

COMMENTARY: THE MODERN RELEVANCE OF THE NUREMBERG PRINCIPLES

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I arrived in Nuremberg in the late Winter of 1946 to begin the adventure which would define my life. It seemed as though civilization as we had known it had been obliterated in that great city. Nuremberg had been the crossroads of trade during the Middle ages, the home of the great artist Albrecht Durer, of Hans Sachs, the shoemaker poet, and the original meistersingers. But in 1946 much of Nuremberg had been destroyed by Allied bombing. Shelter for Nurembergers was limited and very primitive. Food was in short supply and the people were hungry. When I saw what modern weapons had done to Nuremberg, I resolved to do my part to never let it happen again.

Pursuing the vision of Justice Robert Jackson, we scaled the heights at Nuremberg and made dreams become a reality. Justice and morality won the day, and thus civilization was saved. But now, fifty years later, how should we view Nuremberg in terms of its achievements? What follows is a list of lasting results from Nuremberg.

Nuremberg marked the beginning of the International Human Rights Movement. Nuremberg held that individuals have human rights, beyond the control of nation states. These rights are universal in character, and individuals who violate the human rights of others will be punished. It was the first time in human history when there was an adjudication of the international human rights of individuals rights that existed even though the nation state in question did not recognize

* A Professor of Law at Case Western Reserve Law School, Professor King was a prosecutor at Nuremberg and participated in the Boston College Nuremberg conference. During Professor King's presentation at Boston College, he recalled a story from his childhood that sparked his interest in the wartime prosecution. Born in Meriden, Connecticut, Professor King's father impressed upon him that a public office is a public trust. Professor King's father would reserve Sunday night suppers for discussions of the great issues of the day. One Sunday night in May of 1935, his father asked, "How do you stop wars?" This was important to his father, because as Meriden's wartime mayor, he saw the devastating results of World War I on the flower of Meriden's youth. Since he was stumped for a response, his father gave an answer, which was: "The people do not want wars. It is their leaders. To stop wars you have to punish the leaders." This answer is one that Professor King never forgot and a lesson that was applied at Nuremberg.

their existence. This was a giant leap forward, and the legacy of Nuremberg today is reflected in the Genocide Convention of the United Nations (U.N.),¹ the Universal Declaration of Human Rights,² the European Convention for the Protection of Human Rights and Fundamental Freedoms³, and the American Convention on Human Rights.⁴ Nuremberg lives on in today's world not only in words but in deeds.

In Europe, individuals have human rights which are enforceable against nation states under the European Human Rights Convention.⁵ For example, forty-three individuals have been indicted for trial by the U.N. Tribunal now sitting at the Hague for alleged violations of the human rights of other individuals in the former Yugoslavia. The Tribunal began hearing evidence against the suspected war criminals in October of 1995.

Nuremberg extended the reach of international law to individuals found guilty of violating rules governing the conduct of warfare. These rules were set forth in the Hague Convention of 1907⁶ and the Geneva Convention of 1928.⁷ They were updated after Nuremberg in certain aspects of the Geneva Convention of 1949.⁸ Again, the Hague Tribunal is hearing cases based on the Nuremberg rulings regarding war crimes and crimes against humanity. Thus, it is evident that Nuremberg lives on today at the Hague and in the training that our soldiers receive regarding the conduct of warfare.

¹ The Convention on the Prevention and Punishment of the Crimes Against Genocide, (1948), *reprinted in* THE ENCYCLOPEDIA OF THE UNITED NATIONS AND INTERNATIONAL AGREEMENTS 664 (2d ed. 1990) [hereinafter Genocide Convention].

² Universal Declaration of Human Rights, Art. 21, G.A. Res. 217 (III), UN Doc. A/810 (1984).

³ Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221, 224 [hereinafter Convention for the Protection of Human Rights and Fundamental Freedom].

⁴ American Convention on Human Rights, Nov. 22, 1969, O.A.S.T.S. No. 36. OEA serv. s/v/II, 23 art. 1(1) (1979).

⁵ See Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 4, at 224.

⁶ Convention Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277.

⁷ See Henry T. King, Jr., *The Nuremberg Context From the Eyes of a Participant*, 149 MIL. L. REV. 37, 40-41 (1995).

⁸ Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Convention of the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

Justice Jackson's focus at Nuremberg was on the aggressive war count whereby individuals were charged with planning, preparing, and carrying out wars of aggression. In this respect, less progress has been made in implementing the inheritance of Nuremberg. One problem is the judgment of the international military tribunal itself, which held that what the Nazis did constituted aggression. This conclusion, however, lacks a sweeping definition of aggression in more generic terms so as to extend the applications of the court's decision to other contexts. Given this gap, it was up to the U.N.'s international law commission to pursue the matter.

The commission moved gradually, and consequently it was not until 1974 that they arrived at a draft of aggression.⁹ Even after this development matters have moved very slowly. State sovereignty remains the eternal barrier to dealing effectively with the problem of aggression, both today and in the earlier, post-Nuremberg years. It remains still strong in today's world, and Jackson's dream has not been realized. The fires of hope which were dim for so long, however, have been rekindled with the 1991 publication of the U.N.'s Draft Code of Offenses Against the Peace and Security of Mankind.¹⁰ This was followed in 1993 by a draft statute for an international criminal court which was revised in 1994.¹¹

Today we honor the memory of Justice Robert Jackson and Thomas Dodd¹² by building a constituency for action in this area to ensure completion of this critical United Nations initiative. Such action is a fundamental, necessary precursor to an ordered world governed by a rule of law. The stakes are high. Nonetheless, this is the unfinished business of Nuremberg.

Our children must inherit a world in which the likes of Nazi aggression will never happen again. Fifty-three million people lost their

⁹ Resolution on the Definition of Aggression, G.A. Res. 3314, U.N. GAOR, 29th Sess., Supp. No. 31, at 142-43, U.N. Doc. A/9631 (1974).

¹⁰ Draft Code Against the Peace and Security of Mankind: Report of the Working Group Established Pursuant to the Request from the General Assembly to the International Legal Commission, U.N. Doc. A/CN.4/L.454 (1990).

¹¹ United Nations International Law Commission, Report of the Working Group on A Draft Statute for an International Criminal Court, U.N. Doc. A/cn.4/L.490 (1993), *reprinted in* 33 I.L.M. 253 (1994).

¹² This commentary was derived from a speech given by Professor King in honor of Thomas Dodd, former Senator and executive counsel to the American prosecutorial team at Nuremberg. It was at Nuremberg that Professor King met Thomas Dodd, which marked the beginning of a long and much valued friendship.

lives in Hitler's Wars—young people, old people, Frenchmen, Jews, Poles, Russians, Americans, and individuals like Anne Frank. We can honor their memory with action to enforce the thrust of the Nuremberg rulings on aggression.

Another legacy of Nuremberg is the principle that superior orders is not a defense. This principle is incorporated into the constitution of the Tribunal governing the proceedings at the Hague.¹³ Moreover, just as heads of state were not granted immunity at Nuremberg for War crimes and crimes against humanity, so in the Hague proceedings we see that the head of the Bosnian-Serbs and the Bosnian-Serb Army Chief of Staff are defendants. The Hague Tribunals also reinforced the Nuremberg concept that war crimes trials should be fair. Nuremberg also inspired the Genocide Convention. The Genocide Convention was influenced to incorporate the concept of crimes against humanity and extends the application of these principles to peace time as well as war time.¹⁴

Nuremberg was the first post-mortem analysis of a totalitarian state. It gave us an appreciation of the levers of power in a dictatorship and of the defenses which have to be in place to prevent dictatorships and their destructive effects.

We found that a strong, free press could have posed significant barriers to totalitarianism. One of Hitler's early targets was the German press which was put under Goebbels' control soon after Hitler took power. We would be wise to always remember the power of a free press in our own country. The *Washington Post* served us well in getting at the true facts surrounding Nixon's presidency.¹⁵ In the Vietnam era, when serious questions were being raised about the wisdom of our continued participation in the war, the *New York Times* acted in the public interest by publishing the Pentagon Papers.¹⁶ Hitler was able to avoid such revelations by ruthlessly destroying any opposition in the press.

¹³ See RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 3.2 (1969). The principle has been well established that orders pursuant to municipal law are no defense to violations of international law. See Vienna Convention on the Law of Treaties, U.N. Doc. A/CONF. 39/27, art. 27, at 293, (1969), *reprinted in* 8 I.L.M. 679, 690 (1969).

¹⁴ See Genocide Convention, *supra* note 2.

¹⁵ See CARL BERNSTEIN & BOB WOODWARD, *ALL THE PRESIDENT'S MEN* (1974); see also *Nixon v. Adm'r of Gen. Services*, 433 U.S. 425, 445 (1977).

¹⁶ See NEIL SHEEHAN ET AL., *THE PENTAGON PAPERS AS PUBLISHED BY THE NEW YORK TIMES* 241-78 (1971); see also *New York Times v. U.S.*, 403 U.S. 713 (1971).

One of the most basic rights which was destroyed in Hitler's Germany was the right of free speech, the right to dissent. The populace heard only what those in the Nazi hierarchy wanted them to hear. Free speech went by the boards early on once Hitler's regime was in place. It vanished like a puff of smoke. The horrifying and catastrophic results in Hitler's Germany must continue to remind us today that this right is very precious and vital to the preservation of humanity in a civilized state. Respect for the right of all of us to speak our piece can be a barrier against the rise of a future Hitler or to the onset of yet another aggressive war.

Another lesson of Nuremberg was that a viable constitution with three separate branches of government and a system of checks and balances between these units of government can serve the United States well in avoiding a rise of authoritarianism here. The tension between these three branches of government, as wisely anticipated by our forefathers, has proven its validity in the past and will in the future. The validity of three separate branches of government will be tested against those seeking to aggrandize the power of the executive branch, Congress, or the judiciary. History has proven that aggressive war and democracy are antithetical in nature.

Another essential barrier to totalitarianism is a strong and vital court system, with judges who are truly independent and with enforcement agencies to enforce court decisions. Such a system was certainly not in existence in Hitler's Germany.

The real meaning of Nuremberg is that individuals are responsible not only to themselves but to others. Nuremberg represented a blueprint for a better world in which men and women can live in peace and security and with dignity. We are not there yet, we have a long road ahead. There are those who say that Nuremberg was an imperfect proceeding. My response is that we made a good start on the road to justice and the re-civilization of human relationships after the most brutal and extensive war in modern history. The basic principles of Nuremberg were valid then, and they remain so today. These basic principles are as follows:

- (1) That the initiation and waging of aggressive war is a crime as is a conspiracy to wage aggressive war;
- (2) That the violation of the laws and customs of war is a crime;
- (3) That inhumane acts upon civilians in execution of, or in connection with, aggressive war constitutes a crime;

- (4) That individuals may be held liable for crimes committed by them as heads of state;
- (5) That individuals may be held liable for crimes committed by them pursuant to superior orders;
- (6) That an individual charged with a crime under international law is entitled to a fair trial.¹⁷

And so, by remembering Nuremberg, we should renew our appreciation for those institutions which stand between us and the abyss: a free press, free speech, an independent judiciary, and balance between the three branches of government, with a viable and living constitution solidly in place.

¹⁷ WHITNEY HARRIS, *TYRANNY ON TRIAL: THE EVIDENCE AT NUREMBERG* (1954).