

Erste europäische Internetzeitschrift für Rechtsgeschichte

<http://www.forhistiur.de/>

Herausgegeben von:

Prof. Dr. Rainer Schröder (Berlin) †
Prof. Dr. Hans-Peter Haferkamp (Köln)
Prof. Dr. Christoph Paulus (Berlin)
Prof. Dr. Albrecht Cordes (Frankfurt a. M.)
Prof. Dr. Mathias Schmoeckel (Bonn)
Prof. Dr. Andreas Thier (Zürich)
Prof. Dr. Franck Roumy (Paris)
Prof. Dr. Emanuele Conte (Rom)
Prof. Dr. Massimo Meccarelli (Macerata)
Prof. Dr. Michele Luminati (Luzern)
Prof. Dr. Stefano Solimano (Milano)
Prof. Dr. Martin Josef Schermaier (Bonn)
Prof. Dr. Hans-Georg Hermann (München)
Prof. Dr. Thomas Duve (Frankfurt a. M.)
Prof. Dr. Manuel Martínez Neira (Madrid)
Prof. Dr. D. Fernando Martínez Pérez (Madrid)
Prof. Dr. Marju Luts-Sootak (Tartu)
Prof. Dr. Heikki Pihlajamäki (Helsinki)

Artikel vom 02.08.2017

© 2017 fhi

Erstveröffentlichung

Zitiervorschlag

<http://www.forhistiur.de/2017-08-canedo-goncalves-da-silva-faria/>

ISSN 1860-5605

Carlos Augusto Canêdo Gonçalves da Silva^{*}
Aléxia Alvim Machado Faria^{*}

The Nuremberg Trial Court

Between discourse and negotiations in post-war International Law

Abstract

Among many texts that had been written about the Nuremberg Trial, from different academic perspectives, this paper aims to historically contextualize the creation and conduction of the first grand international criminal court in History. A background of strong symbolism, controvert discourses and political need to signpost a quick and exemplary solution for the destination of Germany's Nazi leaders is analyzed through statements, legislation and trial records. The narrative highlights the ambient of choosing procedural rules, targets and criminal principles of the court that represented a watershed in what jurists understand as international criminal law nowadays. It therefore dialogues with other studies concerning the Trial in historiography and international law and then concludes, in short, that if any obvious connection between Nuremberg's International Criminal Law and politics is proposed, it is made forcefully, due to the openly presented contradictions and difficulties in every decision.

Introduction

The Nuremberg Trial Court takes us to darker times. The photos and films that recorded the event display the twenty-two gentlemen, some of them seating upright and starchy while others seemed a little more relaxed and nonchalant, with serious and watchful faces, but also alien and distant, who could, in a different scenario, be mixed up with peaceful grandpas waiting for the end of classes to pick up their grandchildren at the school doors. Nevertheless, at that trial court, created in grand style by the allied powers that had recently won the Second World War, the group of gentlemen was emblematic of the whole in »radical evil« represented by Nazism, and personified the savagery that the Prosecution was preparing to minutely describe during the trial. The human evil did have specific faces and personified expressions beyond an ideology expressed in the Führer's – the great absence – discourse and publications, and beyond an impersonal, efficient, modern and bureaucratic machine for annihilation of individuals in a proportion never witnessed before. This was probably one of the main reasons for the complex creation and assembly of the Trial Court: to publicly introduce to the world the men that fully incarnated the responsibility for the insanity of that »war of all hells«, and, through the trial and conviction of each one of them, set forth the new values that would stand for the new international order ruling from then on. That would be the first grand international criminal court in history, and nobody would ignore the strong symbolism behind it. Not only would an absolutely wicked ideology be judged, but also its hideous practical applications and implications, and its main planners and commanders. To that end, a rather tricky and troublesome logistic was called up because a list of accused should be prepared in detail –

1

* Professor, Faculty of Law at the Federal University of Minas Gerais and Pontifical Catholic University of Minas Gerais (Brazil). PhD by the Federal University of Minas Gerais (1997). Curriculum vitae: <http://lattes.cnpq.br/6149109996307398>. Contact: canedo@pucminas.br

* Msc. Candidate at the Federal University of Minas Gerais. Curriculum vitae: <http://lattes.cnpq.br/1585768306574221>. Contact: alexiamachado@ufmg.br

though a not too long list in order to prevent the spread of the main responsibilities and that, at the same time, would be representative of the core organizations and decision-making instances of the National Socialist regime. The judges and prosecutors had to be carefully chosen, and attention should be drawn to prevent the trial from becoming a stage for the defendants' political proselytism. Moreover, statutory conditions should be prepared to define as a crime the conducts excluded from the then fearful international legal and criminal system. Furthermore, necessarily complex procedural rules had to be set forth, proper material installations and the selection of qualified support personnel had to be provided. Would so much work and risk be worth it? Would it not be better to follow the advice of the British Prime Minister, Winston Churchill, who looked with distrust such a trial court, fearing its dangers and traps now that he was aware of the troubles that arose from the frustrated attempt to try Kaiser William II by the end of the First World War? Churchill was suggesting a quicker solution by the cursory shooting of the main German leaders. After much resistance, the experienced British Minister accepted the arguments put forth by the United States of America, then already in a leading position of the capitalist Western world, that a trial would best comply with the interests of the winners. Stalin, the other great leader emerging from the ruins of the conflict, had already anticipated his preference for an international trial court, certainly looking back to those clownish spectacles performed by the Soviet trial courts in the decade of 1930, that allowed him eliminate not only several enemies, but also friends by sending them to the deserted Siberia, or directly to the cemetery – which would not exclude the possibility of several thousands of Nazis being simply executed. Nevertheless, the Soviet leader cautiously considered the trial of the main Nazi leaders even if grounded by a methodology and procedures that would fatally take all or almost all of the firing squad, or some other »functional equivalent«.

Nobody can deny – although some insist on this position – the extension and depth of the Nazi savagery documented by a sound historiography mainly recorded by the efforts of historians coming from English and North-American academies, besides the work of German researchers. The work of outstanding memorialists also helped spread the subject into other fields such as Psychology, Sociology and Political Science, using their own methodology and suffering their own limitations as well. The Nuremberg Trial Court opened the debate to jurists especially by means of the International and Criminal Law. As a matter of fact, what is nowadays known as Criminal International Law or International Criminal Law¹, and the composition of international criminal

2

¹ Gil Gil (A. GIL GIL, *El genocidio y otros crímenes internacionales*, Valencia, Centro Francisco Tomás y Valiente, Colección Intercienaias, 1999. S. 23 ff.; A. GIL GIL, *Derecho penal internacional*, Madrid, Editorial Tecnos, S. 17 ff.) slowly proceeded on this terminological issue. She records the diversity of the expressions proposed by literature such as “Universal Criminal Law” (Dautricourt), “Interstate Criminal Law” (V. Pella), “Crimes against the Rights of Peoples” (Jesheck, R. Bernhard), “Public International Criminal Law” (Sánchez de Bustamante). Highlighting her subsidiary nature regarding the internal Criminal Law, the author adopts the expression “International Criminal Law”, standing for the protection of judicial goods in the international scenario since there is an international society structured and organized through sovereign States. These judicial goods would fundamentally be the independence and the peaceful interaction among the States that may encompass life, freedom or health, and that would act only when the internal law is insufficient or unable. But in Spanish and Portuguese, the most common expression is “Criminal International Law” (“Direito Internacional Penal”) as the complex of penal norms aiming at the repression of offenses that constitute the International Law, while the “International Criminal Law” would cover the penal provisions affecting two or more states. See F. F. JANKOV, *Direito Internacional Penal: Mecanismos de implementação do Tribunal Penal Internacional*, São

court precedents arising of international criminal jurisdictions currently in force will find some inspiration in Nuremberg.

Some jurists perceive in Nuremberg »the genesis of a New Order in the International Law« suggested by Gonçalves² in the subtitle of his work, though he acknowledges its innumerable problems, ambiguities, limitations and arbitrariness. Nevertheless, although it interests Law and may lay its shade on current international criminal jurisdictions, Nuremberg is also and mostly History, and, as such, »a contested discourse«³, a drilling »problematization«⁴, a set or sum of discourse processes that establish »the plot of possible narratives that disputed, were spread and still dispute the place of hegemony« in the understanding of this Trial Court.⁵ Therefore Nuremberg is, at the same time, depending on which discourse process one uses, a fundamental moment of disavowal of those crimes that offend human consciousness – and its limitations as a trial court must not blind the magnitude and transcendence of its intentions – an exercise of finest »international criminal power«⁶, the real practice of the »Enemy’s Criminal Law«⁷, the emblematic redemption of a lost humanity, the projection of the »Realpolitik« upon the judicial sphere, the statement of new international hegemonies and so forth.

The reader should not infer from the abovementioned concepts that a Foucaultian analysis is to be presented to shed light on the »episteme«, the »discourse practices«, the »assumptions« or the »devices« (Foucault’s vocabulary is as long as changing) by means of a historical and genealogical work, offering the best way to understand the Nuremberg episode. Foucault’s hermeneutics and his strive for »clearing the meaning« of gestures, words and acts of the actors and institutions are just shallowly mentioned in this work.

Firstly, this work is an attempt to politically and historically contextualize the trial court in question, highlighting that the urge of its constitution, driven by the winners’ need to signpost a solution able to quickly set forth exemplary punishments for the defeated Germany’s leaders, and its own winner’s trial court nature inevitably impaired its impartial character.

Afterward, its structure is introduced followed by its jurisdiction, when the crimes submitted to its appraisal are considered. Follows a brief approach to Rudolf Hess’ case trying to demonstrate a possible intersection between the punishment demands and political interests.

Paulo, Saraiva, 2009. The English language prefers the expression “International Criminal Law” without further studies in this terminological debate.

² J. B. GONÇALVES, *Tribunal de Nuremberg 1945–1946: a gênese de uma nova ordem no direito internacional*. 2. Aufl. Rio de Janeiro, Renovar, 2004, S. 2.

³ K. JENKINS, *Re-thinking History*, London, Routledge, 2003, S. 23.

⁴ Understood as “problematization” in the wake of Foucault’s »the assanble of discursive and non-discursive practices that bring something into the play of truth and falsity and place it as an object for the mind « M. SOZZO, *Reconstruyendo las criminologías críticas*, Buenos Aires, Ad-Hoc, 2006.

⁵ N. R. R. ARAÚJO, *Entre a história e o Direito: o caráter episódico do direito internacional penal: um estudo sobre o episódio do Tribunal de Nurembergue e suas leituras na historiografia jurídica moderna*, Dissertação do Programa de Pós-Graduação em Direito da Faculdade Mineira de Direito, 2002.

⁶ D. R. PASTOR, *El poder penal internacional: Una aproximación jurídica crítica a los fundamentos del Estatuto de Roma*, Barcelona: Atelier Libros Jurídicos, Colección Justicia Penal, 2006.

⁷ G. JAKOBS, *Kriminalisierung im Vorfeld einer Rechtsgutverletzung*. In: *Zeitschrift für die gesamte Strafrechtswissenschaft* 97 (1985), S. 751–785, hier S. 783.

To conclude, Nuremberg's role is problematized as the first great experience of international criminal law the extent and projection of which should not be overestimated but that, after all, launched shades and lights upon the contemporary projects. If any obvious connection between Nuremberg's international criminal law and politics exists, it is made forcefully. Possibly no other international criminal court presented difficulties and contradictions so openly: a trial court that supposedly could administer justice with impartiality, but whose judges and defendants were respectively the winners and losers of the most violent of wars; a trial court that made all efforts to enforce values, though debased by unprecedented war practices and repression, as absolute and universal, but that did not take into consideration that some of these crimes could be accounted to the winners; a trial court that denied some criminal procedural principles acknowledged by the criminal systems of at least three of the winning States, and a trial court that bequeathed important International Law principles, but that, at the same time, gave way to the appearance of a power system more focused on the hegemony of the great powers than on the valuation of the same International Law.

7

The discourse on Nuremberg tells us of a milestone for a new International Law and of the dawn of an international criminal justice submitted to inalienable universal principles warranted and protected by a not so known International Criminal Law that far, though not as much of a new International Criminal Branch, nor of a New Order in the world's hegemony distribution. In both discourses, elements of *truth* may be found, and other possible alternative discourses can include them as well. If Nuremberg appears among »the great processes of History«, perhaps this is due less to its existence than to the role it was given in the great narrative of the Second World War. If History gave it an outstanding position, it was through a certain narrative, imbued with meaning and symbols. This time Churchill, the »old fox«, was mistaken. The symbols and discourses count and, as matter of fact, nobody was more aware of this than himself. Especially when one wins (or loses) a war.

8

The creation of the trial court, its political chanciness and legal dilemmas

On October 18th, 1945, in the grand meeting room of the Allied Control Council, in Berlin, at ten thirty in the morning, the solemnity of the overture of the Nuremberg Trial Court was started. On November 20th of the same year, the Trial Court effectively began its works, not in the ruined capital city, but in the Bavarian Nuremberg, stage of some of the main manifestations of opulence and might of the Nazi regime, and where, in astonishing spaces and before excited crowds, as we can see through the lenses of Lina Riefenstahl⁸, march huge and millimetrically organized parades of troops and military organizations absolutely convinced of their racial superiority. The Führer, after long and flattering speeches of the said »superior race«, which would soon master and subject all the others, rescuing historical unfairness contemplated in the rapture that spectacle that frightens us to

9

⁸ We especially make reference to the cinematographically dazzling and powerful record of the National Socialist Party Convention held in Nuremberg in 1934, which became the documentary entitled »Triumph of the Will«.

our days. In Nuremberg, the year 1935, the first German racial laws were executed, and there were good emblematic reasons – although some of them were due to security and to the lack of good installations in the ruined capital – for the choice of that beautiful city as the headquarters of the »most famous criminal process in History«⁹, which still had buildings and houses in reasonably good conditions. It is not unimportant to mention that Berlin was divided into four occupation zones, and that caused an additional problem for the installation of the trial court in the old Reich's capital.¹⁰ To settle this issue had not been an easy task. The way to Nuremberg is filled with discord, diverging interests and different perceptions on the meaning and political utility of an unprecedented trial court. As highlighted, the English perception was that a trial court of such an unheard-of nature, assembled right after the end of a conflict of catastrophic proportions, that would accuse the main leaders of the defeated country, within its own territory, now occupied, could bear the danger of becoming the stage for political proselytism and victimhood-based speeches of the crushed leaderships. Churchill was not envisaging a shooting squad. For him, the summary execution of about fifty leaders would suffice for the aliens to eliminate some immediate nuisance personified by this leadership. As expressed in a meeting in Cairo, the Prime Minister was willing to grant these leaders strict imprisonment instead of putting them to death, but not preceded by a trial that could have unexpected consequences.¹¹ Anyway, it should be highlighted that

*the North-American and British documents unquestionably display that there has never been a plan nor a firm policy for Nuremberg. The negotiation for a great trial to judge the war criminals was a clumsy one and marked by commitments among the allies. Even the government leaders and prosecutors never exactly learned the extent of the uncertainties inherent to the enterprise .*¹²

It is unnecessary to read minusculously the extensive bibliography on Nuremberg to understand that the court was mainly set due to the North-American efforts. One could say that it was an »American invention«. Smith¹³ dedicates the three first chapters of his book to precisely detail the trajectory of the creation of the court, its deadlocks, the leaders' changing positions, the persuasion games, the fairly radical and careful positions and, of course, the political and historical context that pervaded the debate. Owen and Tusa and Tusa¹⁴, though not as detailed as the descriptions by Smith, also tracked down this movement only to acknowledge that, without the North-American efforts, the Nuremberg Trial would hardly take place. Nevertheless, important divergences could be traced in the core of the American establishment in what concerns the dealing with the debate, not only relevant but also touchy. After all, the scenery was a recently ended war, a war so great that introduced a new and industrialized dynamics of genocide, innovations in combat strategies, sudden attacks (Blitzkrieg) through frightful armored infantry, massive aerial bombing, more advanced and

⁹ DEMANDT, Alexander. Los grandes procesos de la historia, Barcelona, Crítica, 2000.

¹⁰ J. OWEN, Nuremberg: Evil on Trial, London, Headline Publishing Group, 2006, S. 13.

¹¹ B. F. SMITH, O Tribunal de Nuremberg, Rio de Janeiro, F. Alves, 1979, S. 31.

¹² SMITH, O Tribunal de Nuremberg (Anm 15), S. XVII.

¹³ SMITH, O Tribunal de Nuremberg (Anm 15).

¹⁴ OWEN, Nuremberg (Anm. 14); A. TUSA; J. TUSA, The Nuremberg Trial, Canada, Skyhorse Publishing, 2010.

deadly guns, and even the use of nuclear weaponry (at the Asian front). About fifty to sixty million people died.

As for the political hegemonies and the world power distribution, many were the alterations. In the capitalist Western world, the United States of America were dealing the cards, had the best game and could often count on the support of the nineteenth-century grand power, Great Britain, now fragilized but still holding an important share of relative ascendancy. France, defeated by the Germans but rescued by the North-American and English, could not be more than a pale shade of its past potency though it still had some cartridges to fire. Apparently, it had managed to eliminate its mighty historical rival, Germany, now divided and subdued. The Soviet Union, an ally by necessity during the conflict, represented different ideology and values, and many political observers and actors could already foresee that, in no time, the apparent unity of the winning allies could be shaken. While Nuremberg's details were being discussed, the winds of rupture were still blowing gently, although minor particulars were already telling of changes to come for a wiser eye.

These powers were up to decide Germany's future and that of the European and world's new order. Turn it into a rural country, unarmed and counting on a frail industrial production could be a way out. At least in the opinion of Henry Morgenthau Jr., the American Treasury Secretary, author of a tough plan of occupation presented to Roosevelt by the end of the war.¹⁵ Berlin was already divided into four occupation zones, and that would make a difference during some tense episodes further unveiled as deeply worrying. Innumerable issues would challenge the winners, and the punishments for war crimes were one of them.

This issue had already been announced years before. On October 27th, 1941, when the Nazi artillery was already breaking through the Soviet land, Roosevelt and Churchill warned about the immorality of the execution of innocent people in retaliation to the isolated attacks against the Germans, and that those »collaborating« with Hitler should be aware of its consequences. Russia was Germany's ally shortly before, but now undergoing Hitler's mighty war machine, joined these declarations. The same Soviets had signed a non-aggression pact and assistance with the German regime in 1939 and benefitted from this treaty as they appropriated part of Poland right after it had been invaded by the Nazi forces, all this due to the secret clauses therein.

Nevertheless, as already suggested, it was due to the United States' power that the war crime punishment issue became stronger. This debate became the topic of the agenda as it was rather clear that it was closing the end, and that the allied victory was only a question of time, little time. The closing defeat guided some Nazi sectors to positions increasingly radical in what concerned the war prisoners' extermination and to a hastier implementation of the genocide politics developed in the several concentration camps spread mostly in Eastern Europe. The »final solution« was fully progressing, and this urged a certain cautiousness from the allies in announcing future punishments for they could cause severe German retaliation against the war prisoners.

¹⁵ SMITH, O Tribunal de Nuremberg (Anm 15), S. 24.

The same Morgenthau, Jr., still in 1944, was proposing something beyond the German deindustrialization plan. According to Smith¹⁶: 16

the Treasury memoranda suggested the creation of workforces with Nazi Party leaders, government agents and soldiers in order to repair allied countries devastated by war and by the Nazi occupation, besides a mass deportation of Nazis to distant places, and even the thorny issue on the SS under six years' children was seriously treated in one of the Treasury meetings! 17

Morgenthau and his followers had no time to lose, and no further patience with the complex processes related to the war crimes. They accepted the allied promise that the lower ranked war criminals would be sent back to the crime scenery where they practiced their offenses to find their own doom. As for the great war criminals, the higher public agents and the Nazi Party followers, the Treasury's sound and simple solution was that a list of the criminals would be handed over to the allied frontline forces, who would then identify the captured criminals who would immediately be sent to the arms. In a few words, the Morgenthau Plan was based on a tripod: retribution, stigmatization and neutralization. Stimson, the War Secretary, always in agreement with Smith, assumed a face-to-face position against the Treasury Secretariat. The project arising of the War Secretariat was at last formatted by the Head of the Special Projects, Murray Bernays, and became the main source of ideas that at last prevailed in the creation process of the Nuremberg Trial Court. Bernays tried to give a collective tone to the committed crimes rebuffing the summary execution. So, organizations such as SS, the National-Socialist Party and the Gestapo would be criminally responsible before an international court not as legal entities but through the individual actions of some of their members. Only persons would be on trial, but as representatives of several criminal organizations. 18

The conviction of any defendant standing for any of these organizations would imply consider all the other members as involved in collusion and, therefore, also punishable. This collusion could date back even to periods prior to the beginning of war, during the Nazi regime. According to Smith¹⁷, »in this concise document resides the main source of the ideas that shaped the subsequent processes in Nuremberg«. Now let us proceed with a broader view of the mentioned processes. 19

Much has been written about the horror staged during the Second World War. New destruction technologies used by all the parties in conflict caused a huge multiplication of human and material loss. The procession of death, the physical disabilities and the ruined cities are duly recorded in the hearts and souls of not only those who still live to remind us of the event but also by a vast literature from many perspectives and points-of-view. The untold of and indescribable Nazi genocide barbarism has already given rise to uncountable controversies and discussions, and now we know its magnitude, although some still insist on downsizing the facts. In the Second World War, there were no two sides that could be called the »good guys« and the »bad guys« – as in any other war. During wars all kill, all commit barbarisms, everybody destroys. But it is out of a question that the atrocities committed by Hitler's Germany surpassed any other dimension known, and if 20

¹⁶ SMITH, O Tribunal de Nuremberg (Anm. 15), S. 25.

¹⁷ SMITH, O Tribunal de Nuremberg (Anm. 15), S. 28 ff.

it is true that had it won the war, History would be told differently. In truth, its outcome was the best that could have happened to the world. We should be relieved in what concerns the winners' responsibilities for extremely reproachable actions. But winners judge losers, and so it happened in Nuremberg.

Nevertheless, there is a way that leads us there. As recorded, many authors help us find this way. 21
We have already learned that with the USA still out of the war – but already assisting Great Britain in many ways, with Roosevelt making efforts to convince the North-Americans that, sooner or later, their sending the battlefields would be necessary – the leaders of both countries gave out a joint declaration, as follows in more detail:

The practice of executing scores of innocent hostages in reprisal for isolated attacks on Germans in countries temporarily under the Nazi heel revolts a world already inured to suffering and brutality. Civilized peoples long ago adopted the basic principle that no man should be punished for the deed of another. Unable to apprehend the persons involved in these attacks the Nazis characteristically slaughter fifty or a hundred innocent persons. Those who would "collaborate" with Hitler or try to appease him cannot ignore this ghastly warning. 22

*The Nazis might have learned from the last war the impossibility of breaking men's spirits by terrorism. Instead they develop their lebensraum and "new order" by depths of frightfulness which even they have never approached before. These are the acts of desperate men who know in their hearts that they cannot win. Frightfulness can never bring peace to Europe. It only sows the seeds of hatred which will one day bring fearful retribution . . .*¹⁸ 23

Within the scenery of the already invaded USSR, Molotov supports »deserved punishment for all those unprecedented crimes perpetrated against the Russian peoples and against all those peoples that love freedom«. Similar declarations coming from governments in exile (National Committee of Free France, the Norwegian government, the governments of Czechoslovakia, of Yugoslavia and of Poland) also follow. 24

Two years later, the Moscow Declaration, which, according to Gonçalves¹⁹, is »a preparatory mark for the composition of the Nuremberg Trial Court« signed by the USA, USSR and Great Britain on the first of November 1943 – when the tracks of war were already taking shape – announces the inevitable trial of those responsible for the war crimes in the victimized countries and warns those »who had not soiled their hands with the blood of the innocent yet« to the risks of joining the list of the guilty. He also mentioned the main war criminals, threatening them with penalties to be defined by the allied governments. 25

Therefore, 26

*two types of repression are openly presented in the Moscow Declaration. First, we have the local repression for individualized crimes, perpetrated in a specific territory. The trial of these criminals would be carried out by the authorities of the place where they had committed the offense, and supported by the common law of that jurisdiction .*²⁰ 27

¹⁸ F. ROOSEVELT; W. CHURCHILL, Joint Statement by Roosevelt and Churchill On War, Department of State Bulletin, October 25, 1941.

¹⁹ Gonçalves, Tribunal de Nuremberg (Anm. 6), S. 62 ff.

²⁰ Gonçalves, Tribunal de Nuremberg (Anm. 6), S. 64 ff.

The second model of repression refers to the so-called »great war criminals«, whose offenses had no specific geographical definition. This is the cornerstone of the First Nuremberg Trial, judging the twenty-two Statesmen. 28

As the war was coming to an end, the United States was struggling internally about the ways and guidelines for the trial of the accused of war crimes, and once the »Morgenthau Plan« was set aside, the Secretaries of War and State pulled their strengths to convince Roosevelt that the Bernays Plan, with some alterations and extensions, could serve as a guide and inspiration for a punishment model for post-war international justice based on a more traditionally modeled trial, even if adapted to the peculiar circumstances of the recently ended war. A »Memorandum to the President: Trial and Punishment of the Nazi War Criminals«, was executed by Secretaries Hull, Stimson and Biddle. The last one, future Judge in Nuremberg, took all efforts to convince the President of the USA to institute a court to judge the Germans and their organizations for »atrocious crimes« committed through a »broad criminal society«. ²¹ In Yalta, this topic became blinded by more urgent issues. Nevertheless, Roosevelt's death and Harry Truman's rise drove a new dynamics to the theme, for the new President accepted the memorandum almost in its entirety signed by the three Secretaries, declaring that he was little inclined to course alterations and practically sealed Washington's position. As soon as the United States discussions were settled, he should now make his point with the rest of the allies. The North-American Supreme Court Judge, Robert Jackson, was assigned the Head of Prosecution of the future Trial Court and was in charge of dealing its implementation with the French, British and Russians. That would take place at the London Conference. 29

The negotiations in London proved to be much harder than Jackson had figured. 30

Firstly, perhaps due to Judge Robert Jackson's own features as a negotiator. Short-tempered and somewhat imperative, his difficulty to become the diplomat necessary for the occasion was evident. The Russians vexed him, he was unable to understand the French, and the English resistance was tougher than he had imagined. Many were the impasses. Nikitenko, the Soviet negotiator, criticizing the North-American project, posed a question: how could one judge, for instance, an organization such as Gestapo that had already been extinguished by the allies? Moreover, he questioned the idea of judging criminal organizations itself, at this point supported by the French. Ex post facto criminalization also worried the French and English, especially fearing the proposal of considering all aggression wars as a criminal act. 31

However, it was the colluding proposal that caused the major criticism. Smith's words were: 32

In what concerns this issue, two separated sides immediately emerged: on the one side, the Continental countries, France and the Soviet Union, and on the other side, the British and North-Americans. During a great part of the debates, French and Russians seemed unable to understand everything that this idea encompassed. When they, at last, became aware of it, they were sincerely shocked. To the French, this seemed more a barbarian legal anachronism, unworthy of the modern Law, while the Soviets seemingly could not believe their ears – a reaction that would be 33

²¹ SMITH, O Tribunal de Nuremberg (Anm. 15), S. 37.

interpreted as envy by the skeptic. Nonetheless, the most relevant aspect in the Soviet criticism to the notion of collusion was the fact that it was very vague and so unfamiliar to the French and to themselves, and also to the German. ²²

A lot of conflicts and a real chance of setback in London were on stage. All seemed to have emerged from Potsdam where the three-great gathered: the boost and the necessary orders so that an agreement could finally be reached in London. Expressing their hopes that »the negotiations in London (would) ... result in »speedy agreement«, and the trial would “begin at the earliest possible date«, the three great would have flagged that closing the negotiations satisfactorily was a must at that point of dead end. The Russian representative in London, following Stalin’s orders, promptly withdrew his main objections, and an agreement was quickly executed. So, in the political field, the obstacles, the indecisions and the legal perplexities were overcome.²³

34

The London Statute – court framework and jurisdiction

On August 8th, 1945, the International Military Court Statute was established by the London Agreement, according to its Article One, »for the just and prompt trial and punishment of the major war criminals of the European Axis«, without prejudice of the other courts to carry on the minor war criminals’ trial. Known as the London Statute, it created a Trial Court that would be made of four main members and four substitutes, representing the four winning powers: The United States of America, the Union of the Soviet Socialist Republics, the United Kingdom of Great Britain, and France. The judges were irremovably fixed during the trial, and in an awkward attempt to make them stand for the whole humanity, their nationalities were disregarded, and they were vested with a »supranational« status. They were, to wit: Major-General Iona T. Nikitenko and his substitute, Colonel Alexandre F. Volchoff (the only ones to bear military ranks), appointed by the Soviet government; the Criminal Law Professor Henri Donnedieu de Vabres and his substitute, Robert Falco, appointed by France; Francis Biddle and John J. Parker, sent by the United States of America as permanent and substitute, respectively; and, by appointment of the British government, Lord Geoffrey Lawrence, who took the position of Chairman, having as substitute Lord Norman Birkett. The prosecution also presented names of the four powers, and during the court works, the North-American prosecution earned a clear protagonism. It was headed by Robert H. Jackson. For France, François de Menthon oversaw the top accusation, replaced by Chapentier de Ribes later. As both were regularly absent from the sessions, Charles Dubost was the one who often headed the works before the trial court. Sir Hartley Schawcross figured as His Majesty’s representative. Due to his position as General Attorney in Great Britain, his duty obliged him to stay in Britain, which allowed David Maxwell-Fyffe to take the lead of prosecution. As done before in the appointment of the Magistrate, Stalin chose a military in the command of the Soviet Prosecution, assigning this responsibility to General Roman Rudenko. All could count on a team of assistants, and the North-

35

²² SMITH, O Tribunal de Nuremberg (Anm. 15), S. 54.

²³ TUSA; TUSA, The Nuremberg Trial (Anm. 18), S. 84–85; SMITH, O Tribunal de Nuremberg (Anm. 15), S. 60.

American protagonism could be perceived in the number of Jackson's assistants: 22 against eight, six and eight French, English and Soviet respectively.

The defense was composed of talented German lawyers – from a wrecked country, available at the time – chosen by the Court, and each defendant could pick one of them though another one could be chosen out of the list to the discretion of the court. They worked with reduced resources and little assistance, limited to the scarce time given for the preparation of defenses. Moreover, they were often baffled by the proceedings provided by the Statute, which included part of the continental European legal tradition, and mixed it with elements typical of the common-law system. The flood of documents presented mostly by the North-American prosecution frequently confused them, and the interrogation technique based on cross-examination exposed their fragilities with this kind of proceeding, almost unknown by the then German Law. Besides, many of them were hostile or at least did not approve of the national-socialist government, which hampered any empathy they could have for their clients.²⁴ 36

Art. 6 of the London Statute²⁵ set forth the Court competent jurisdiction: 37

The Tribunal established by the Agreement referred to in Article 1 hereof for the trial and punishment of the major war criminals of the European Axis countries shall have the power to try and punish persons who, acting in the interests of the European Axis countries, whether as individuals or as members of organizations, committed any of the following crimes. 38

The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility: 39

(a) Crimes against peace: namely, 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 the foregoing; 40

(b) War crimes: namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to Wave labour or for any other purpose of civilian population of 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; 41

(c) Crimes against humanity: namely, 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. 42

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. 43

A first reading of the »accusation points« sufficed to see the broadness and vagueness of these »international criminal types«. The difficulties that the men in charge of the Statute faced cannot be denied. Their task was full of hindrances. Managing to write a Statute that contained crime 44

²⁴ SMITH, O Tribunal de Nuremberg (Anm. 15), S. 98.

²⁵ UNITED NATIONS. Charter of the International Military Tribunal, 1945.

estimation, some of which unknown to any prior legislation, that could charge important leaders of a wrecked country, who were part of a political system whose command chain, conversely to the myth about a Germany strictly hierarchized in the decision-making processes and highly organized in administrative terms, was not always so clear (excepting the Fürher's leadership), and taking into account a political context in which the interests of the winning powers, now that the war had ended and the »single battle front« had been overcome, diverging in many ways, was a far cry from a welcoming task. In spite of considering these and other difficulties, even a careless observer will find a punitive determination scarcely disguising a desire for revenge hovering during the Trial Court works. Nevertheless, let us also consider the bright side of it. Smith warns us that the attempts to restrain excesses were not completely put aside. Actually

the British tried, from day one, to change the allies' ambitious plans; the Soviets and French sought to keep down the likely dangers of an indictment for collusion and criminal organizations; the North-Americans were determined to avoid anything that seemed a "purging-like" Soviet trial. And if, according to the Court Statute, "bad seeds were planted there and produced even worse fruit during the Trial", in Nuremberg there are not only "blind-fold acts, neither were they inspired by bitterness and hatred only, but also were they under the pressure of the public feeling of outrage; moreover, there was a high moral purpose. This time, the Great Powers would not let escape the opportunity to warrant peace enforcing the International Law to the trial of crimes . ²⁶

A high moral purpose may seem somewhat exaggerated in what concerns these issues. Furthermore, we know – and so did the winning powers, even better – that the International Law, in itself, is unable to warrant peace. Nevertheless, it is time we analyzed, even if not as deeply as we should, some of these shadows and lights.

Crime of conspiracy

Maybe this type of crime was the most controversial, confusing and unintelligible one of the crimes charged against the accused, even to those more familiar to the Anglo-Saxon legal constructions that inspired it.²⁷

As Quintano Ripollés²⁸ could note, it was about an institute

²⁶ SMITH, O Tribunal de Nuremberg (Anm. 15), S. 76 f.

²⁷ »Professor Henri Donnedieu de Vabres in his "Le Procès de Nuremberg devant les princes modernes du droit pénal international", published in the Recueil des Cours of the "Académie de Droit International de La Haye" (volume 70-1947), recounts all political and legal contingencies that surrounded "the issue of the plot." Its legal basis, he says, lies in a proper notion of British law: that of "conspiracy." According to this concept may be punishable as plot any concert of wills that leads to the commission of something illegal: that is to say, not only a crime but a simple infraction or any act that, without being granted a criminal sanction, is contrary to the law Or morality. According to the doctrine, the plot involves the confluence of two elements: common resolution (agreement) and agreement on procedures (common plan). However, the practice complies with the first to justify the indictment«. J. YRIGOYEN, El proceso de Nuremberg y el Derecho Internacional, Lima, 1955, S. 258–259.

²⁸ A. Q. RIPOLLÉS, Tratado de Derecho Penal Internacional e Internacional Penal, Madrid, Instituto Francisco de Vitoria, 1955, S. 421.

45

46

47

48

that has in fact rather a character of degree in the dynamics of the crime or in the criminal participation than of a substantive crime per se. As a result of this, criminal acts of the most varied morphology appear, almost always repeated in subsequent accusations, notably in those dealing with crimes against peace and humanity. 49

Actions of internal political character were also mentioned regarding the conquest of power by the Nazis and the consequent repressive actions taken against it. It is worth quoting the three paragraphs of the accusation²⁹: 50

1. Beginning with the initiation of the aggressive war on 1 September 1939, and throughout its extension into wars involving almost the entire world, the Nazi conspirators carried out their common plan or conspiracy to wage war in ruthless and complete disregard and violation of the laws and customs of war. In the course of executing the common plan or conspiracy there were committed the War Crimes detailed hereinafter in Count Three of this Indictment. 51

2. Beginning with 'the initiation of their plan to seize and retain total control of the German State, and thereafter throughout their utilization of that control for foreign aggression, the Nazi conspirators carried out their common plan or conspiracy in ruthless and complete disregard and violation of the laws of humanity. In the course of executing the common plan or conspiracy there were committed the Crimes against Humanity detailed hereinafter in Count Four of this Indictment. 52

3. By reason of all the foregoing, the defendants with divers other persons are guilty of a common plan or conspiracy for the accomplishment of Crimes against Peace; of a conspiracy to commit Crimes against Humanity in the course of preparation for war and in the course of prosecution of war; and of a conspiracy to commit War Crimes not only against the armed forces of their enemies but also against non-belligerent civilian populations. 53

Here the already mentioned Murray Bernays' Memorandum suggestion materialized, which seemed rather satisfactory to the eyes of the Department of War. After all, it would allow the connection of the actions of repression and racism internally carried out by the Nazis, in an apparently sound sequence with the war crimes perpetrated during the conflict, all under the umbrella of Conspiracy or Complot. Even the actions that could not technically be considered as criminal would then become criminal if they could be set forth as part of a conspiracy aiming at the outbreak of the war and the crimes therein committed. All those participating in the conspiracy would be criminals even if no criminal action could be specifically demonstrated. Therefore, according to the North-American Prosecution, even before September 1st the defendants were already taking part of a conspiracy envisaging war and Europe's dominion. Richard Overly³⁰ observes that the simplicity of this thesis immediately attracted Stimson's attention for the idea of conspiracy suggested the engagement in actions such as genocide, war crimes and crimes against humanity, even if the defendant was fairly distant from the war operations and genocide. There was another benefit: there were no excuses for the »I was only obeying orders«. But, as also recorded by the author, historical counterfeit was the price of it once the thesis that the Nazis, as soon as they took power had a plan, and that they engaged in a conspiracy to dominate the world had absolutely 54

²⁹ INTERNATIONAL MILITARY TRIBUNAL, Indictment: Count One, (g) War Crimes And Crimes Against Humanity Committed In The Course Of Executing The Conspiracy For Which The Conspirators Are Responsible, 1945.

³⁰ R. OVERLY, Interrogatorios: El Tercer Reich en el banquillo, Barcelona, Tusquets Editores, Tiempo de Memoria, 2003, S. 70.

no support anymore. Or, as E.L. Woodward, consultant of the British »Foreign Officer« could not avoid to see, »in truth, there was no plot. The other great powers knew, in 1937, that the rhythm of German military preparations strengthened the country (...) It is, thus, unreal – and so it will seem to the historians – to talk about a German plot or collusion only because the other powers were always ready to forgive all the breach of promises by the Germans, and to execute agreements with the German government«. ³¹ If in 1945 Woodward was already aware of the fragility of a thesis based on a great Conspiracy carried out by the Nazi leaders, counting on the mindful participation of several layers of leadership, in the contemporary historiography it is taken for granted.

According to the accusation, the defendants, through a Complot, or Conspiracy, allegedly began wars that involved several countries and populations, practicing murders, mistreatments, deportation for slavery, and crimes against humanity and pursuits for political, religious and racial reasons. Often referring to these conducts, the charges handled them not only as crimes against humanity, then as crimes against peace, but also treated them as war crimes, giving rise to grounded suspicions ending up in the so-called *bis in idem*.

The German workers' National Socialist Party would then be one of the main clusters of this complot since its foundation in 1920 as part of a take-over plan and implementation of these criminal purposes. Following the line of accusation, putting an end to the Versailles Treaty, retrieving lost territories during World War I, and conquering their vital space (*Lebensraum*) would be some of the main goals of the accused, who did not hesitate to resort to the worst crimes to accomplish them.

In doctrinal and ideological terms, the Complot would be founded on principles such as the Party's supremacy over any other institution, the Führer's unquestionable leadership (in this case, the defense asked how to align the Führerprinzip with the existence of a Conspiracy), and that of the Aryan superiority.

The Prosecution supported that, since its take-over in 1933³², Hitler's regime carried out its plan for the triggering of war, thus, all the domestic and foreign political acts, and all the public administration acts should be understood as part of these objectives. The economic and labor policies, amid which was the rearmament policy, the four-year plan and the suppression of labor rights were included as well.

³¹ SMITH, O Tribunal de Nuremberg (Anm. 15), S. 76. Let us remind that the annexation of Austria counted on the consent of the European powers, and the conquest of the Sudetes was only possible because Czechoslovakia had been abandoned by the French and English. A second fact to remind is that the inaction of France and England – and the unimportant measures taken by the Nations League – facing the Japanese territorial conquests in Manchuria, and of Italy in Abyssinia, two future allies of Hitler's, besides the known Ribentrop-Molotov pact (or Hitler-Stalin), allowed more freedom to the Germans in the Western front, once Poland was divided. At last, it was an absolute failure of the so-called appeasement politics launched by England, and to a lesser extent, by France.

³² Gonçalves questions if one can criminalize the legitimate and democratic seizure of power. There is a certain truth in this, though Hitler's ascent to power aroused tension and intimidation from his followers. Gonçalves, Tribunal de Nuremberg (Anm. 6). See, for instance, Evans and Turner detailing the complexity of the Nazi seizure of power, a process in which the force of the popular vote prevailed (although the National Socialist Party never reached the majority), but was not fully adverse to violence and physical harassment towards the adversaries. R. EVANS, *O terceiro Reich em guerra*, São Paulo Planeta, 2012. H. A. TURNER JR., *A treinta días del poder*, Barcelona, Edhasa, 2000.

De Vabres, one of the judges, did not find enough elements to support this conspiracy, and chose to point out, within the power framework of the national-socialist Germany, the existence of a leadership and Hitler's almost unequalled decision-making power, admitting at most the possibility that Goebbels, Himmler, Borman and Goering – only the latter sat at the dock as defendant in Nuremberg, although Borman had been judged and convicted in absentia – sometimes had seized partial power, but still had to submit their intentions to Hitler's final word.³³ 59

De Vabres' position partially prevailed. The Trial Court accepted the Conspiracy thesis at last in the cases of aggression wars only, disregarding Prosecution's claims with reference to the war crimes and to the crimes against humanity. Therefore, all those aware of the aggression plan of Hitler's regime, and still insisted in cooperating with it, were convicted by Crimes against Peace, but proportionally to their partaking in the planning and preparation of the aggression wars. 60

That was one among other commitment solutions found by the Trial Court. Even if rather questionable from the legal point of view – but perhaps unacceptable due to the circumstances – that solution was clearly unsustainable from the contemporary historiographical perspective, almost all of it reluctant in accepting the existence of an aggression plan previously structured and accordingly put into practice.³⁴ 61

Crimes against peace

These crimes were the second point of accusation. The defendants were charged with the triggering and guiding of aggressive wars breaching international treaties and conventions. Specifically speaking, the defendants' responsibilities for the invasion of Poland by Germany on September 1st, 1939, for the war against Great Britain and France beginning on September 3rd, of the same year; against Denmark and Norway, beginning on April 9th, 1940; against Yugoslavia and Greece on April 6th, 1941, against the Soviet Union on July 22nd, 1941, and the United States of America on September 11th 1941 were pointed out. The main international texts breached were, according to the accusation, the Geneva Protocol of 1924, the resolution of the Society of the Nations of September 1927, the Paris Pact (Briand-Kellog) of 1928, and the treaties executed between Germany and Poland, and Germany and the Soviet Union on January 26th 1934 and August 23rd 1939, respectively. The information pinpointed Hitler's *Mein Kampf*, the book he wrote in 1924, some of his speeches, the Hossbach Memorandum, a written record by military Friedrich Hossbach reporting a meeting presided by Hitler in which he, before Goering, Von Blomberg, Von Neurath and other important figures of the regime, praised the importance of the conquest of Austria and Czechoslovakia³⁵, and the Schmundt Document, a text describing a conference that took place in May 1939, with the presence of Keitel, Goering, Raeder and others, when the topic was the 62

³³ Gonçalves, Tribunal de Nuremberg (Anm. 6), S. 106 f.; J. YRIGOEYEM, *El proceso de Núremberg y El Derecho Internacional*, Lima, Talleres Gráficos P. L. Villanueva, 1955, S. 259.

³⁴ See Evans and Kershaw, to mention just a couple of recent and important works. EVANS, *O terceiro Reich* (Anm. 36); I. KERSHAW, *Hitler, the Germans and the final solution*, Yale University press, 2008.

³⁵ Gonçalves, Tribunal de Nuremberg (Anm. 6), S. 126.

possibility of a confrontation with Poland, were considered as important evidence of the combative intentions of the accused. Jackson had already received the translation of the documents related to the »Green Operation«, the guideline written by the end of 1938 to invade Czechoslovakia and, although he also already translated »Additional Secret Protocol of the German-Soviet Pact« formalized in August 1939 and that sliced Poland between Germany and the Soviet Union, had already been handed since the Preparatory Conference of Nuremberg, he thought it would be wiser not to confront his important occasional ally.³⁶ It was not for another reason that Nikitchenko, the head of the Soviet Prosecution, chose to put this topic aside because he feared that the accused, reminding the Trial Court of the existence of this Pact, would embarrass the Soviet Union. Moscow even sent a team to the court, led by Colonel Ligachev, with express order not to allow that these issues were detailed during the trial.³⁷

If huge difficulties were faced to conceptualize aggression with some clarity during the Rome Conference in 1998 that created the current International Criminal Court, which caused the postponement of the discussion that finally took place years later in Kampala, it is not difficult to figure the enormous obstacles to characterize it with some pertinence in 1945. Furthermore, none of the Treaties or Conventions deemed as breached by the defendants set forth sanctions in the case of non-compliance – among other reasons because all their signatories were aware of the possibilities of infringements because the use of force was still an acceptable resource at the time, even if with likely controversies. If in 2012 Barack Obama said that no possibility is ruled out when it comes to the Iranian project of obtaining nuclear military capability – thus admitting the possibility of unilateral use of force – in 1945 any agreement upon this impossibility was farfetched. Although Marcel Merle³⁸ and Sheldon Glueck³⁹ took efforts to demonstrate that the forbidding of aggression was, at that time, a »custom in progress« already sufficient to constitute international obligation in 1939, the defense of the accused, as informed by Gonçalves⁴⁰, had good reasons to doubt the existence of this »new International Law« at the time.

The court, at last, considered that the infringements of the International Law occurred before the German invasion of Poland – which is the cornerstone of the onset of the Second World War – were built step by step to come to the real acts of aggression that began when the Wehrmacht crossed the German-Polish frontier.

War crimes

The charges for the perpetration of war crimes met more consistent legal grounds. They could be considered and accepted as customary law and formed a rather broad range of international

³⁶ OVERY, Interrogatorio (Anm. 34), S. 77.

³⁷ OVERY, Interrogatorio (Anm. 34), S. 77.

³⁸ M. MERLE, *Le procès de Nuremberg et le châtimeut des criminels de guerre*, Paris, A. Pedone, 1949.

³⁹ S. GLUECK, *The Nuremberg Trial and Aggressive War*, Knopf, 1946.

⁴⁰ Gonçalves, *Tribunal de Nuremberg* (Anm. 6), S. 128.

63

64

65

legislation, at least for the time, commanded by the Hague Convention of 1907 and of Geneva of 1929. So, murders and mistreatments of civilian populations such as torture, kidnapping and deportation could be punished with sound legal foundation. The issue here was the overlapping of these crimes with the crimes against humanity – often the borders were fine and caused the *bis in idem* question. The accusation also pointed out as war crimes the deportation for slavery and other purposes of the civilian populations that were found in territories occupied by the German.

Basically, the defense brought up two theses: the first one referred to the fact that Germany incorporated the territories it invaded to the Reich, and therefore the acts practiced there were supported by the exercise of sovereignty. The trial court deemed that the effects of an occupation do not prevail if the army and the population of the occupied territory fight the enemy invader. **66**

The second claim refers to the highest personal character of these crimes. Could those men in the defendant's dock be judged for third party conducts? Gonçalves⁴¹ acknowledges that »some deserved punishment for given criminal orders«, but he indicates judgment incongruities. For instance, a somewhat lenient judgment was carried out in the case of Admirals Raeder and Donitz, the idealizers of the submarine war and who escaped from a death sentence, if compared to the toughness of Sauckel's and Kaltebruner's judgments subject to hanging. **67**

Crimes Against Humanity

The crimes against humanity, sometimes not exactly distinguishable from the war crimes, constituted new criminal offenses, which were, to wit: »murder, extermination, slavery, deportation and each and every inhuman act committed against civilians, before or during the war«, and »the pursuits for political, racial or religious reasons, carried out in the wake of all the crimes of jurisdictional competence of the International Trial Court, or in connection with them, even if those pursuits have constituted breach of the internal law in the countries where they were perpetrated«. Here are also included as part of a common plan, the pursuits to the Jews from 1933 on. **68**

We will not go through the technical-judicial specificities related to the probable cases in which the legality principle was breached, in which the *bis in idem* prevailed, and where the conducts were not sufficiently defined or specified, in which the adversary proceeding and the opportunity to be heard were not sufficiently observed, etc. Much has been said about this topic, and any amendment here would be of no use considering the abundant and authorized literature on it. **69**

This is one of the most predictable risks when one writes on the Nuremberg Trial Court and the period from 1933 and 1945. Literature is plentiful.⁴² But a final record is worthwhile: even after the onset of the court works, when a great part of the evidence had already been collected and presented to Prosecution, other kept coming, or so thought the accusation. Nevertheless, while new evidence **70**

⁴¹ Gonçalves, Tribunal de Nuremberg (Anm. 6).

⁴² For a deeper analysis on the matter, besides the already mentioned, we suggest H. VABRES, *Le proces de Nuremberg*, Paris, Domat Montchrestien, 1947; R. JACKSON, *The Nürnberg Case: As presented by Robert H. Jackson*, New York: Alfred A. Knopf, Inc, 1947; S. GLASSER, *Le charte du Tribunal de Nuremberg et les nouveaux principes du droit international*. In: *Révue Penale Suisse* 63 (1948), S. 13–38; and R. FALK, *Nuremberg: past, present and future*. In: *Yale L. J.* 18 (1971), S. 501 ff.

surfaced, the frailest points of accusation – and we mention just a few – kept coming in during the whole trial process. Therefore, the thesis of the conspiracy plan was never supported by stronger and more consistent evidence and, even today, the most authorized historical bibliography took in that Hitler wanted war, but never had planned it concretely. What he did was to adapt himself more often to the political circumstances and to the international powers relations.

Likewise, a more serious historiography supports the genocide practiced by the Third Reich especially focusing the Jews but falters to point the exact moment when this decision was made, and even how this decision-making process fully developed itself, besides its definite reasons.⁴³

These and other issues are open to debate and still shed uncertainties on some aspects of the Prosecution performance and even of the judges. Certainly, a trial this size and importance would bring with it complexities to the works, hampering and tantalizing the involved in their job. For the contemporary historians, sixty years after that trial, provided with abundant and much more trustful information, the deconstruction of some »historical truths« taken to the Court becomes a more comfortable drill. For the jurist, with the help of the growing international criminal legislation in the last years, it may appear that the »hermeneutic effort« of the accusation is sometimes almost incomprehensible and unjustifiable. It is not unusual that historians and jurists are right in their stern criticism. But may the current complexity, the rising political impasses, and the newness of the situation serve as mitigating factors – but not justification – to those judges and prosecutors involved in the Nuremberg works.

The accused and their convictions

A detailed description of the sometimes sibylline selection process of the defendants that would be convicted for their offenses before the court does not seem pertinent here. Lists have been made and unmade, names have been listed and taken out of the list, depending on the representativity of each within the structure of the German power system, or on a minor or major organical relationship with the several Nazi organizations, besides, for sure, the specific interests of the judges. The list made by the United States government included, in the first place, the organizations pointed as criminal: the »leadership« of the National-Socialist Party, the Reich Council of Ministers, the Staff, and the Higher-Command of the Army, the SSs and Gestapo, and, according to the Prosecution's request for the trial, the SA (that had been dissolved before war) should be included.

Each organization related to a list of accused that stood for them more significantly. According to the North-American judgment, a total of 16 from an initial list of 46 names was reached. From this list, 14 ended up effectively judged. Smith⁴⁴ mentions that, much more important than the

⁴³ An educated discussion around the so-called “final solution” and the most different historiographic trends on the onset of it, Hitler's leadership role, the German people's reaction, the decision-making process, the Third Reich's bureaucracy, its scope and extension, etc., may be found in: Kershaw, Ian. *Hitler, the Germans and the Final Solution*. Yale University Press, 2008. Literature on this topic is huge and almost uncontrollable.

⁴⁴ SMITH, O *Tribunal de Nuremberg* (Anm. 15), S. 68.

issues that, in the end, influenced this listing of accused was the method employed. According to the author,

names were chosen before an indictment was prepared, and even before any negotiation of the Letter setting forth the law according to which some of them would be tried. It was not the personal action, the cruelty and the reputation of the defendants that directed the selection of names, but the fact that they matched the North-American plan to judge the organizations. 75

The trial of the organizations in Nuremberg was often treated as if an idea that came up in the last minute, but it constituted the core of the North-American indictment project. The defendants, as individuals, were no more than actors through whom the main plot was staged. 76

In the end, the 22 judged were: 77

- Herman Goering, Air Force Minister, convicted for the indictment of four crimes, took his life before the execution; 78

- Rudolf Hess, Reich Minister, sentenced to life imprisonment for conspiracy and crime against peace; 79

- Joachim Von Ribbentrop, Foreign Affairs Minister, sentenced to death for the indictment of four crimes; 80

- Wilhelm Keitel, Chief Wehrmacht High Command, sentenced to death for the indictment of four crimes; 81

- Ernst Kaltenbrunner, Chief SD, sentenced to death for war crimes and crimes against humanity; 82

- Alfred Rosenberg, Eastern Occupied Territories Minister, sentenced to death for the indictment of four crimes; 83

- Hans Frank, General-Governor of Poland, sentenced to death for war crimes and crimes against humanity; 84

- Wilhelm Frick, Minister of the Interior, sentenced to death for crimes against peace, war crimes and crimes against humanity; 85

- Julius Streicher, Minister without Portfolio, sentenced to death for crimes against humanity; 86

- Walter Funk, Minister of Economy, sentenced to life imprisonment for crimes against peace, war crimes and crimes against humanity; 87

- Karl Doenitz, Commander-in-Chief of the Submarine Force, sentenced to ten years in prison for war crimes and crimes against humanity; 88

- Hjalmar Schacht, Minister of Economy (1933/1936), acquitted of the crime; 89

- Erich Haeder, Commander-in-Chief of the War Navy until 1943, sentenced to life imprisonment for crimes against peace, war crimes and crimes against humanity; 90

- Baldur Von Schirach, Governor of Viena, sentenced to 20 years in prison for crimes against humanity; 91

- Fritz Sauckel, General Plenipotentiary of Mobility and Compulsory Labor Organizer, sentenced to death for war crimes and crimes against humanity; 92

- Alfred Jodl, Staff Operations Chief, sentenced to death for the four crimes indicted; 93

- Franz Von Papen, Reich Ex-Chancellor, acquitted of the crime; 94

- Artur Seyss-Inquart, organizer of the Anschluss and Netherlands Governor, sentenced to death for crimes against peace, war crimes and crimes against humanity; **95**
- Albert Speer, Armaments and War Production Minister, sentenced to 20 years in prison for war crimes and crimes against humanity; **96**
- Constantin Von Neurath, Foreign Affairs Minister until 1938 and Bohemian and Moravian Protector, sentenced to fifteen years in prison for the four crimes indicted; **97**
- Hans Fritzsche, Goebbels's Assistant, acquitted of the crime; **98**
- Martin Borman, Chancellery Chief and the Führer's Secretary, sentenced to death by default for crimes against peace and crimes against humanity. **99**

All those sentenced to death were hanged. **100**

Each of these convictions encompasses political interests mixed with legal system considerations, some of a very questionable nature, others steadier, and this is not the place to strive for a customized analysis. Let us just highlight one case, that of Rudolf Hess, which bears an interesting mixture of political factors and also an important issue of technical-judicial order, stressing the mutual mistrust between the two allies at the time, the Soviet Union and Great Britain, among other cases that could fit these characteristics as well. **101**

As is known, Hess undertook an intriguing and solitary flight from Germany to the Glasgow neighborhood, where he landed with a parachute in 1941. This awesome act of one of the closest men to the Führer nourished an intense literary controversy that has nowadays seemingly been calmed down once it was interpreted as an awkward attempt of a man, already showing mental disturbance, to enact a peace agreement between Great Britain and Germany.⁴⁵ Throughout the war, the Soviets constantly suspected that it was all about a joint plan between Germans and English in the sense that, once peace was reached, Germany would be free to attack the Soviet Union. Stalin's suspicions positively grew when Hitler actually unleashed the Barbarossa operation in that same year. The Soviets, during the whole war, continued to suspect that the »Hess letter« could be used within a peace-building process between Great Britain and Germany, although the English made all efforts to deny any action in this sense. The latter, on the other hand, shrank back to judge Hess immediately fearing strong Nazi reactions against the English prisoners. Thus, England saw a great opportunity to place Hess among the defendants in Nuremberg, willingly surrendering to the Soviet pressure. In legal terms, an issue came up: Hess clearly signaled mental disorders, which protected him from a regular criminal trial. After notorious hesitations, the psychiatric reports finally deemed him apt to be tried without completely excluding the possibility of mental disorders. The Court was uncertain about the situation, but it was Hess himself who, before the bar, stated that he had been pretending amnesia to that point.⁴⁶ Thus, on November 30th, 1945, sitting between **102**

⁴⁵ A relatively recent work presenting a summary of this debate is that by Allen. M. ALLEN, Martín, *The Hitler-Hess deception*, Harper-Collins, 2003.

⁴⁶ Leon Goldensohn, Psychiatrist M. D., who interviewed Hess on June 8, 1946, attests that the prisoner could not remember his father's occupation, neither his mother's personality traits, nor did he really remember his siblings, among other disturbances. L. GOLDENSOHN. *As entrevistas de Nuremberg*, São Paulo, Companhia das Letras, 2005.

Goering and Von Ribbentrop, Hess asked to be heard and acknowledged tactic reasons in doing so, and that henceforth he would behave himself as a responsible person. But he went on with the same distant and strange behavior, apparently oblivious. He was sure that the guards were trying to poison him. It is likely that he was judged in a dazed and digressive mental condition, and that his manifestation was a quick moment of lucidity, but submerging in a paranoid state and amnesia right after⁴⁷, He was only sentenced to life imprisonment when Nikitchenco, seeing that his death sentence was impossible, allied to Lawrence and Biddle, reducing De Vabres' intention of a lighter penalty to a minority. In the Nuremberg trial, the Hess episode is emblematic of the mistrust that the Soviets nourished regarding the three other countries, and this is the point, although in a stage, where the first signals of the cold war were given. A lot of mistrust that a criminally incapable individual ended up treated as if he wasn't one is left. Hess died aged 92, in 1982, in the prison of Spandau, seriously insane.

Conclusion

Zolo⁴⁸ suggests that the »Nuremberg model«, in short, was built upon three pillars: **103**

1. The absence of autonomy and partiality: in spite of the acknowledged unlikelihood in any international jurisdictional authority of the split between the mutually contaminating justice and politics, Nuremberg completely voided any possible neutrality; justice emerged from the waters of politics undermining it completely. The Italian professor reminds us that **104**

Otto Kirchheimer argued in Politische Justiz that if the functional differentiation between politics and justice were to be nullified, the criminal process ends up only carrying out extrajudicial or judicial functions, that is, the ritual theatricalization of the political struggle, the personalization and stigmatization of the enemy, the procedural legitimation of the measures that are attempted to take against him (including physical elimination), the atoning sacrifice. These aspects are certainly present in Nuremberg. **105**

2. Breach of the subjective rights of the accused: only regarding the war crimes could one find grounds for safer charges, but with limitations. As for the other offenses, the violation of the principles of lawfulness and nonretroactivity of the criminal law was flagrant, including the fixation of penalties left to the judges' discretion. The defendants were chosen in a somewhat arbitrary manner, based on the »decisive or high positions« they occupied in the Nazi state apparatus. The defenses were forbidden to call witnesses that could embarrass the winners in what concerns their own behavior during the War. **106**

3. The penalties established were carried out only by taking into account the objective seriousness of the facts putting any references to subjectivity (intention, awareness of the aftermath of facts, personal motives, social and cultural context) aside. Their content was exclusively retributive and had expiatory purposes, and judgments barred any filing of appeal. According to the author, it meant **107**

⁴⁷ OWEN, Nuremberg (Anm. 14), S. 71.

⁴⁸ D. ZOLO, La Justicia de los vencedores: de Núremberg a Bagdad, Buenos Aires, Edhasa, 2007, S. 165–167.

simply to perform hostile behavior to the detriment of the inmate, in order to cause him suffering, mortification and humiliation, to his physical and moral annihilation. The possible preventive effectiveness of the sanction seems to be in the shadow of its "exemplarity", that is, an intimidatory exemplarity that seems to be encroached not so much to prevent other crimes, but rather to celebrate the power of the victors – themselves responsible for grave international crimes – just as, in the premodern age, the "splendor" of the doom of the condemned was a collective celebration of the majesty of the king or of the emperor. 108

Could the Nuremberg Trial Court be considered a satisfactory model of international criminal justice? It seems that Kelsen's⁴⁹ question can only have one answer: no. Even if the alternatives presented to the actors were rather narrow and hardly better. Even if, to their creators, the benefit of mitigation enjoyed by those in charge of making difficult decisions can always be granted. After all, it was about real men dealing with concrete situations and decisions, taking actions according to circumstances never faced before, and challenged by inevitable political annoyance in post-war periods. Still, nothing justifies the arbitrary and unedifying character of the justice performed in Nuremberg. It is most likely that all the defendants deserved Nuremberg's determinations, but it does not take away the vindictive and sometimes hypocritical nature of the winner's intentions. 109

The contradictions, ambiguities, falseness and interests common to the logic of the realpolitik have already been sufficiently explored by several studies on the Nuremberg trial court. If it was a »mark for the international criminal justice« as some profess, the other side of the coin showed us a much more murky and questionable aspect as if it were »an original sin of the international criminal justice« that could be expressed in the following question: by its own nature, characteristics, facing episodes inevitably connected with political interests and considerations, and because they are placed in the universe of the »international politics«, are the international criminal courts, be they transitory or permanent, inexorably doomed to drown in their troubled and treacherous waters? As a kind of subproduct, this debate poses uncountable questions. Zolo⁵⁰ lists some of them. 110

Should the autonomy of the international criminal courts from their agents, sponsors and financiers be considered as a naïve expectation of the jurists that ignore the logic of the Realpolitik? Should the requirements of a winners' justice that cannot consider lesser judicial and doctrinal subtleties within a context where power strategies are priority prevail? What is the use of international sanction? Should it have a retributive function? Should it hand out the role of a scapegoat? Should it look for the defendant's redemption? Or should it adapt itself to the social hazardousness? Can individual blames manage – let us consider, for instance, the crime of aggression – to retribute actions involving chains of command and decisions made within a rather complex system? Is it possible that punishment complies with redress and/or general prevention of new international crimes, or new wars? Should international criminal trials restraint to the appointment of individual responsibilities or establish the truth of the events? Should they contribute to the *making of history* or ascribe *historical responsibilities*? Choosing certain leaderships or 111

⁴⁹ H. KELSEN, Will the Judgement in the Nuremberg Trial Constitute a Precedent in International Law? *International Law Quarterly* 1 (1947), S. 153–171.

⁵⁰ ZOLO, *La Justicia de los vencedores* (Anm. 52), S. 168.

crimes – and punishing them exemplarily – leaving unpunished several other actions and individuals, or choosing emblematic cases and episodes from inevitably political criteria, would that weaken the search by the international justice for the fine balance between punishing and making justice? As Nasser⁵¹ suggests, can the specificities of the international criminal courts make them tilt the balance towards a punitive answer?

There are too many questions and possibly too many uncertain answers. 112

For instance, it is not all clear if international criminal courts help settle accounts with the past and if they allow that the new generations face it with more responsibility, giving the opportunity to future appeasement. At least in what concerns Nuremberg and the trials managed by the allies in the post-war period, this seems to be true. Koskenniemi⁵² reports their dusky didactic effects checking out that, during the process, 78 % of the German population thought it was »fair« while four years later, this number had decreased to 38 %. In 1952, only 10 % of the Germans approved of the trials carried out by the USA within their occupation area.⁵³ 113

The international criminal courts that followed Nuremberg, and that occurred from the years of 1990 on were created under rather different political and historical conditions. They are legislatively stronger encompassing uncountable treaties and conventions that prevented them from the criticism peculiar to that court. They benefit from a well-organized network of international militants that support and consider them as a necessary way for the construction of international peace and valuing of the human rights. International congresses, academic works and public demonstrations are tools usually used for the sponsoring of the necessity of these international criminal jurisdictions in which are deposited somewhat naïve and excessive, almost redemptive hopes. Within a broader scope of the International Law of Human Rights, the reference to a cognitive evolutionary process may be appropriate. Epistemic communities that develop intellectual and political strategies envisaging given purposes through the creation, selection and spreading of values and expectations able to channel the actions and engagement of several actors for the fulfillment of those ends may be helpful.⁵⁴ 114

⁵¹ S. H. NASSER, *International law and Politics: International Criminal Courts and Judgments. The case of the Special Tribunal for Lebanon*, in: *Gonzaga Journal of International Law* 15 (2012), S. 146–171.

⁵² M. KOSKENNIEMI, *Between Impunity and Show Trials*, *Max Planck Yearbook of United Nations Law*, Vol. 6, 2002, S. 1–35.

⁵³ “Influential members of the US judiciary – including judges from the tribunal themselves – had serious doubts about the constitutionality and procedural fairness of the trials and congressional support for them was thin. Under such conditions, little sympathy could be expected for the trials from the German population” “... the war crimes programme did little to change German attitudes. Cries of foul play and “victor s justice” accompanied the proceedings... The constant attacks against the Allies, especially the United States as the main instigator of those proceedings in the late 1940s by Germany’s church leaders, politicians, veterans and refugee organizations demonstrated that the war crimes programme had not reeducated and democratizes the Germans”. Buscher, F. M cit. por Koskenniemi, p. 5.

⁵⁴ Epistemic communities are understood as elites that have and share a given knowledge and object, spreading them through several strategies, intervening in specific debates and, as a result, they often have an innovating role that may be relevant in the construction and implementation of real and specific agendas. See J. DOGHERTY; R. PFALTZGRAFF, *Contending Theories of International Relations – A Comprehensive Survey*, 2001, S. 216 f.

Nevertheless, we should remember that the eagerness of making »justice« through a tool of uncertain usefulness such as the criminal punishment – and literature on this subject is overwhelmingly abundant⁵⁵ – may scatter dangerous pitfalls along the way of those advocating hardline international criminal justice. A very little number would deny the worth of struggling against unpunished heinous crimes. However, in the name of a universal ethical justice, of the world peace, or of the punishment of genocide dictators, there will always be a real risk (and Nuremberg will always remind us of this) of the implementation of a criminal process that will not comply with the warrants and fundamental rights of the accused – treating him as an enemy – that will choose the defendants, that will not take into account the expectations of the aboriginal peoples victimized by these offenses⁵⁶, neither the political processes of peace negotiation that may count out the judicial action, that may become a tool in the hands of the powerful etc. 115

In the words of Zolo, 116

one of the slogans most used by the supporters of these new international criminal courts is: 'There cannot be peace without justice'. I believe that, propagandas aside, this shows an oversimplified notion of the relationship between justice and world peace, justice being considered only from a judicial point of view. But there is something else to consider. The slogans show a sort of criminal fetishism, naively applied to international relations, which ignores centuries of theoretical debate on problems of the "preventive efficiency" of criminal sentences – and in particular of prison sentences – and the doubts raised about the effectiveness of a rehabilitation process of a stay in prison . ⁵⁷ 117

When it comes to crimes against humanity, the deterrence rationale may only prevail to the cost of an unconvincing generalization, as reminded by Koskenniemi.⁵⁸ Kulaks-like experiences, or the Nazi genocide, to the extent that they are bearers of a »new world« or of a »new humanity« discourse, invalidate any other considerations regarding the preventive character of the criminal punishment. After all, for those who justify their actions based on their »redemptory functions«, in the rescue of »historical injustice«, on the »superiority of a people«, on the »refoundation of society«, or whatever 118

⁵⁵ Within the International Law, Eiroa presents an interesting discussion. P. D. EIROA, Políticas del castigo y derecho internacional: Para una concepción minimalista de la justicia penal, Buenos Aires: Ad-Hoc, 2009, S. 147 ff.

⁵⁶ The conflict in Uganda may serve as an example of how all those problems mix. It is about a bloody and dramatic conflict that occurred in a peripheral country in Africa. The Uganda government itself asked for the interference of the International Criminal Court (ICC) against the will of a great part of the political leaderships and of the population. The objective would be to involve the international society in a conflict that the government could not stop. As the Lord Resistance Army is a group that fights the government by means of arms, recruiting children by force for their army, an evidently disgusting action, the population is skeptical towards an international criminal jurisdictional action that could reach their children and grandchildren belonging to the "Lord's Army". On the other hand, the action of the international criminal justice may become an obstacle to the peace negotiating processes, and was likely to further the escalating of the conflict. As for the punishment, its retribution/deterrence effects in this case are questionable because only five individuals were considered as responsible for all the crimes committed, which gives out the feeling of an almost general impunity, and stresses the rationale that to get involved in the conflict will bring very reduced possibilities of punishment. For more details, see M. T. TOSI, Dever de punir e os interesses da Justiça. A posição do Tribunal Penal Internacional frente ao conflito de Uganda, Revista Brasileira de Ciências Criminais 96 (2012), S. 427–465.

⁵⁷ ZOLO, La Justicia de los vencedores (Anm. 52), S. 170.

⁵⁸ KOSKENNIEMI, Between Impunity and Show Trials (Anm. 59), S. 8.

other »transcendental« purposes they may present, any penalty of preventive nature, or of any other nature, sounds absurd, unfair and persecutive.⁵⁹

The several issues and questions posed here – and in such an extensive theme, others would still be pertinent – are a long way off to find satisfactory answers. But, perhaps we should go back to the beginning of the text. Each historical event has several disputing narratives, and the one to prevail will depend on the discursive space reserved to the involved, on the competitors' distributive game of power, on the rhetorical strategies, on the public space reserved to the debate, on the dissemination of the construing networks by the interested parties, in the struggle for the appropriation of the most adequate »language« etc. The winners of the Second World War, while winners, imposed their language to the dispute on the »historical truth«. But, in Nuremberg, as in no other international criminal court, the »historical truth« could not be found, and it was not up to it to find it – or at least it should not be, nor is it the role of any international criminal court. Judges are not historians. Judges ascribe responsibilities and are not prepared to search for the »always provisional truths of History«. International criminal courts are not truth commissions. All they do is judge, and it is the Prosecutor's duty to prove the culpability of the accused in his search for conviction *beyond a reasonable doubt*.⁶⁰ Nevertheless, Nuremberg built its narrative as well – an incomplete and limited narrative, and it could not be different⁶¹, though loaded with symbolic effects due to its narrative structure able to tell perpetrators from victims, warriors from peace lovers, dictators from Statesmen. Perhaps no international criminal court is in the position of operating, at least partially, without these dichotomies.

More than half a century away from these events, we still cannot deny that the international criminal justice managed to get over many obstacles that, in those post-war days, were very difficult to bridge. Many remained followed by a list of questions, some of them as relevant as unanswerable. This work tried to answer them, but not as much as to call attention to the importance of taking them into account. Let us make the last remark: Nuremberg symbolized, among other things, the rise of an international order whose unrelenting reality concerning the practice of power, its uneven and hierarchical distribution and the prevalence of hegemonies endured, even if resized and apportioned in a different way, entailing the rise and fall of different actors. This arrangement kept on almost unaffected until the end of the cold war. The scenery has been constantly changing ever since, but only giving frail signals to some world system that may embody meaningful democratic elements.

⁵⁹ In the same sense, Eiroa says: "En síntesis, puede decirse que, frente a hechos de violencia sistemática con raíces históricas tan complejas y antiguas, como el genocidio ruandés (por no hablar Del genocidio de los judíos de parte de la Alemania nazi o de los crímenes cometidos por el régimen de Milosevic), parece realmente difícil pensar en la supuesta eficacia disuasiva de la pena como hipótesis plausible para prevenir la constitución de una elite promotora de las atrocidades". P. D. EIROA, Políticas del castigo (Anm. 56), S. 187.

⁶⁰ Hannah Arendt, dismayed by the rhetoric of the prosecution in Eichmann's trial, emphasized that: "Justice demands that the accused be prosecuted, defended and judged, and that all other questions of seemingly greater import – of "How could it happen?" and "Why did it happen?", of "Why the Jews?" and "Why the Germans?", of "What was the role of other nations?" ... – be left in abeyance. H. ARENDT, Eichmann in Jerusalem: A Report on the Banality of Evil, New York, Viking, 1963, S. 5.

⁶¹ Historians show their worries in establishing Germany as the hostile State to the detriment of a deeper discussion on the Holocaust. See R. A. WILSON, Writing History in International Criminal Trials, Cambridge, Cambridge University Press, 2011, S. 10 f.

Maybe we are on the verge of a »transformation of hegemonies« period, but it seemingly does not pave a way towards an international society in which all actors – and especially the most powerful national States – are willing to accept an International Criminal Law equal for all. Nor does it warrant an International Criminal Law that will fully embody – is that possible? – all the fundamental rights and warrants that many of them accept internally to their jurisdictions, but are not willing to embody them in the broad sense within the international jurisdiction. If we are a far cry from the *winners' justice* of Nuremberg, we are also very distant from a democratic and universal Criminal Justice. **121**