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The subject of my paper is the trial of the major Nazi war leaders before the International Military Tribunal in Nuremberg, Germany at the close of World War II and about events which have transpired since as they seem to me to appear in the light of Nuremberg.

You will agree, I am certain, that the recorded history of mankind reflects an abysmally large amount of time spent in organized efforts to destroy itself. Despite apparent manifestations of progress towards civilization, the present century has already suffered two colossal wars and many, many smaller, but deadly encounters.

World War II had been a particularly brutal experience. As described by Bradley Smith in his book Reaching Judgment at Nuremberg, "Europeans stood knee-deep in the horror and wreakage left by six years of war and twelve years of Nazism. No one doubted that Nazi Germany had started the war. Millions were dead, and the memory of a savage Nazi occupation was still a bitter reality from central Russia to the Atlantic. Each day's newspaper revealed new chapters in bestiality out of concentration camps and death factories, such as Auschwitz and Treblenka. Nazi Germany had too drastically proven its powers and ruthlessness. Scores had to be settled and a groundwork barring revival of such power had to be laid." In a letter written in May of 1945, President Truman expressed what was by far the prevailing sentiment in America as well as in the areas of the world so devastated by the long

ordeal. He said that due to their "barbaric practices, we have a stern duty to teach the German people the hard lesson that they must change their ways before they can be received back into the family of peaceful civilized nations."

Indeed, sentiment was such that there was a very good chance that no trial would be needed. Spurred by the influential Henry Morgenthau, Roosevelt and Churchill at the Quebec conference agreed to his plan for the "pasturization" of the German economy and, noteworthy for our purposes, for the summary execution of Nazi leaders. A list of war criminals, leaders and subordinates, would be given to the advance Allied military forces, who would use the list to identify and immediately shoot captured prisoners.

According to Bradley Smith, it was Henry Stimson, then Secretary of War, who finally persuaded Roosevelt against summary execution and for a trial to determine guilt, degrees of guilt and who knows, even of innocence. Smith quotes Stimson as telling Roosevelt, "The very punishment of these men in a dignified manner consistent with the advance of civilization, will have the greater effect upon posterity...I am disposed to believe that at least as to the chief Nazi officials, we should participate in an international Tribunal constituted to try them."

Although Churchill held to the idea of summary execution to the very last, he was finally persuaded by his own colleagues, and, ironically enough in a visit to Moscow, by Joseph Stalin who opined that a trial of major Nazis was absolutely essential.

With strong, decisive support from Truman on his ascendancy to the Presidency, the four main Allies: Russia, France, England and the United Stated signed two short documents on August 8, 1945, one entitled just "The Agreement" and the other the "Charter of the International Military Tribunal".

With the background of a significant amount of sentiment for summary execution, and now the rush to bring what were already called the Nazi war criminals to trial, one can only think of the fine old frontier tradition of "We'll give 'em a fair trial and hang 'em." Smith uses an apt quote from Alice in Wonderland, "No, No", said the Queen. "Sentence first - verdict afterwards." "Stuff and nonsense!," said Alice.

Mr. Justice Robert Jackson, chosen as the chief American prosecutor, was keenly aware of this potential criticism. In an article in the American Bar Association Journal in June of 1945, he stated: "If you are determined to execute a man in any case, there is no occasion for a trial; the world yields no respect to courts that are merely organized to convict."

But I do not intend to dwell here on the fairness of the trial or try to develop the procedural or substantive steps as they evolved. For those who have an interest, Smith's book, written recently after many new documentary sources became available, will do very well.

What I do wish to discuss are some of the concepts on which the defendants were tried and then look at some selected events which have transpired since and attempt to evaluate Nuremberg in their light.

But I should not leave the subject of the trial itself without a statement in support of the very sincere effort that was made to do justice within the confines of the Charter, world opinion and the haste with which the evidence was prepared and evaluated. Quotes from two German defense counsel made more than fifteen years after the Trial give very creditable evidence of this. Herbert Kraus, counsel for Hjalmer Schacht, says of the judges that they "were persons of integrity guided by the idea of administering law impartially". And Carl Haensel, another German lawyer who was one of the chief defense counsel said, "The proceedings, the treatment of the defendants and the rights granted to defense counsel were very fair." The verdict itself is some evidence of this. There were four counts in the indictment. Twenty-two defendants were judged. Three - Papen, Schacht and Fritzsche - were found not guilty; four given terms from ten to twenty years; three, including Hess, got life; and twelve were sentenced to hang, with only Borman, sentenced in absentia, escaping the noose. Interestingly, the French wanted to have some shot instead of hung, particularly the old line military generals and admirals.

As I have indicated, my interest in Nuremberg does not lie in who was convicted, or how they were sentenced. Rather it is in the ideas, the concepts which were used as a

basis to justify a trial at all. For this purpose the words of Mr. Justice Jackson are the best source. The following are quotes from his report to President Truman on June 7, 1945 not long before the trials were to start; his opening statement to the Tribunal; and his closing address.

These quotations give us the best insight as to how the prosecutors saw their responsibility. They also serve the purpose of highlighting in Mr. Justice Jackson's own words principles or maxims which must cause us some concern, I submit, when we try to apply them to events which have transpired in the decades following the trial.

Hear then, the American Chief Prosecutor as he writes to his President, and addresses the International Military Tribunal at Nuremberg. First from his closing address in which he seeks to place the trials themselves in a very broad historical perspective:

> "It is common to think of our own time as standing at the apex of civilization, from which the deficiencies of preceding ages may patronizingly be viewed in the light of what is assumed to be 'progress'. The reality is that in the long perspective of history the present century will not hold an admirable position, unless its second half is to redeem its first. These two-score years in this twentieth century will be recorded in the book of years as one of the most bloody in all annals. Two World Wars have left a legacy of dead which number more than all the armies engaged in any war that made ancient or medieval history. No half-century ever witnessed slaughter on such a scale, such

cruelties and inhumanities, such wholesale deportations of peoples into slavery, such annihilations of minorities. The terror of Torquemada pales before the Nazi inquisition. These deeds are the overshadowing historical facts by which generations to come will remember this decade. If we cannot eliminate the causes and prevent the repetition of these barbaric events, it is not an irresponsible prophecy to say that this twentieth century may yet succeed in bringing the doom of civilization."

And again, Jackson in his report to President Truman:

"Now we stand at one of those rare moments when the thought and institutions and habits of the world have been shaken by the impact of world war on the lives of countless millions. Such occasions rarely come and quickly pass. We are put under a heavy responsibility to see that our behavior during this unsettled period will direct the world's thought toward a firmer enforcement of the laws of international conduct, so as to make war less attractive to those who have governments and the destinies of peoples in their power."

And as he made his opening statement:

"The privilege of opening the first trial in history for crimes against the peace of the world imposes a grave responsibility. The wrongs which we seek to condemn and punish have been so calculated, so malignant and so devastating, that civilization cannot 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 ever has paid to Reason."

So much for perspective.

Jackson was not unaware that many people, lawyers and non-lawyers, were disturbed that some of the laws upon which the trials were based were ex post facto; that the defendants could not have known they were violating the law at the time of the commission of the crime - certainly a principle deeply set in our system of justice.

There were four counts in the indictment. Count Three was the most straightforward, charging violation of traditional laws and rules of warfare. But it did not reach those who had slaughtered civilians to terrorize a government or to break the popular will of the opposition. So Count Four was necessary. It broadly charged "Crimes Against Humanity", and included as crimes, murder, extermination and persecution on political, racial or religious grounds, whether committed before or during the war. It permitted the prosecution of prewar war criminals. Again, in Smith's words, "the core of the criticism of Count Four is the obvious fact that there was no code of law or international agreement in existence in 1933, 1939 or even 1949 that made it illegal to ~~prosecute~~ persecute religious, or to exterminate populations."

Count Two was entitled "Crimes Against Peace". It charged that "All the defendants with divers other persons during a period of years preceding 8 May 1945 participated in the planning, preparation, instigation and waging of wars of aggression which were also wars in violation of international treaties, agreements and assurances." The language is worth noting carefully. It speaks of "wars of aggression which were also wars in violation of treaties", etc. Count One, the remaining count, in effect charged the defendants with a conspiracy to violate the other three counts.

The defense counsel at Nuremberg verbalized their attack on Count Two, "Crimes Against Peace" this way:

> "The present trial can, therefore, as far as Crimes against Peace shall be avenged not invoke existing international law, it is rather a proceeding pursuant to a new penal law enacted only after the crime. This is repugnant to a principle of jurisprudence sacred to the civilized world, the partial violation of which by Hitler's Germany has been vehemently discountenanced outside and inside the Reich. This principle is to the effect that only he can be punished who offended against a law in existence at the time of the commission of the act and imposing a penalty. This maxim is one of the great fundamental principles of the political systems of the signatories of the Charter for this Tribunal themselves, to wit, of England since the Middle Ages, of the United States since their creation,

of France since its great revolution and the Soviet Union. And recently when the Control Council of Germany enacted a law to assure the return to a just administration of penal law in Germany, it decreed in the first place the restoration of the maxim, 'No punishment without a penal law in force at the time of the commission of the act.' This maxim is not merely a rule of expediency but is derived from recognition of the fact that a defendant must consider himself unjustly treated if he is punished under an ex post facto law."

This is how Mr. Justice Jackson tried to answer the critics of the ex post facto charge:

"There was a time, in fact I think the time of the first World War when it could not have been said that war inciting or war making was a crime in law, however reprehensible in morals. Of course, it was under the law of all civilized peoples a crime for one man with his bare knuckles to assault another. How did it come that multiplying this crime by a million, and adding firearms to bare knuckles, made a legally innocent act? The doctrine was that one could not be regarded as criminal for committing the usual violent acts in the conduct of legitimate warfare. The age of imperialistic expansion during the eighteenth and nineteenth centuries added the foul doctrine, contrary to the teachings of

early Christian and International Law scholars such as Grotius, that all wars are to be regarded as legitimate wars. The sum of these two doctrines was to give war making a complete immunity from accountability to law. This was intolerable for an age that called itself civilized. Plain people, with their earthy common sense, revolted at such fictions and legalisms so contrary to ethical principles and demanded checks on war immunity. Statesmen and international lawyers at first cautiously responded by adopting rules of warfare designed to make the conduct of war more civilized. The effort was to set legal limits to the violence that could be done to civilian populations and to combatants as well.

The common sense of men after the first World War demanded, however, that the law's condemnation of war reach deeper and that the law condemn not merely uncivilized ways of waging war, but also the waging in any way of uncivilized wars - wars of aggression. The world's statesmen again went only as far as they were forced to go. Their efforts were timid and cautious and often less explicit than we might have hoped. But the 1920's did outlaw aggressive war."

But despite Jackson's eloquence, the reality is that while nations did make treaties attempting to outlaw barbaric acts against civilian populations and against participants in a war, there was no provision anywhere which contemplated that people would be held criminally responsible for violating those treaties, and indeed be placed on trial for their lives by their victorious enemies.

And one had to reach into something more than written law to find the liquidation of a race to be a crime for which leaders and participants would be placed in the dock to be judged. One must think of the teachings of St. Thomas Aquinas and of other theologians who have held that there is a universal, absolute right and wrong which man, as God's creature, can discern. But Thomas would hold that it is God who would bind accountable the transgressor of those discoverable laws. At Nuremberg the victors would say that we men will also judge you accountable.

There was yet a third concept that I want to single out for our discussion. That is the provision in the Charter which denied to the accused the defense of following superior orders.

There was a correlary, too. The leaders were to be held responsible for the acts of their subordinates, but they could not themselves offer a defense that they were caught in a situation offering only one choice - to follow orders.

Having in mind these concepts, let's try to apply them to some events, during and since the war.

The Allies were really in some trouble right at the beginning. After all, Russia, who now of course sat in judgment, had reached an agreement with Hitler that left Poland helpless. Documents were available, captured from the Germans that were of great embarrassment to Russia, but they were not admitted into evidence.

And other documents surfaced which showed that Britain had prepared to land in Norway, but the Germans beat them to the punch. Yet Germans who were held responsible for waging illegal aggressive war by attacking Norway were in the prisoner's dock. The German defense was one of self-defense, and they quoted Molotov, then under a non-aggressive pact with Hitler, as saying, "I wish Germany a good and plentiful success with its defense measures." The defendants were not permitted to introduce Allied conduct in defense of their own. The plain fact was that Allied hands were not totally clean, but there was also no question that, on balance, the Nazi crimes made whatever the Allies did pale to insignificance. We should not get hung up on these inconsistencies.

Now I would like to return to the subject of aggressive war.

Mr. Justice Jackson laid down some very confining rules in talking about what constituted "aggressive war". He said:

> "It is perhaps a weakness in this Charter that it fails itself to define a war of aggression. Abstractly, the subject is full of difficulty and all kinds of troublesome hypothetical cases can be conjured up.... I suggest that an 'aggressor' is generally held to be that state which is the first to commit any of the following actions:
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> (1) Declaration of war upon another State;
>
> (2) Invasion by its armed forces, with or without a declaration of war, of the territory of another State;

(3) Attack by its land, naval, or air forces, with or without a declaration of war, on the territory, vessels, or aircraft of another State;

(4) Provision of support to armed bands formed in the territory of another State, or refusal, notwithstanding the request of the invaded State, to take in its own territory, all the measures in its power to deprive those bands of all assistance or protection.

"And I further suggest (Jackson continues) that it is the general view that no political, military, economic, or other considerations shall serve as an excuse or justification for such actions; but exercise of the right of legitimate self-defense, that is to say, resistance to an act of aggression, or action to assist a state which has been subjected to aggression, shall not constitute a war of aggression."

And make no mistake about how Jackson felt his words and actions should apply to us in the future. He said:

"We must never forget that the record on which we judge these defendants today is the record on which history will judge us tomorrow. To pass these defendants a poisoned chalice is to put it to our own 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."

The war in Viet Nam is a subject where passions still control and meaningful discussion is difficult. I read the other day that the most successful movie, Star Wars, is about Viet Nam; that the author started to write directly about Viet Nam and was persuaded to place the story in a future environment because of the public's unwillingness to think about Viet Nam, and most certainly not to pay to be entertained by it.

Having in mind what happened at Nuremberg there are at least three facets of the German war criminal trials which come to mind in considering the war in Viet Nam. We can examine it as an "aggressive war" by Nuremberg standards, we can apply the Nuremberg principles for the responsibility of subordinate acts such as those at Mylai, and we can talk about draft evaders and their pardon. If I get through that much alive, I will try to address what I think is the more profound issue and that is whether the concepts formed at Nuremberg are really compatible with today's world of geo-politics.

What can be said as to whether the role of the United States in Viet Nam was a war of self-defense, and thus legally within the Nuremberg framework? Self-defense, says Jackson, includes "action to assist a state which has been subjected to aggression". So the legitimacy of our actions seemingly rests upon the request of the South Vietnamese for us to come to their defense from the aggressive acts of the North Vietnamese, perhaps the Chinese and the Russians. I recently heard Dr. Henry Kissinger say that initially we misjudged the relationship between China and Russia, and that if we had better understood in the late 50's and early 60's that they were not acting in concert, we might not have read the Viet Nam situation to be one involving our vital interests.

I think I have set up a straw man for you. The issue of whether North Vietnam was the aggressor and whether we were invited in by a legitimate South Vietnamese government - both, I concede, can be supported - is not <u>really</u> what that tragic time was all about. The moves we made were ploys in a much larger arena - the world itself - and the overriding, perceived need to maintain a balance between the world powers, primarily the U.S. and the Soviet Union. If, as Dr. Kissinger suggests, we misjudged the Soviet role, all the more tragic. But I find it very difficult to reconcile the proclaimed desire to outlaw war, as at Nuremberg, and a foreign policy which uses threats of war, support of war and actual use of armed force as essential weapons to accomplish political ends. As against this, hear Mr. Justice Jackson once more:

> "<u>Any</u> resort to war - to any kind of a war - is a resort to means that are inherently criminal. War inevitably is a course of killings, assaults, deprivations of liberty, and destruction of property. An honestly defensive war is, of course, legal and saves those lawfully conducting it from criminality. But inherently criminal acts cannot be defended by showing that those who committed them were engaged in a war, when war itself is illegal. The very minimum legal consequence of the treaties making aggressive wars illegal is to strip those who incite or wage them of every defense the law ever gave, and to leave war-makers subject to judgment by the usually accepted principles of the law of crimes."

Perhaps another example, not directly involving our country, will help sharpen the edges of the dilemma which I am trying to draw.

The following scenario was recently related by Major General Brent Scowcroft, Assistant to President Ford for National Security Affairs, as an explanation of events leading to the outbreak of war in the Middle East in 1973. The decisive, rapid and complete defeat of the Arabs by the Israeli in the first conflict, had two important effects. One, it convinced the Israelis they were invincible, and thus they had no need for real peace negotiations, and two, the Arabs had been humiliated, their manhood placed in severe self-doubt. Sadat knew that he must find a way to reverse both of these conditions. He deliberately attacked Israel, gambling on an initial success. It paid off - the Israelis were shaken by the realization that they <u>could</u> lose and they were devastated by the terribly high cost they paid in terms of the lives of their youngest and strongest. The Arabs regained considerable self-esteem, and we now see the results as the cards are being played out.

A very successful, and important move by Sadat. But what of Mr. Justice Jackson's admonition about criminal responsibility for waging aggressive wars? Sadat's actions would not meet the tests which Jackson laid down.

The idea that leaders will be held responsible for the acts of subordinates, necessary to some of the convictions at Nuremberg, is also troublesome. Lt. Calley seemed awfully alone during his ordeal. It is not a war situation, but how do we see

the coming trial of FBI agents, both as to their criminal accountability for breaking the law, and as to the responsibility of their superiors who surely knew of and even directed their activities.

I will leave the subject with one more quote from Mr. Justice Jackson as he talks about responsibility at Nuremberg:

> "Of course, the idea that a state, any more than a corporation, creates crimes is a fiction. Crimes always are committed only by persons. While it is quite proper to employ the fiction of responsibility of a state or corporation for the purpose of imposing a collective liability, it is quite intolerable to let such a legalism become the basis of personal immunity. The Charter recognizes that one who has committed criminal acts may not take refuge in superior orders nor in the doctrine that his crimes were acts of states. These twin principles working together have heretofore resulted in immunity for practically everyone concerned in the really great crimes against peace and mankind. Those in lower ranks were protected against liability by the orders of their superiors. The superiors were protected because their orders were called acts of state. Under the Charter, no defense based on either of these doctrines can be entertained. Modern civilization puts unlimited weapons of destruction in the hands of men. It cannot tolerate so vast an area of legal irresponsibility."

I said I would also discuss some relationships between draft evaders and Nuremberg. Again, I am in an area of deeply and emotionally felt positions. But I started this, and I am committed to see it through.

What strikes me here is this. At Nuremberg we heard of "acts which offended the conscience of our people", acts which were "criminal by standards generally accepted in all civilized countries". In the Fourth Hague Convention it was expressed as "the laws of humanity and the dictates of public conscience".

A moment ago I mentioned that these ideas were like those of Thomas Aquinas in the sense that all mankind recognized universal standards of acceptable and unacceptable conduct. And, more, each man would be held accountable for disregarding these rules which his conscience, like those of all his fellow man, identifies. The philosophers were talking of eternal judgment. Nuremberg talks of political accountability now.

It seems to me that Nuremberg invites - no demands - that each individual form a moral judgment on the validity of governmental acts in the use of armed force. If a soldier, or civilian for that matter, can be criminally liable for failing to speak out against an unjust war, can we punish him when he does speak out and when he refuses to become an accessory?

It is not necessary to make my point to argue that Viet Nam was in fact an unjust or illegal war. I believe it is enough to remind ourselves that some of the highest church leaders in the United States reached public conclusions long before the fighting finally stopped by our withdrawal that the war itself was or had become "unjust and immoral". Their having said it, of course, does not make it so. The point is not whether it was just or unjust, but how much can you quarrel with any individual who has seemingly reached the same judgment?

I will close so you may shoot at will. But I owe it to you to try to express my own conclusions as to Nuremberg, in 1978.

As I indicated before, I cannot, for myself, reconcile the admonitions against waging aggressive war for which the Germans were held accountable, and our world today where the threat of force itself, lies at the base of a foreign policy which seeks to maintain a balance among the powers of the world. It includes selling (or giving) arms to both sides in situations, such as the Middle East, where conflict can break out at any time. On the one hand we seek to negotiate arms reduction with the Soviets and at the same time we and the Russians sell arms to others. I cannot believe that we will be so smart, or even so lucky, that the precarious balance between the world's powers will be maintained. I think that despite its short comings Nuremberg was truly a high point for the human race in holding that war in intolerable and that war makers must be held accountable.

There has been very little to cheer about since Nuremberg, I submit, except the memorable and heart warming act of Sadat in carrying the dove of peace boldly to Israel. The almost universal reaction to this gesture and to the response it evoked in Israel gives all of us cause for hope. Even if they fail now to reach agreement, the course of events has been forever altered. Just maybe we will come to believe that deep in their hearts all men wish peace and will have the courage to say so and to act accordingly.

The proper resolution of the issue of individual conscience determination is also very difficult. It is hard to understand how any government can be effective in world relations if each citizen and potential combatant can make a moral judgment on the validity of governmental action and be free to act in accordance with that judgment. On the other hand, I submit that we are far from the old addage of "my country right or wrong". Viet Nam has seen to that.

For my part, I think there is a cause to be argued for the restraints that are imposed upon governments by the knowledge that the people will judge their acts and will not follow leadership blindly. Perhaps this is a heritage of Nuremberg.

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