1995

Remembering Nuremberg

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OCCASIONAL PAPERS FROM
THE LAW SCHOOL
THE UNIVERSITY OF CHICAGO

NUMBER 34

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"Remembering Nuremberg" was delivered at the University of Chicago Law School on November 21, 1995, the fiftieth anniversary of Justice Jackson's opening statement before the International Military Tribunal in Nuremberg.

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REMEMBERING NUREMBERG

BY BERNARD D. MELTZER*

Fifty years ago today, Justice Jackson, on leave from the United States Supreme Court, and serving as Chief of the United States Prosecution, delivered his magnificent opening statement in the trial before the International Military Tribunal in Nuremberg. The trial, because of the horrors it addressed and the purposes it sought to accomplish, has been viewed as the greatest in this century, if not in history. The road back to "Nuremberg"—which means both a trial and a place—is, of course, well travelled. Nonetheless, there are reasons, in addition to this fiftieth anniversary, for another trip. "Nuremberg" seems relevant—alas, too relevant—because of the atrocities, the grim clichés, of our own time, such as so-called ethnic cleansing in the former Yugoslavia and Rwanda and mass rape as an instrument of terror and territorial expansion. Finally, the memory of Nuremberg is also evoked by the rise of neo-Nazism in Germany and the United States, as well as by the preachers of bigotry and separatism, everywhere.

And so, this afternoon, I hope initially to sketch the trial's purposes, limitations, and the principal criticisms surrounding it.

The way for the trial was paved by the Germans' unconditional surrender on May 7, 1945, and by the Allies' capture of the major surviving leaders of the Nazi regime. On November 20, 1945, a little over six months after the surrender, the trial of "the Major War Criminals of the European Axis" before the International Military Tribunal opened at the Palace of Justice in Nuremberg, with the reading of the hundred-page indictment. In the courtroom were twenty-one defendants—the surviving major leaders of the Nazi regime, such as Goering, Ribbentrop, and Hess. All of the defendants pleaded

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Not Guilty. Seeing them in the dock, stripped of their medals and insignia of power, one could scarcely believe that these men had dominated much of the world and had terrified most of it.

The International Military Tribunal had been established under the so-called London Charter agreed to by the major Allies, that is, United States, England, France, and the Soviets. Two of the principal authors of the Charter, representing the United Kingdom and the United States, respectively, as had been anticipated, served as Chief Prosecutors for their governments. The Soviet draftsman later served as a member of the Tribunal. The French brought new people into those posts. The Charter set forth the law that was to govern the trial.

Each of the major Allies appointed one judge and an alternate to this military tribunal, who were, however, civilians, except for the USSR judges. The British judge, Sir Geoffrey Lawrence, was elected the Tribunal's President by the other judges; he announced its decisions on procedural matters. His election was apparently designed to play down the numerical dominance of the Americans; our legal staff was, I believe, bigger than the three other prosecution staffs combined.

Incidentally, the international trial is to be distinguished from so-called "Subsequent Proceedings," that is, later trials held at Nuremberg by only our own government; other trials were also held elsewhere before other national tribunals.[1]

I am not sure why the Nuremberg Palace of Justice became the situs of the trial of the Nazi leaders, but its choice surely meshed with a justice of retribution. The Nuremberg Laws of 1935 had been part of a series of anti-Semitic measures that had stripped German Jews of their citizenship and their property and had excluded them from the government, the armed forces, and other important areas of economic and cultural life. Beginning in 1934, during Nazi party rallies in Nuremberg, Hitler sought to seduce, deceive, and to terrorize his potential adversaries and to fire up his followers. When the trial began, Nuremberg was a pile of rubble; but the Palace of Justice and the prison adjacent to it had not suffered any substantial damage.

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[1] See generally, Telford Taylor, *The Nuremberg War Crimes Trials*, No. 450 International Conciliation 243, 277 (April 1949).

Albert Speer, a convicted defendant, said in his diary that he could not help thinking that there had been a deeper meaning to this almost miraculous survival of the Palace of Justice.[2]

In describing the international indictment, which in general tracked the Charter, I will oversimplify a bit. The first count charged a common plan or conspiracy to commit crimes against peace as well as war crimes and crimes against humanity.

The second count charged the actual commission of crimes against peace, namely, preparation and waging of aggressive wars, which were also in violation of international treaties.

The third count alleged certain specified war crimes.

The fourth count alleged crimes against humanity, namely, extermination, enslavement or other inhumane treatment of any civilian population either *before* or during the war or persecution on political, racial, or religious grounds.

The Charter rejected certain defenses, such as acts of state and superior orders, which in combination might have immunized all the defendants. Furthermore, in the trial of any individual member of an organization, the Charter authorized the Tribunal to declare organizations, such as the SS, illegal. About those organizational provisions, I am going to say only that they created overwhelming practical and moral problems and were of little use.

The most criticized provisions of the Charter were those making aggressive war an international crime and providing for individual punishment of those guilty of that crime. Critics challenged that approach as incompatible with the principle that punishment should not be imposed on the basis of standards or penalties retroactively defined.

Before examining that criticism, it is useful to recall the context out of which the Charter arose. Before Germany's surrender, this is what reliable evidence had shown:

First, ruthless pre-war Nazi assaults on the Jews, the churches, independent labor unions, and dissidents in Germany, as the Nazis achieved and consolidated their power.

Second, the deliberate and indisputable aggression against Czechoslovakia, Poland, most of the rest

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[2] See Albert Speer, *Spandau: The Secret Diaries*, 52 (1976).

of Europe, and then against the USSR and the United States.

Third, as a result of those wars, the systematic and massive pillaging, plundering, and devastation of a continent, and the deportation of millions of slave laborers, all centrally organized.

Fourth, the deliberate mistreatment and execution of POWs, the murder of millions of Jews, Slavs, Gypsies, and dissidents. The murder of Jews had occurred on so large a scale that it was then uncertain how many millions had been destroyed. But the vast scope and general consequences of the Nazis' Final Solution and the unspeakable horrors that had attended it were known before the war ended.[3]

World War II has understandably been called "the largest single event (and the Holocaust the greatest crime[4]) in human history."[5] It has been estimated that the war killed nearly fifty million, and, for millions more, destroyed their towns and cities, and left them wounded in mind and body.

Many of those horrors had, of course, been war crimes, which for a long time had led to individual punishment. But given the human misery resulting from Nazi aggressions, Jackson, among others, found such charges, based only on how the war had been conducted, insufficient. It was necessary also to impose individual punishment for the Nazis' aggressive wars, the supreme evil and the generating cause of most of the other offenses and their attendant agonies. Jackson urged, moreover, that the principles against retroactive punishment, properly understood, did not preclude punishment, in the circumstances present.

Those principles are, as you know, designed to avoid punishing one who when he acted had no reasonable warning that his conduct was culpable. That rule was manifestly inapplicable to the Nazis. They knew of the Kellogg-Briand Pact, which had out-

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[3] See generally, Martin Gilbert, "Final Solution," *Oxford Companion to World War II*, 364 (1995) [states, at p. 371, that six million Jews were murdered]; cf. J.A.S. Grenville, *A History of the Twentieth Century*, 284 (1994) [historians cannot tell for certain to the nearest million the huge number of Jews murdered]; David S. Wyman, *The Abandonment of the Jews*, Ch. 2-4 (1984).

[4] See, e.g., Leopold Gratz, President of the Austrian Parliament, quoted in Arthur Spiegelman, "Head of Austrian Parliament Meets Jewish Leaders," *The Reuter Library Rept.* (9/28/87), available in Lexis News Library, Curnws.

[5] See John Keegan, *The Second World War*, Foreword (1990).

lawed war except in self-defense, and which had been signed by an earlier German government. They were aware of an impressive list of other international formulations explicitly or implicitly condemning aggressive war as an international crime. They knew that, given modern technology, the launching of such a war was a terrible act. Not even Hitler had been prepared publicly to claim the right to do so. Thus, after the attack on Poland, Hitler, in a speech to the Reichstag, contended that the Poles had launched a war of aggression and that the Nazis had acted only in self-defense. Hitler's aggressive "Poles" had been concentration camp inmates forced into Polish uniforms—a mordant bit of irony.

As Justice Jackson urged, the character of international law precluded the strict and automatic application of the rule against retroactivity. That rule has flourished in comparatively well-developed legal systems but not in primitive or immature ones. Thus, during the early development of our common law, offenses, like killing and robbery, that had shocked the moral sense of the community had been retrospectively transformed into crimes for which individual punishment was exacted. Similarly, individual punishment for war crimes had become an established feature of international law without any express provisions for individual punishment in organic documents such as the Geneva Convention. International law was at best a primitive system, lacking a legislative body, and, like the early common law, dependent on case-by-case development. The strict and automatic application of the principle against retroactivity in such a system would have created too large a gap between the law and the developing moral sense of the world community. I'll skip more intricate arguments that sought to avoid or override the ex post facto label. In the end, the key argument is that the principle against retroactivity was a principle of justice and that the reasons behind it were totally inapplicable to the Nazi leadership.

I was once convinced that the foregoing considerations trumped the ex post facto objection, but I am now doubtful about that conclusion. It is undermined by the pre-1945 practices of nations.[6] The

[6] See George A. Finch, "The Nuremberg Trial and International Law," 41 *Amer. J. of Int. Law* 20 (1947); Robert K. Woetzel, *The Nuremberg Trials in International Law*, 166-69 (1960).

most troubling events were the Soviet aggressions against Poland, the Baltic States, and Finland. Furthermore, the French, stressing the ex post facto objection, resisted, even though they ultimately acquiesced in, the inclusion of crimes against peace. Like most European lawyers, they relied on a tradition of a code or a statute, which tended to be less flexible and open-ended than the common law tradition.[7] To be sure, the idea of "crimes against peace" met the emotional needs of the time, but it also left a shadow on the trial.

Incidentally, the Charter and the Indictment had raised another independent question of retroactivity by appearing to include within "crimes against humanity," governmental persecution and extermination of civilian populations in Germany, *before* the outbreak of the war. The tribunal ducked that question by folding crimes against humanity into war crimes or into crimes against the peace, thereby eroding any independent legal significance for crimes against humanity.

Concerns about retroactivity seemed to sharpen the question of whether judicial procedures should have been used to determine guilt and impose punishment. For a time the United States and the Soviets had flirted with the idea of executive punishment, which had been pressed by the British. The British had proposed that the Allies would identify, let us say, twenty-five or a hundred leading Germans whose offenses had been serious and obvious and shoot them, out of hand. Stalin, who was said to have been pulling Churchill's leg, had raised the ante to 50,000 Germans. But the Allies ultimately decided to grant the defendants a hearing—a decision explained by Jackson with characteristic power early in his opening statement. He declared:

> 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.[8]

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[7] See Telford Taylor, *The Anatomy of the Nuremberg Trials*, 65-66, 628, 629 (1992) ("Taylor").

[8] See Robert H. Jackson, *The Nürnberg Case*, 31 (1947.)

He added:

> It may be that these men of troubled conscience, whose only wish is that the world forget them, do not regard a trial as a favor. But they do have a fair opportunity to defend themselves—a favor which these men, when in power, rarely extended to their fellow countrymen.[9]

Nonetheless, some critics condemned the use of judicial procedures to determine guilt and impose punishment, urging that to do so would be to turn a court into a political instrument by which the victors exercised their power to punish the defeated. Thus, as Dennis J. Hutchinson has recently reported, then Chief Justice Stone privately labeled the trial as a "high class lynching party." [10] These critics urged that avowedly political means—that is summary executions by executive fiat—rather than ostensibly judicial means—should be used for political punishments.

But that position ignored or dismissed the risk of error involved in summary action whether it is based on "principles of law" or executive fiat. That position was in essence an argument against due process. Had it prevailed, it would no doubt have triggered an outcry against the risks of prosecutorial error aggravated by denial of the right to make a defense. The acquittal of three Nuremberg defendants is a powerful reminder of such risks. Indeed, it would not be pleasant to defend today the summary execution of individuals chosen on the basis of incomplete evidence, untested by an adversary proceeding.

A trial, moreover, also would respect the needs of history and provide a record of the Nazi affronts to civilization—a record that might serve an educative and reformative role for the generation of 1945 and beyond, in and outside of Germany. Such a record might also, as Jackson urged, both foreclose responsible denial and avert martyrdom for the major leaders of the Nazi regime. The evidence of the Holocaust was so strong and palpable in 1945 that I doubt that anyone then foresaw the so-called Auschwitz lie—the recent denials that the Holocaust actually hap-

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[9] Ibid, 34.

[10] Dennis J. Hutchinson, "Justice Jackson and the Nuremberg Trials," (forthcoming).

pened. But the trial record surely serves as a corrective of such fantastic revisionism.

What I have said so far does not, of course, deal with what was the central difficulty of the trial. The governing law was not applied equally. The standards of guilt were applied only to the losers. For example, the Soviets, who sat on the Tribunal, were not forced to answer for Soviet aggression against Poland, the Baltic States, or Finland. Nor were the United Kingdom and the United States required to face the questions raised, for example, by the bombing of Dresden and Hiroshima. To some, the unequal application of the law, compounded by the Soviet presence on the Tribunal, fatally compromised the morality of the trial. To others, the Nazis' monstrous barbarities and the fact that it was their aggression that precipitated the ensuing horrors warranted the apparently unequal application of the law.

Furthermore, Nuremberg merely reflects the troubling inequality. It didn't produce it. It has been the product of an undeveloped and fragile international system. Long before Nuremberg the victor had applied an unequal standard, for example, in dealing with traditional war crimes. The victor has punished the misconduct of the enemy; similar conduct by his own forces has largely gone unpunished. Unless we had been prepared to comb our own ranks for violators of the rules of war, the logic of the inequality argument would have required us to give the Nazis complete immunity for all their crimes, war crimes as well as crimes against the peace. Even the critics shrank from that position. We were, I believe, justified in rejecting it, because of what was the overwhelmingly greater depravity of the Nazis and because they had launched wars of aggression.

I want now to turn from those large legal questions to narrower problems regarding the content of the Charter, the indictment and the conduct of the trial. One set of problems arose from the need to mesh different legal and political cultures. For example, the French were puzzled by the concept of a common plan or conspiracy but acquiesced reluctantly in its inclusion in the charter.[11] The Soviet negotiator at first insisted that aggressive war should

[11] See William M. Jackson, "Remarks," New York Law School, 4, (April 4, 1995, forthcoming); Taylor, 581, 628, 629 (1992).

be made a crime only when committed in the past by the Nazis. Jackson held out for and secured a more expansive prohibition—one addressed to the future as well as the past. There were also inter-allied differences in the role of the indictment, the role of the lawyers, and the importance of cross examination. The Soviets were used to much more specificity in an indictment; in crimes against the state at least, the evidence set forth in the indictment was not expected to be challenged but to be received as the Truth, by the tribunal, and, as you know, accepted often by the accused as well. The French and Germans were used to an active judge who did much of the investigating and questioning of witnesses. Perhaps as a result, the French and German lawyers were not skillful cross examiners; nor were the Russians. These, and other differences that I'll bypass, were bridged by workable compromises and by recognizing within broad limits the discretion of each prosecuting team to follow its own style.

There were also lively disagreements among the U.S. prosecutors on issues of trial policy. The most important issue was whether to rely primarily on documents without much live testimony. Some urged that live witnesses in the prosecution's case-in-chief would spice up the proceedings. Jackson, however, decided to rely primarily on documentary evidence. Documents, although drabber, would be free from the problems that live witnesses would entail —bad memory, susceptibility to pressure, currying favor, or turning the tables and making Nazi propaganda. Because of Jackson's policy, the case against the defendants was proved by documents of their own making, the authenticity of which was challenged only once or twice. Fortunately, the German obsession for record keeping had made our case.

The defendants were afforded adequate opportunity to challenge and to meet the evidence offered against them. They were allowed to pick their lawyers from the German bar, or they could have German counsel appointed for them. After some logistical difficulties were solved, their lawyers received a copy in German, of all the documents put into evidence and could and did have witnesses and documents subpoenaed. The defendants could and did in most cases take the stand. Even critics of the idea of a trial or of some provisions of the Charter generally applauded the fairness of the trial.

In the end the Tribunal acquitted, as I said, three defendants, sentenced twelve to die, by hanging, and seven to prison terms ranging from ten years to life. Only one defendant, Hess, was convicted of only crimes against peace. The others convicted of such crimes also were convicted of war crimes or crimes against humanity. (Of course, their convictions for crimes against the peace might have affected the sentences imposed on them.) The USSR dissented from all the acquittals but dissented from only one sentence, life imprisonment rather than death for Hess.

Nuremberg, in its condemnation of aggressive war, focused not only on the offenses of these defendants but also on establishing a precedent designed to punish and to deter aggression in the future. But at the time, so far as I know, the prospects for such deterrence had not been closely analyzed. No one, of course, had expected aggressive war to be completely exorcised by the trial. The hope seemed to be that the condemnation of aggression would bite into the culture, affect public opinion, and constrain aggression by governments because of concern for domestic and foreign criticism or sanctions against an offending nation, as well as individual punishment. But the significance of those considerations for shaping official decisions about aggression—especially by totalitarian governments—was far from clear. In any event, after Nuremberg, there were plenty of aggressive wars, for example, in Korea, Afghanistan, and the Persian Gulf—wars for which no individual punishment was imposed. Nuremberg may, of course, have helped keep the number down and was invoked to justify and organize resistance to the Korean and Gulf aggressions. But the incidence of aggression has been high enough to raise questions about Nuremberg's deterrent effect—questions that are sharpened by the difficulties of enforcing the proscriptions of Nuremberg. Furthermore, it is arguable that once an aggressive war breaks out, the aggressors' fear of punishment might encourage them to make a gambler's throw and to prolong the war even when the probability of their winning is low.

I am going to leave those questions to those more adept in speculating in futures and turn to my past—my work in Nuremberg. My defense for this potential exercise in anecdotage is, first, that it may give you a sense of the grubby particulars, and, second, superior orders from Holly Davis and Ellen Cosgrove.

I have often been asked: "How did you happen to get to Nuremberg?" Well, it was just one of those nice accidents that happen to lawyers. Frank Shea, who had served as an Assistant Attorney General under Jackson when he had been Attorney General, became a senior member of Jackson's Nuremberg staff. I had met Shea during my time in Washington, and when he asked me to join the prosecution, I said yes. The Navy indicated that it could take care of the Pacific Theater without me, and I was off to Nuremberg, via Washington and London.

Before I get to my own work, let me explain the general order of proof. First, the prosecution introduced evidence of the Nazis' commission of crimes alleged in the indictment. The responsibility for introducing such evidence was divided among the four Allied prosecutors, not without some overlap. After the prosecution had introduced proof of general criminality, it focused on proof connecting each defendant with the substantive crimes involved. Then the defendants put in their evidence.

My own work dealt primarily with what was called "the economic case," for which Shea had initially been responsible. Shea, incidentally, left the prosecution's staff long before the trial began. Anyhow, the economic case included first, crimes against peace by defendants who had financed the building of, or had built, the German war machine, with knowledge of Germany's aggressive purposes; and second, war crimes and crimes against humanity resulting from the systematic plundering and pillaging of occupied territories, and the deportation and exploitation of millions of slave laborers.

I coordinated and reviewed the work of a group of lawyers, who assembled the evidence and prepared trial briefs on the various aspects of the economic case. Some of our briefs related to pillaging and plundering in the East. After those subjects had been allocated to the Soviets, we gave them our briefs. Disclosure was, however, a one-way street.

The Soviet's disinclination to share information reminds me of a story about Justice Jackson. At a birthday party for him, he was given a Swiss watch, the best of our PX's meager supply. After graciously conveying his thanks, he asked: "Where did it come from?" Before giving you the answer, I want to remind you that Soviet soldiers loved a watch with Mickey Mouse on its face even more than vodka. So

a wag's answer to the Justice was "from the Russians." The Justice quickly replied: "That's fine, that's fine. Up to now I haven't been able to get even the time of day from them."

I also was responsible for preparing and presenting to the Tribunal the case against Defendant Walter Funk, who had been charged under all four counts of the indictment. Funk had joined the Nazi party in 1931, and, as the Tribunal found despite his denial, he had soon become one of Hitler's personal economic advisers. Later, in March 1933, he had become the Undersecretary of the newly established Ministry of Propaganda, headed by the notorious Joseph Goebbels, who had remained faithful to Hitler until they both had committed suicide. As a propagandist, Funk had had a significant part in stimulating the persecution of Jews and other minorities. He had succeeded Schacht as Minister of Economics and Plenipotentiary General for the war in 1938 and as head of the Reichsbank, in January of 1939, three jobs crucial to war finance. Funk was also involved with, although he did not play a major role in, agencies that determined the number of slave laborers required for German industry and called on others to produce them. He had headed the bank when it had become the storehouse of the gold fillings, jewelry, eyeglass frames, and other valuables stripped from the corpses of concentration camp victims. Funk wept when confronted with this evidence pre-trial, but claimed that he knew nothing about that ghoulish traffic. The Tribunal concluded that he had known or had not wanted to know.

By trial time, he was in poor health; he wept frequently as evidence of Nazi horrors piled up. His apparent weakness as a man seemed to have served him well as a defendant. The Tribunal noted that he had been subject to the supervision of Goering and found him not guilty under Count I (the conspiracy count), but guilty under the other three counts and sentenced him to life imprisonment. He was released from Spandau Prison in 1957 because of ill health (after serving only ten years) and died three years later.

In connection with my work on Funk and on economic crimes, I interrogated Goering and lesser figures, pretrial. Of those I met face to face, I found Goering the most interesting, and most diabolical.

As Hilary Gaskin put it, he had the "charisma of evil." [12] He was intellectually quick, verbally nimble, and always wily. He often sensed the ultimate purpose of a question as soon as it was put. Incidentally, he did very well in an IQ test, which all the defendants took, ranking just below Schacht. Goering was completely unrepentant, and gloried in his role as second to Hitler and the first of the named defendants. He assumed the responsibility for defending the Nazi regime while attacking the laws of war as obsolete. During the trial, he outpointed Jackson during the latter's cross-examination of him—a notorious defeat for Jackson. In the end, Goering also managed a small triumph. He cheated the hangman by swallowing cyanide.

In addition to the economic case, I was quite unexpectedly given another assignment that highlighted both the horrors of the concentration camps and the Germans' obsession with records. About ten days before the concentration camp case was to be presented to the Tribunal, I was asked to work on that presentation, which had been the responsibility of an Army team, whose circuits had apparently been overloaded by mountains of evidence. I couldn't read German, so I got help from two lawyers who could. We had seven days to prepare the principal part of the case that for many was the mark of the Nazi regime. Other evidence of the pervasive role of the camps had emerged or would do so in separate presentations concerning the Nazi attacks on, for example, the Jews, labor unions, churches, and Gypsies. Indeed, the movies taken by Allied troops showing the horrors of the camps when they had been liberated had been presented to the Tribunal earlier—out of order—as relief, if that is the word, from the tedium of documentary evidence. Anyhow, my partners ran through the files, fired up evidence, and I wrote as fast and slept as little as I could. The evidence was a lawyer's dream and a humanist's nightmare. It included two totenbuchs—deathbooks—that recorded approximately 300 deaths at the Mauthausen camp, deaths recorded as having occurred in alphabetical order, at brief intervals of time, and in each case because of heart disease. I still recall the hush in the courtroom when those books were put into evidence.

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[12] See Hilary Gaskin, *Eyewitness at Nuremberg*, xix (1990).

Let me turn from evidentiary details to a brief assessment of the legacy of Nuremberg.

First, the law of the London Charter has been absorbed into international law. Nuremberg has also helped promote the development of what is now called humanitarian law, embodied in such instruments as the Genocide Convention. Enforcement is, of course, a different matter.

Second, the trial was an important part of the closure of World War II, validating the casualties and devastation that the Allies had suffered and inflicted; satisfying, in part at least, the demand of the peoples of the occupied countries for a judgment concerning, and punishment for, the crimes inflicted on them; and helping, it appears, to reintegrate Germany into Europe. Finally, although the law of the trial has been generalized beyond the Nazi defendants, the trial has remained essentially a product of its special time and circumstances.

The trials relating to the former Yugoslavia, which have been so much in the news, arise from vastly different circumstances. I can mention only some of the major differences. The Balkan indictments are based on the authority of the U.N. Security Council, and they charge not aggressive war but only violations of humanitarian law. They certainly do not constitute victors' justice. Indeed, Dr. Karadzic and General Mladic, the leaders of the Bosnian Serbs, apparently the big territorial victors, have been the subjects of two indictments. But in the absence of the right kind of undisputed victors, there may be no justice. Unlike the situation in Nuremberg, key defendants and suspects are not in custody but in power, presumably ready to resume the war unless they can negotiate an acceptable peace. Furthermore, even though the Bosnian Serbs seem to have been the worst offenders, none of the parties or forces involved appears to have clean hands.[13] Under all the circumstances, vigorous prosecution may be seen as an obstacle to peace rather than as part of a process leading to a durable peace. But Judge Goldstone, the Chief Prosecutor of the Balkan trials, has argued that genuine peace is not possible unless the key suspects are handed over for trials. He urges that otherwise the victims and their

[13] See Charles Boyd, "Making Peace with the Guilty," *Foreign Affairs*, Sept./Oct. 1995, 22.

survivors will consider whole groups collectively guilty, and that there will be no end to the cycle of violence. But hard pressed negotiators may well be tempted to trade justice for peace, apparent or real. It would not be the first trade-off between politics or prudence and individuated justice. Given the stated commitment of the UN and the United States to try to reach and punish the principal offenders, such a bargain is likely to lead to frustration and cynicism inside and outside of the former Yugoslavia. Nonetheless, it is not for spectators—and especially underinformed ones like me whose fellow citizens are not now in the line of fire—to ask those who have already suffered so much to risk more war so that the prosecution may use the peace process in order to get custody of the major indictees.

Whatever the ultimate outcome of the Balkan indictments, Judge Goldstone and his staff, have, I believe, earned our gratitude for their skill, energy, and tenacity. For they and their supporters have shown their awareness of a charge not made at Nuremberg but resonating from it—the charge, as Elie Wiesel has reminded us, of the crime of silence and indifference. In remembering Nuremberg, it is right that we remember that charge—perhaps above all others.

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