the Statutes of the International Criminal Tribunals for the Former Yugoslavia (1993) and for Rwanda (1994), the Special Court for Sierra Leone (2002), and the 1998 Rome Statute of the International Criminal Court.

The UN General Assembly affirmed in Resolution 95(I) of December 11, 1946, the “Principles of International Law Recognized by the Charter of the Nuremberg Tribunal.” The illegality of aggression was further elaborated in a 1974 UN General Assembly resolution defining aggression with regard to state responsibility, and in the Draft Code of Crimes Against the Peace and Security of Mankind, which was adopted by the International Law Commission.<sup>38</sup> Deeply influenced by the record of the Nuremberg trials, the states that are party to the Rome Statute of the International Criminal Court continue to negotiate how to activate the crime of aggression which, for purposes of individual criminal responsibility, is included in the new court’s jurisdiction.<sup>39</sup> Justice Jackson, in his opening statement at the Nuremberg trials, summed up what they were all about:

The wrongs which we seek to condemn and punish have been so calculated, so malignant, and so devastating, that civilization cannot

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<sup>38</sup> HARRIS, *supra* note 1, at 573.

<sup>39</sup> *Id.* at 577.

tolerate their being ignored, because it cannot survive their being repeated. 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 has ever paid to reason.<sup>40</sup>

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<sup>40</sup> TAYLOR, *supra* note 1 at 167.

## **Conclusion**



## **The International Humanitarian Law Dialog: An Agenda for the Next Century**

**Elizabeth Andersen\***

The remarkable August 2007 Chautauqua Institution gathering of most of the living international prosecutors—from Nuremberg to the International Criminal Court—was at once celebratory and cautionary. The conference marked the 100<sup>th</sup> anniversary of the Hague Rules and the sixty-year legacy of the post-World War II Nuremberg trials, leading in recent years to ad hoc tribunals to meet out justice for atrocities committed in the former Yugoslavia, Rwanda, Sierra Leone, and Cambodia, and culminating with the creation of a permanent international criminal court. Participants appropriately lauded the triumph of law over violence that these developments represent. But at the same time, much of the discussion fixed on contemporary challenges to that legacy.

The Chautauqua Declaration and these commemorative essays by Dialog participants mirror that dichotomy. With two of the Nuremberg prosecutors represented, it is not surprising that those proceedings figured prominently in the Chautauqua dialog, and that several of the essays hail their substantive and procedural contributions to the law. Decades later, when many of the legal concepts that were controversial at Nuremberg have become firmly established in treaties and international jurisprudence, it is helpful to recall that earlier, less certain time, and to celebrate the dramatic

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\* Executive Director, American Society of International Law.

development of the international accountability regime. But to their credit, the Chautauqua participants are neither satisfied nor complacent with the progress they have made, and these essays reflect the significant remaining challenges—an agenda for future Dialogs.

Some persistent legal questions date to the Nuremberg trials, and though resolved time and again, continue to plague accountability efforts. These include the issue of who to charge and how to address questions of official immunity, command responsibility, and the defense of superior orders. From the Nuremberg process described by Whitney Harris, Henry King, and David Scheffer, to Michael Newton's account of issues presented in the Dujail trial of Saddam Hussein, these questions keep coming up. Hassan Jallow's essay highlights the particular new legal challenge presented by the growing role of private military contractors.

During the Dialog, comments by Luis Moreno-Ocampo and David Crane reminded us that the exercise of prosecutorial discretion is further complicated as the scope of potential jurisdiction expands and issues of institutional capacity, public perception, and international politics are factored into the equation. Indeed, the Dialog revealed that while legal questions persist, the prosecutors are challenged most today in the realm of the practical and political: working in multiple languages; collecting testimony from reluctant or threatened witnesses; gathering evidence in a continuing war zone; victim and witness protection and outreach; ensuring the rights of the defense, but also completing trials in a timely and efficient manner; developing the

capacity of national judicial systems to conduct credible complementary criminal prosecutions; and obtaining international cooperation in bringing the most culpable to justice. This last challenge emerged as the focus of the First Chautauqua Declaration, which lists by name many of those most responsible for war crimes committed over the past two decades—all of whom remain at large. The Declaration underscores the persistent problem of impunity. Ultimately, the prosecutors gathered at Chautauqua are powerless to address this problem. They can marshal evidence and bring indictments, but they must rely on political and military leaders to bring perpetrators to justice.

As several of the prosecutors' essays reflect, perhaps the single most significant challenge facing the field of international humanitarian law is its applicability to the "war on terror." Against the backdrop of the post-9/11 global effort to combat terrorism, there is a very real risk that the work of these international prosecutors and so many others to develop international criminal law and its institutions of enforcement will be sidelined, will seem "quaint"—oh, so 1998. There are important open questions about the applicability of international humanitarian law to this anti-terror effort. Is it an armed conflict subject to the laws of war? If so, between whom, which rules apply, and how should violations of the laws of war be adjudicated? As Robert Petit questions, what relevance do the procedural safeguards developed by the international criminal tribunals have for those accused in this new "conflict?" Or, as Leila Sadat argues, should these anti-terror measures be construed as



law enforcement, not war; and if so, what steps need to be taken to strengthen that law enforcement regime? Should we, as David Tolbert suggests, develop new evidentiary doctrines that give more weight to inference and circumstantial evidence in such cases? What does our commitment to the “rule of law” require? And how do we combat terrorism in a manner that reinforces the “rule of law” norm that crystallized at Nuremberg and has flourished since?

If that is not a sufficiently challenging agenda, the Nuremberg prosecutors have pointedly given us another task—defining the crime of aggression. On legally shaky ground at Nuremberg, this crime was left undefined at the Rome conference and remains a challenge for the ICC Review Conference scheduled for 2010. It is interesting that the most senior members of the Dialog have the greatest ambitions for international law and press insistently for codification of their “conviction that civilization can no longer tolerate war as a method of settling international disputes.”<sup>1</sup> They recognize that this may be an unpopular cause. But it is instructive to recall, as Henry King did at Chautauqua, that the Nuremberg trials were also once unpopular, and that those who took up that cause were spurned by the organized U.S. bar in the late ‘40s. Perhaps today’s efforts to define the crime of aggression will one day seem as enlightened as Nuremberg now does.

Thus the International Humanitarian Law Dialog has its work cut out. This first gathering and these

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<sup>1</sup> See Whitney R. Harris, *The Legacy of Nuremberg*, PROCEEDINGS OF THE FIRST INTERNATIONAL HUMANITARIAN LAW Dialogs, 32 (2008).

commemorative essays have laid important historical groundwork and infused the project with “the spirit of Nuremberg,” that belief in a peaceful world based on justice, coupled with a hardnosed assessment of the challenges ahead and a commitment to develop the law and legal institutions to meet them.



# **Appendices**



**First Chautauqua Declaration**

**August 29, 2007**

**The Assembled Prosecutors, both Past and Present**

Celebrating the 100<sup>th</sup> Anniversary of the Hague Rules of 1907;

Remembering the legacy of our Nuremberg colleagues;

Recalling the principles of Nuremberg;

Noting the importance of the rule of law in facing down impunity;

Understanding the need for a family of nations united for peace;

Appreciating that the legal tools are now in place to prosecute those who bear the greatest responsibility;

Aware of the need to seek justice efficiently and effectively.

Noting that international humanitarian law still remains the cornerstone to controlling international and internal armed conflict;

Recognizing that both truth and justice create sustainable peace;

Highlighting that justice is not an impediment to peace, but in fact is its most certain guarantor.

**Now do solemnly declare to the world**

That ending impunity by perpetrators of crimes of concern to the international community is a necessary part of preventing the recurrence of atrocities.

That it is no longer about whether individuals agree or disagree with the pursuit of justice in political, moral, or practical terms; now, it is the law.

That the challenge for States and for the international community is to fulfill the promise of the law they created; to enforce judicial decisions; to ensure the arrest and surrender of sought individuals; *and in that light;*

That Ratko Mladic, Radovan Karadzic, Felician Kabuga, Joseph Kony, leader of the Lord's Resistance Army in Uganda, Ahmed Harun, the Sudanese Minister who organized the system of persecution and attacks against the civilians in Darfur, and all others not listed here and are sought by international justice, be arrested and surrendered to the appropriate court, tribunal or chamber;

That States are reminded of the words of Martin Luther King Jr. that "*the arc of moral justice is long but it bends toward justice.*"

That the world community take note of the words of Justice Robert H. Jackson at Nuremberg: "*We are able*

*to do away with domestic tyranny and violence and aggression by those in power against the rights of their own people only when we make all men answerable to the law.”*

**Signed in Mutual Witness:**

David M. Crane  
Special Court for Sierra Leone

Luis Moreno-Ocampo  
International Criminal Court

Sir Desmond DeSilva, QC  
Special Court for Sierra Leone

Robert Petit  
Extraordinary Chambers in the  
Courts For Cambodia

Whitney Harris  
International Military Tribunal  
Nuremberg

Stephen J. Rapp  
Special Court for Sierra Leone

Hassan Jallow  
International Criminal Tribunal  
for Rwanda

David Tolbert  
International Criminal Tribunal  
for the Former Yugoslavia

Henry King  
International Military Tribunal  
Nuremberg





## **Summary of the First Morning Dialog\***

**Moderated by David Scheffer**

The First Morning Dialog covered three main topics: influence of customary international law in the recent development of international criminal law; the limits of customary international law; and how the prosecutors choose whom to prosecute. The primary rationale for the use of customary law in international criminal courts is found in the preamble of The Hague Rules of 1907. It states that “the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience.” The general principle behind this is that beyond the rules established by treaties and statutes, customary international law may also be applied when determining the law of armed conflict.

When responding to a question regarding the influence of the Martens Clause, the prosecutors seemed to agree on its importance in the development of international criminal law. David Tolbert noted that when the International Criminal Tribunal for the Former Yugoslavia (ICTY) was established in 1993, international criminal law was codified in treaties such as The Hague

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\* Dialog Summaries were prepared by the following Rapporteurs and staff members of *Impunity Watch*, Syracuse University School of Law: Jacob Brier, Sarah LaBelle, Joe Nosse, and Laura Zuber.

Rules of 1907 and the Geneva Conventions. However, the Martens Clause in The Hague Rules provided that acts in violation of the “laws of humanity” were also contrary to international law. He continued by stating that between the Nuremberg trials and the ICTY there was little development in the field of international criminal law. However, since the formation of the ICTY, several other international criminal courts have been established and many cases have been heard and decided.

David Tolbert also stated during the beginning of the recent development of international criminal law, prosecutors and judges alike relied heavily on international custom. Now, tribunals still rely on international customary law, but the law is clearer as a result of being applied in cases and defined by judges. He mentioned that the ideals represented in the Martens Clause are still important but there is more substance of international criminal law with the creation of international criminal tribunals. David Crane summarized the Hague Martens Clause as “the center point of the broader development of both customary and statutory law.”

The prosecutors noted the importance of customary international law when prosecuting war crimes. Until recently, crimes like rape, use of child soldiers, and forced marriages were not included in the realm of war crimes or crimes against humanity. But, with the use of customary international law and the “law of humanity,” judges were able to find that such actions were contrary to international law at the time they were committed.

Hassan Jallow stated that even though sexual violence may not be considered within statutory international law at the time it was written, prosecutors and judges, by the use of customary law, are able to include it under statutes regarding crimes against humanity. Desmond DeSilva agreed that the Martens Clause provides guidance in the development of international criminal law, but also that the current work in international criminal courts, in creating jurisprudence, will be the “true signposts” in the development of the law.

The prosecutors agreed that Common Article 3 of the Geneva Conventions and international criminal law applies to internal armed conflicts. Luis Moreno-Ocampo discussed the effect of the 1998 Rome Statute. He stated that it is important for two reasons. First, that the Rome Statute is the law. Second, international criminal courts use it in their decision making. He stressed that even non-signatories may refer to this law. Stephen Rapp also stressed that Common Article 3 has been indispensable when prosecuting war criminals in Sierra Leone. Without the article, it would have been impossible to define the crimes to charge many of the defendants.

While the prosecutors agreed that customary international law is influential in the development of international criminal law, they also agreed that it has its limits. Desmond DeSilva recounted the difficulty the Sierra Leone tribunal had when addressing the issue of the use of child soldiers in armed conflict. No court had previously dealt with the issue of whether the use of

child soldiers was a crime under international law. In order to convict individuals for this act, the prosecutors had to show that the act violates customary international law. Until prosecutors won a case in which the use of child soldiers was found to be an international crime, there was no formal law stating that it was. However, after the courts found that the crime had crystallized under customary international law in the mid-1990's, warlords and others now know that if they use child soldiers, they are committing a crime.

The prosecutors discussed the difficulty of showing that the act was contrary to customary international law at the time it was committed. He stated that legal theory prohibits the application of laws to actions committed prior to this enactment. Many defendants argue that since no statutes described their act as a crime, they had no notice that their act was criminal. In order to secure a conviction, prosecutors have to show that nations and the international community viewed the act as criminal even though there was no written statute against it at the time. One of the prosecutors added that criminal law requires certainty that might not be present in customary international law. The question is not whether the act is criminal, but rather when the act was first considered to be criminal.

Another issue that international criminal courts face is deciding whom to prosecute and the extent of the mode of liability that is used. Should the courts focus on prosecuting the leaders or should they focus on prosecuting the individuals who committed the action? Should prosecutors employ "command responsibility" to

attach criminal liability on the leaders of nations and organizations that commit war crimes and crimes against humanity? Or should the court limit itself to individual responsibility and prosecute those who carried out the criminal act.

A tribunal's mandate puts limits on whom it may prosecute. Robert Petit stated that there are two categories of individuals that the Extraordinary Chambers in the Courts of Cambodia seeks to prosecute: leaders and those most responsible. He the challenge problem is not lacking evidence, but rather how to link the crimes to those higher in command: those who are indirectly responsible rather than directly responsible. Joint criminal enterprise is important in holding these leaders responsible for criminal conduct. A prosecutor's showing that leaders and those high on the chain of command possessed a root of knowledge, together with the root of authority, can make their criminal liability almost undeniable.

Robert Petit also noted that it is important to be able to define the criteria or standard the prosecutors used when deciding whom to prosecute. The prosecutors and the court are accountable to the public to tell them why they are prosecuting an individual, but more importantly why they are not prosecuting another. An important method of promoting this accountability is to maintain an outreach program.

Luis Moreno-Ocampo noted that it is more difficult to decide whom to prosecute in the International

Criminal Court. There are many crimes that may be prosecuted by the Court. A pragmatic approach to prosecution must be taken as the Court is able to prosecute only a limited number of people, and it cannot exceed these limitations.

David Tolbert highlighted another issue facing prosecutors when deciding whom to prosecute. Since the conflict usually takes place over a period of several years, many violations of international humanitarian law may occur. This leads to the complicated situation of deciding which violations should be prosecuted.

Stephen Rapp identified another issue that arises when prosecuting individuals for international crimes. A local court system is usually in place and acting contemporaneously with the international tribunals. The local courts usually prosecute individuals who committed the act and the international tribunals usually focus on the higher level actors. This leaves a lack of prosecution of the mid-level authorities. David Tolbert elaborated upon this issue by stating that many local courts have been destroyed by years of conflict and strife.

David Crane discussed the limits of a criminal tribunal, such as the Special Court for Sierra Leone, in terms of prosecuting those outside government and the geographical borders of the state. Crane stated that the conflict in Sierra Leone extended far beyond its borders, even as far as Nigeria. There were many actors outside of Sierra Leone who played an important role in the conflict. He also posed the question of whether an

international corporation will or may be held individually responsible for war crimes for their role in financing the continuation of the conflict.

David Crane concluded the morning session by reminding the audience that there is a political element in deciding whom to prosecute. There is a tension between prosecuting those who are responsible and ensuring the continuation of the court. While prosecutors have a responsibility to prosecute individuals who violated international humanitarian law or the laws of war, prosecutors also have a responsibility to not act in a manner that may cause the tribunal to be prematurely shut down. Crane recounted his tough decision of potentially indicting three heads of state, including Libya's leader, Muammar al-Qaddafi. If he had indicted Qaddafi, it is possible that the tribunal would not exist today.





## **Summary of the Second Morning Dialog**

### **Moderated by Leila Nadya Sadat**

The Second Morning Dialog continued with questions concerning whether the rule of law is more powerful than the rule of the gun, and whether changes to the international criminal justice system were required to strengthen the authority of international tribunals. While there are bound to be comparisons between the current international tribunals and the tribunal at Nuremberg, there are different rules and different challenges. The panel discussed the practical challenges future prosecutors will encounter in carrying out international criminal prosecutions.

The consensus among the prosecutors was that the law is clear and relatively unproblematic. Rather, the principal practical issues future tribunals will experience include: how to collect the testimonies of reluctant witnesses and gather evidence in the difficult environments; placing members of a country's leadership under arrest; operating in a venue where multiple languages are spoken; challenges to the credibility of the institution; how to deal with victims on a massive scale; the complex and long nature of the trials; and the need for states to take some of the cases from the tribunal and prosecute war criminals at the national level.

There are also complicated evidentiary rules, and in combination with the difficulties in gathering evidence,

trials can run for a long time. People may grow impatient with the tribunals because they seem to drag along in contrast with the Nuremberg trials. Without the support of a community that believes in the tribunal, justice can seem distant or hollow.

The discussants paid substantial attention to the fact that international tribunals depend on the cooperation of members of the international community. The panel discussed the difficulty of overcoming the reluctance of some countries to cooperate with international tribunals. At times, cooperation cannot be secured and international criminal justice has suffered as a result. David Crane acknowledged the fact that tribunals are creatures of political compromise. If states are unwilling, these pressing human rights issues will never reach a court of law.

Time was spent discussing how, in addition to addressing the many practical obstacles to the court's success, international tribunals must also overcome moral challenges. There is often a war going on at the time of the investigation and prosecution of serious crimes. Atrocities are committed on both sides and all parties are likely responsible for human rights abuses. A philosophical dilemma between peace and justice may arise from this complicated scenario. If the tribunal intends to prosecute a country's leadership, those leaders may be reluctant to make peace. The prosecutors agreed that justice—including prosecuting rather than granting amnesty for a country's leadership – is a cornerstone of a sustainable peace. Thus, if you don't have justice as a part of the peace process—some form of international

war crimes tribunal—a lasting peace may never be achieved.

Desmond DeSilva pointed out that one of the problems of criminal justice in general is that the level of trauma experienced by the victims is never matched by the outcome. It is even more of a stark contrast when dealing with crimes against humanity. There is also the problem of different theories of justice, and whether the justice the tribunals are seeking is the justice the communities affected by war want. Robert Petit acknowledged that some segments of the population would prefer retribution to a tribunal, and there are those who are opposed to the idea of an international criminal tribunal. In Sierra Leone, a truth commission worked alongside the court, under the theory that the merger of truth and justice together will yield a sustainable peace. The truth commission offered individuals the chance to tell their stories about what happened to them, whether or not the court was able to prosecute those particular cases.

David Tolbert said that victims have a tremendous expectation that they will see justice, but they may very well be disappointed in certain instances. The tribunals have to be able to explain to the victims and the communities what their limitations are and what they can reasonably expect. This form of outreach buttresses the legitimacy of the tribunal within the community. It would also be helpful to explain the changes in international criminal law since Nuremberg, to explain

why the current trials may take so much longer to dispense justice.

The prosecutors reaffirmed their belief that tribunals matter. With respect to perpetrators, tribunals ensure that those responsible for grave breaches of international humanitarian law are arrested and punished. For the victims, tribunals offer a venue for them to observe the prosecution of those responsible for their suffering and loss. Finally, international tribunals put leaders on notice that they cannot escape the rule of law. Hassan Jallow referred to a recent summit meeting at the African Union where over 50 African leaders gathered and openly spoke of the process to prosecute a former colleague for international crimes—a past president of Chad.

Despite the challenges they face, international tribunals have been very successful, which has raised expectations, but it is still up to political actors to follow through to expand the reach of international criminal law. Stephen Rapp argued that due to this success, international criminal law will eventually be able to move forward even without the advantage of state power. The Rome Statute heralds a significant change – it clearly states that the law will be applied and it calls for the prosecutor to choose those cases that will be investigated and tried by the International Criminal Court. This shifts the decision to prosecute war criminals from a political to a legal one.

The issue is not where the courts are physically located, said Luis Moreno-Ocampo, but how they are affecting the rest of the world through their work. We

have indicted sitting heads of state for war crimes and crimes against humanity and have brought them to trial. The international community is moving toward a system of international justice in which international courts are guided by legal rather than political choices. International criminal law is still underdeveloped, but it is developing quickly, building momentum, and with the support of the international community, it will overcome its challenges and help bring an end to impunity.



## Appendix III: Biographies of the Prosecutors

### **Bibliographies of the Prosecutors**

#### **David M. Crane**

##### *Special Court for Sierra Leone*

Country of Origin: United States of America

Bio: David M. Crane was appointed a professor of practice at Syracuse University College of Law in the summer of 2006. For the year prior he was a distinguished visiting professor of law at Syracuse University. Prior to that time he was the Chief Prosecutor of the Special Court for Sierra Leone, an international war crimes tribunal, from 2002-2005, appointed to that position by then Secretary General of the United Nations, Kofi Annan, on 19 April 2002. With the rank of Undersecretary General, Professor Crane's mandate was to prosecute those who bear the greatest responsibility for war crimes, crimes against humanity, and other serious violations of international human rights committed during the civil war in Sierra Leone during the 1990's. In March of 2003 he indicted sitting President Charles Taylor of Liberia for war crimes and crimes against humanity. The first African head of state to be so charged.

Professor Crane teaches international criminal law, international humanitarian law, and national security law at the College of Law. Additionally, he is a member of the faculty of the Institute for National Security and Counterterrorism, a joint venture with the Maxwell School of Public Citizenship at Syracuse University.



In 2007 Professor Crane launched Syracuse University College of Law's first on line law review and public service blog called Impunity Watch at [www.impunitywatch.net](http://www.impunitywatch.net) .

Professor Crane served over 30 years in the federal government of the United States. Appointed to the Senior Executive Service of the United States in 1997, Mr. Crane has held numerous key managerial positions during his three decades of public service, to include a Senior Inspector General, Department of Defense, Assistant General Counsel of the Defense Intelligence Agency, and Waldemar A. Solf Professor of International Law at the United States Army Judge Advocate General's School.

Various awards include the Intelligence Community Gold Seal Medallion, the Department of Defense/DoDIG Distinguished Civilian Service Medal, and the Legion of Merit. In 2005, he was awarded the Medal of Merit from Ohio University and the Distinguished Service Award from Syracuse University College of Law for his work in West Africa. Professor Crane was awarded a George Arents Pioneer Medal from Syracuse University in 2006 for his work in international criminal law. Also in 2006 he was given the keys to the City of Highland Park, Illinois where he went to high school. Prior to his departure from West Africa, Professor Crane was made a Paramount Chief by the Civil Society Organizations of Sierra Leone.

Professor Crane lectures all over the world on bringing justice to victims of atrocity and has written extensively and been interviewed widely on national security and international humanitarian issues.

**Sir Desmond DeSilva**

*Special Court for Sierra Leone*

Country of Origin: Sri Lanka/United Kingdom

Bio: In 2002, Kofi Annan appointed Sir Desmond DeSilva Deputy Prosecutor for the International Criminal Tribunal in Sierra Leone and in 2005 promoted him to Chief Prosecutor with higher rank of Under Secretary-General. Sir Desmond was called to the Bar in the Middle Temple in London in 1964 and appointed Queens Counsel in 1984. He serves as a member of the Criminal Bar Association and the International Association of Prosecutors. Sir Desmond is the Head of Chambers at 2 Paper Buildings in London and is one of his country's leading Queen's Counsels. His breath of expertise includes War Crimes, Espionage Trials, Treason, Drugs, Terrorism, Human Rights, White Collar Fraud and Sports Law. Recently Sir Desmond has also advised Prime Minister Vojislav Kostunica of Serbia and the Serbian government on how to handle the legacy of war crimes committed during the recent Balkan conflicts, in order to fulfill their international obligations to the Hague Tribunal. Sir Desmond was knighted in the British New Years Honours List of 2007 and he is also a Knight of the British Most Venerable Order of Saint John and Knight of the Sacred Military Constantinian Order of Saint George.

**Whitney R. Harris**

*International Military Tribunal (Nuremberg)*

Country of Origin: United States of America

Bio: Whitney Harris was a line officer in the United States Navy throughout World War II. Toward the end of the war, the Navy assigned him for special duty with the Office of Strategic Services. OSS sent him to Europe for the investigation of Nazi war crimes in the European Theater. In Europe he joined the staff of Robert H. Jackson, the United States Chief Prosecutor for the trial of major Nazi war criminals, and moved with the first contingent of prosecutors to Nuremberg in 1945. He was assigned the prosecution of Ernst Kaltenbrunner, the chief of the Reich Main Security Office and two other organizations, the SD and the Gestapo. Harris obtained the conviction of all three defendants.

Whitney Harris assisted Justice Jackson in the cross-examination of Hermann Goering. He obtained the confession of Rudolf Hoess to the extermination of two and a half million Jews and other victims at Auschwitz concentration camp. Harris sat at the American prosecution table on October 1, 1946, when the Tribunal delivered its final sentences and was the only prosecutor present in the Palace of Justice on the night of the executions.

Harris is the author of *Tyranny on Trial*, first published in 1954, the authoritative account of the trial of the major war criminals at Nuremberg and declared by the *New York Times Review* as “masterly and meticulous...a book of enduring importance,” and *Murder by the Millions, Rudolf Hoess at Auschwitz*, 2005.

**Hassan Jallow**

*International Criminal Tribunal for Rwanda*

Country of Origin: Gambia

**Bio:** In 2003, Hassan Jallow was appointed the new Chief Prosecutor of the Rwanda genocide court by the Secretary General of the United Nations to take charge of cases stemming from the 1994 genocide in Rwanda. Prior to this appointment, Hassan Jallow had extensive experience serving the United Nations and its international courts. In 1998 he served as a legal expert and carried out judicial evaluation of the International Criminal Tribunal for Rwanda and the International Criminal Tribunal for Yugoslavia. In 2002 Hassan was appointed Judge of the Appeals Chamber of the Special Court for Sierra Leone. Before his work for the United Nations, he held many esteemed positions in his own country. Hassan worked as State Attorney in the Attorney General's Chambers from 1976 until 1982 when he was appointed Solicitor General. He then served as Gambia's Attorney-General and Minister of Justice from 1984 to 1994 and subsequently as a Judge of the Gambia's Supreme Court from 1998 until 2002 when he was removed by Gambia's president for allowing a case to go forward alleging the government's role in suppressing a student protest. Amidst his many positions, Justice Jallow also worked on drafting the African Charter on Human and People's rights (adopted in 1981) and served the commonwealth as chair of the Governmental Working Group of Experts in Human

Rights. Jallow was awarded the honor of Commander of the National Order of the Republic of Gambia.

**Henry T. King, Jr.**

*International Military Tribunal (Nuremberg)*

Country of Origin: United States of America

Bio: Henry T. King Jr., is a graduate of Yale College and Yale Law School. A former U.S. Prosecutor at the Nuremberg Trials, a former General Counsel of the U.S. Foreign Economic Aid Program, as well as a former Chairman of the Section on International Law and Practice of the American Bar Association, Mr. King is U.S. Chairman of the Joint ABA (American Bar Association), CBA (Canadian Bar Association), Barra Mexicana Working Group on the Settlement of International Disputes whose recommendations for the Settlement of Disputes under the North American Free Trade Agreement (NAFTA) were incorporated into the Agreement. He is U.S. Director of the Canada-United States Law Institute and Professor of Law at Case Western Reserve University School of Law where he teaches international arbitration. He is also of Counsel to the law firm of Squire, Sanders & Dempsey. Mr. King served as a member of the ABA Task Force on War Crimes in Former Yugoslavia. He was a founder of the Greater Cleveland International Lawyers Group and is a former president of the Cleveland World Trade Association. Mr. King is a former chair and long-time member of the Northern Ohio District Export Council. He has published over seventy articles on international

legal subjects, including international business transactions, international arbitration, and Nuremberg related topics. Mr. King has written a book on Albert Speer, one of the Nuremberg defendants, entitled *The Two Worlds of Albert Speer*. The University of Pittsburgh, School of Law named Mr. King a Fellow *honoris causa* of the Center for International Legal Education on March 9, 2002. On June 4, 2002, Mr. King was awarded an honorary degree of Doctor of Civil Law by The University of Western Ontario. Mr. King was a guest of the government of The Netherlands on March 11, 2003, for the inauguration of the International Criminal Court at The Hague.

### **Luis Moreno-Ocampo**

#### *International Criminal Court*

Country of Origin: Argentina

Bio: On April 21, 2003, the Assembly of States Parties to the Rome Statute of the International Criminal Court unanimously elected Luis Moreno-Ocampo as Chief Prosecutor of the Court. Mr. Moreno-Ocampo gained his reputation prosecuting abuses by senior military officials and for his work combating corruption in his own country. After graduating from the University of Buenos Aires Law School, Moreno served as a law clerk for the Solicitor General from 1980-1984. He rose to prominence as the assistant prosecutor of the National Commission on the Disappearance of Persons in the “Trials of the Juntas.” The trial prosecuted nine senior

figures of the military dictatorship for the mass killing of civilians and resulted in five convictions in 1985. It was the first time since Nuremberg that senior commanders were prosecuted for such crimes. Mr. Moreno has also served as assistant prosecutor in the trial of senior members of the Buenos Aires Police Force for gross human rights abuses in 1986, part of the extradition team that sent General Guillermo Suarez Mason to the state of California, and as the Main Prosecutor of the review for the military trial for malpractice against the commanders of the Falklands-Malvinas War. In 1992 he established a private law firm, Moreno-Ocampo & Wortman Jofre, which specializes in corruption control programs and criminal and human rights law. He has since worked as a lawyer for large companies and taken on a number of pro bono cases, and cases concerning political bribery, journalists' protection, and freedom of expression. Mr. Moreno has also worked with various NGO's, specifically as president of Transparency International for Latin American and the Caribbean and served as a member to the Advisory Board and the Board of Transparency International, whose aim is to reduce corruption in business transactions.

**Robert Petit**

*Extraordinary Chambers in the Courts for Cambodia*

Country of Origin: Canada

Bio: On July 3, 2006, in a historic step toward justice for the estimated 1.7 million Cambodians killed under the Khmer Rouge, 25 genocide-tribunal judges and

prosecutors, including co-prosecutor Robert Petit, were sworn in. Soon after, U.N. co-prosecutor Petit began building a case against those responsible for the atrocities committed during the Khmer's 1975-79 reign. Robert Petit has significant experience in international criminal law. He served as a Legal Officer in the Office of the Prosecutor of the International Criminal Tribunal for Rwanda from 1996 to 1999; Regional Legal Advisor for the U.N. Mission in Kosovo from 1999 to 2000; Prosecutor, Serious Crimes Unit, for the U.N. Mission of Assistance to East Timor in 2002; and Senior Trial Attorney, Office of the Prosecutor for the Special Court for Sierra Leone from 2003 to 2004. Prior to that, Mr. Petit worked as a criminal prosecutor in Montreal for eight years before he decided to "do something different" and applied for a position with the newly established International Criminal Tribunal for Rwanda in 1995. The Cambodian tribunal, which has been fraught with questions and allegations over the years, will be a unique experience with new challenges. "This is definitely a different animal," Mr. Petit said in an interview with *Embassy* in July 2006, but: "To my mind, aside from the types of crimes and the sheer magnitude of them and the sheer horror of them...it still remains the same principle. You're representing the victims. The pressure is the same in that you have a responsibility to represent the voices, to represent the victims."

**Stephen J. Rapp**

*Special Court for Sierra Leone*



Country of Origin: United States of America

**Bio:** In December 2006 the Secretary-General of the United Nations appointed Stephen J. Rapp as the third Prosecutor for the Special Court for Sierra Leone. Mr. Rapp was previously Chief of Prosecutions at the United Nations-International Criminal Tribunal for Rwanda (ICTR) from May 2005. In this position, Mr. Rapp was responsible for supervising the prosecution of military, government and political leaders responsible for the Rwandan genocide in trials at the ICTR in Arusha, Tanzania. Before that, he served as Senior Trial Attorney of what has been called the "Media Trial," against the principals of RTLM radio and the editor of the Kangura newspaper. In December 2003, the Trial Chamber pronounced each of the defendants guilty of Genocide, Direct and Public Incitement to Commit Genocide, and other crimes. Rapp, the lead prosecutor, became renowned internationally for winning the most controversial case stemming from the Rwandan civil war. Prior to his service at the ICTR, Mr. Rapp was United States Attorney for the Northern District of Iowa from November 1993 until May 2001. Rapp was one of the first federal prosecutors to convict repeat abusers under the Violence Against Women Act. Prior to his service as US Attorney, he was in private practice of law in Waterloo, Iowa. He also served as a Staff Director and Counsel at the US Senate Judiciary Committee and as an elected member of the Iowa Legislature.

**David Tolbert**

*International Criminal Tribunal for the former  
Yugoslavia*

Country of Origin: United States of America

Bio: In 2004, David Tolbert took up his duties as Deputy Prosecutor of the International Criminal Tribunal for the former Yugoslavia (ICTY), following his appointment by then-UN Secretary-General, Kofi Annan. Formerly the Deputy Registrar of the ICTY, Mr. Tolbert has had extensive experience in the field of international law. He previously served as the Executive Director of the American Bar Association's Central European and Eurasian Law Initiative (ABA CEELI), which manages rule of law development programs throughout Eastern Europe and the former Soviet Union. Prior to his work at ABA CEELI, Mr. Tolbert served (for over four years) at the ICTY as Chef de Cabinet to former President Gabrielle Kirk McDonald and as the Senior Legal Adviser, Registry. He previously held the position of Chief, General Legal Division of the United Nations Relief and Works Agency (UNRWA) in Vienna, Austria and Gaza. Mr. Tolbert previously was a Lecturer in International Law at the University of Hull, England, and Visiting Professor at the Universidade Federal Espirito Santo, Vitoria, Brazil. He has a number of publications regarding international criminal justice, the ICTY and the International Criminal Court (ICC) and represented the ICTY in the discussions leading up to the creation of the ICC.