

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

*John Q. Barrett\**

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

Over the past one hundred and more years, the world's path to and forward from the Hague Conference of 1907—the path that led to Nuremberg, and the path that has led from Nuremberg to the work of today and tomorrow—is one that climbs, if unevenly and over tough terrain, toward international humanitarian law.

## *National Sovereignty*

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

That period closed in 1899 with the first Hague Conference. This gathering of twenty-six nations produced modest agreements about rules of

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

conduct in war between sovereigns. The nations also created an embryonic international court to arbitrate international disputes.<sup>1</sup>

### *The 1907 Hague Conference*

The second moment to consider occurred exactly one hundred years ago. The United States, through President Theodore Roosevelt, called for a second Hague Conference. A principal United States objective was to create an empowered, more effective international court of arbitration, building on the first international court. As a secondary objective, the United States sought to develop and advance rules of armed conflict.

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

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

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

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

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

that might otherwise escalate into warfare. Instead, the nations merely propounded resolutions for adoption in principle and future discussion.

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

The United States, envisioning and advocating such a court, was willing to and publicly did advocate sacrificing some of its sovereignty in the interest of international justice. The particulars of the United States proposal for a new, binding court are interesting to consider. It proposed a non-packed tribunal of fifteen judges—nine judges from Europe, two from Asia and only four from the United States. In other words, the United States proposed to be bound by the majority vote of a tribunal not comprised mostly of its own nationals.

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

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

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

- One was a New Jersey professor of government, Woodrow Wilson.
- Another was a young lawyer, world traveler and close student of President Theodore Roosevelt who, indeed, emulated him in many ways: Frank Roosevelt of Manhattan and Hyde Park, New York.
- A third, located in Frewsburg, New York, just twenty-four miles south of Chautauqua Institution, was a fifteen-year-old high school junior, voracious newspaper reader, and interscholastic debater of policy issues such as these: Robert Houghwout Jackson. (Jackson later recalled that “the Hague Conferences” were among the events that shaped his generation’s pre-World War I belief that “except for short and local wars, differences between the great powers would be composed by negotiation or determined by arbitration.”<sup>4</sup>)
- A fourth, even more remote (at least from The Hague), was a young Missouri student whose talents and efforts would take him to war and business, business failure, machine politics and, ultimately, some greater successes: Harry S. Truman.

### *World War and After*

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

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<sup>4</sup> Robert H. Jackson, *An Address Delivered at the Ninetieth Commencement of the Albany Law School* (June 5, 1941), available at <http://www.roberthjackson.org/documents/060541>.

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

Pact's declaration that waging aggressive war violated the legal principles of nations.

### *World War II*

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

The first was the summer 1940 "Destroyer Deal" between the United States and Great Britain. The United States agreed to provide fifty over-age (World War I-era) destroyers to Britain, which then was standing alone against the Nazis and dependent on North Atlantic trade that was being decimated by German U-boats. In return, Britain granted to the United States ninety-nine year basing rights on British territorial properties throughout the North Atlantic and the Caribbean. This deal, negotiated by President Franklin D. Roosevelt and Prime Minister Churchill, was controversial because it sailed in the face of American public isolationism, United States neutrality laws, (some) international opinion and perhaps international law. Among the United States lawyers who worked on this deal—advising against its first phase, causing it to be reconfigured, and then approving it in a formal legal opinion—was the Attorney General of the United States, Robert H. Jackson.<sup>5</sup> His legal opinion explains the legality of the Destroyer Deal under domestic and incorporated international law.<sup>6</sup> The ensuing public debate, including criticism from Nazi Germany, focused even more explicitly on international law and the Hague conventions.<sup>7</sup>

A second moment on this path of international legal development is a speech that Attorney General Jackson gave in March 1941 in Havana, Cuba, to the International Bar of the Americas. Jackson actually only wrote the speech—rough seas prevented him from getting to Havana to deliver it, so it was read for him by a United States diplomat. What Jackson explained, building on both the Destroyer Deal and the Lend-Lease program

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

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

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

that then was being legislated, was that the United States was legally entitled to assist Great Britain because Germany's aggression against it was illegal under customary international law and treaty commitments.<sup>8</sup> The legal analysis underlying that conclusion was based in part on the Hague rules of 1907.<sup>9</sup>

### *Nuremberg*

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

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

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

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

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

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

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

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

### *Forward from Nuremberg*

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

On these weighty and enduring questions, which are part of what international leaders, including prosecutors, address every day in their work, some relevant thoughts are Justice Jackson’s, expressed during his eight years following Nuremberg.<sup>12</sup> In his October 7, 1946, final report to

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

<sup>12</sup> Jackson’s notable speeches about international law, Nuremberg and its legacy included, in addition to those discussed here, his 1945, 1949 and 1952 addresses to the American Society of International Law. They recently were republished in “A DECENT RESPECT TO THE OPINIONS OF

President Truman that was the predicate to Jackson resigning his responsibilities as United States Chief of Counsel, he summarized what he believed had been accomplished at Nuremberg for the future:

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

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

By the [London] Agreement and this trial we have put International Law squarely on the side of peace as against aggressive warfare, and on the side of humanity as against persecution. In the present depressing world outlook it is possible the Nurnberg trial may constitute the most important moral advance to grow out of this war. The trial and decision by which the four nations have forfeited the lives of some of the most powerful political and military leaders of Germany because they have violated fundamental International Law, does more than anything in our time to give International Law what Woodrow Wilson described as “the kind of vitality it could only have if it is a real expression of our moral judgment.”<sup>14</sup>

That was Jackson’s fairly optimistic, high, and perhaps self-congratulatory assessment of his own Nuremberg work. Of course he was writing to President Truman and articulating this perspective at a moment

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MANKIND...”: SELECTED SPEECHES BY JUSTICES OF THE U.S. SUPREME COURT ON FOREIGN AND INTERNATIONAL LAW 27-72 (Christopher J. Borgen, ed., 2007).

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

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

when the Cold War had already begun (perhaps literally in the courtroom at Nuremberg). Indeed, the prospect of a World War III, this time pitting the United States against the Soviet Union, was palpably real. Jackson thus knew well, and directly, the grounds for pessimism about the prospects for international cooperation and law-building in the post-Nuremberg world—Great Britain and the United States recently had decided, at Jackson’s direct recommendation, not to participate in any additional international trial of Nazi defendants. Thus while Truman optimistically was asking the United Nations in Fall 1946 to adopt a new code of international law based on the Nuremberg judgment,<sup>15</sup> Jackson was less sanguine. His uncertainty is captured in a November 16, 1946, private letter to newspaper columnist Walter Lippmann, who had visited Jackson in Nuremberg and observed the trial earlier in the year:

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

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

The next summer, Justice Jackson publicly addressed Nuremberg, its legacy and the prospect of world war when he delivered the Fourth of July lecture here at Chautauqua Institution, just up the hill from this Hotel in Chautauqua’s famous Amphitheater. Speaking against the backdrop of his personal dealings with senior Soviet leaders Molotov, Vyshinsky, Nikitchenko, Rudenko and others, Jackson discussed ideological difference and danger in the new nuclear age. He expressed his hope and belief, based in experience and drawing on

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

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

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

international cooperation and successes at The Hague, Nuremberg and the United Nations, that war was not inevitable.<sup>18</sup>

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

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

Finally, on November 2, 1953, less than one year before the early end of his life, Justice Jackson spoke hopefully about the meaning, force, and legacy of Nuremberg. He participated in and delivered an address at the laying of the cornerstone of the new American Bar Center in Chicago. This project was spearheaded by the American Bar Association's executive director Whitney R. Harris, who had served as a Nuremberg prosecutor with Jackson during 1945-46 and of course is here with us this morning.

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

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

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

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

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

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

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