
Book Reviews

Francine Hirsch. ***Soviet Judgment at Nuremberg: A New History of the International Military Tribunal after World War II***. Oxford: Oxford University Press, 2020. Pp. 536. £26.99. ISBN: 9780199377930.

In November 1945, Andrei Vyshinsky, former procurator-general at the Moscow trials and now Vyacheslav Molotov's deputy foreign minister, paid a visit to the Nuremberg tribunal. Robert Jackson hosted a dinner for him at the Grand Hotel, attended by both prosecutors and judges. When the guests were in their cups, Vyshinsky got to his feet and offered a toast to the accused: 'May their paths lead straight from the courthouse to the grave!' Everyone tossed back their drinks before his words were translated, and the American judges were mortified to discover that they had just toasted the execution of defendants that the bench had yet to convict. This is an old Nuremberg story – reported in the British newspapers, then in Telford Taylor's book and now in Francine Hirsch's – and it is a good one because it so neatly encapsulates the divisions within the Allied camp about the proper conduct of the trial of Germany's former leaders.

Among the deluge of publications on Nuremberg, relatively few have focused on the Soviets' contribution. While it is going too far to say that the Soviet Union's role is 'untold' and 'largely forgotten' (at 1, 6), it is certainly true that research in decades past has, with a few groundbreaking exceptions, been hampered by a lack of access to the official archives in Moscow. Hirsch's substantial account, based on her recent research there, goes a long way towards rectifying this, presenting a richly detailed description of the Soviet engagement in the Nuremberg project, from Molotov's proposal for a trial of the Germans in 1942 to the post-trial formulation of the Nürnberg Principles in 1946.¹ And what a tale it is. The Soviets emerged from the European war as a major power, and when they floated the idea of international proceedings with the Allies, they envisaged a carefully choreographed disposal of the Nazi leaders along the lines of the Moscow trials. At Nuremberg, however, they found themselves up against not only the defence lawyers but also their fellow prosecutors and judges from Britain, France and the United States. These encounters on a range of political and legal issues demanded flexibility, diplomatic experience and knowledge of the common law – all qualities that the Soviet prosecutors and judges lacked. Unable to correct their course without consulting Moscow, and frequently outmanoeuvred by their erstwhile allies, they soon found themselves adrift.

Their troubles began during the drafting of the indictment, when the Americans and British claimed for themselves the prime counts of 'common plan or conspiracy' and crimes against peace, leaving the Soviets and French with the derivative (and,

¹ UN General Assembly, Affirmation of the Principles of International Law recognized by the Charter of the Nürnberg Tribunal, 11 December 1946, A/RES/95.

the Soviets thought, less consequential) counts of war crimes and crimes against humanity in eastern and western Europe respectively. Then, when the proceedings commenced, Jackson used his opening speech to elbow his way into the Soviets' portion of the case, describing some of the outrages inflicted upon Soviet prisoners of war and upon Jewish communities in the Baltic republics. Thereafter, Soviet prosecutors, compelled to learn the art of cross-examination on the job, struggled to elicit damning information from defendants and defence witnesses who claimed innocence, ignorance or compulsion. To add to their woes, every slip exposed them to the censure of Joseph Stalin and the Moscow-based commission directing their work. One casualty was assistant prosecutor Nikolai Zorya, who was found dead in his bed in Nuremberg one morning; the rumour went out that he had died while cleaning his gun, but the Americans discreetly investigating the incident noted that generals do not often clean their own guns, especially when loaded and pointing faceward.

When the Soviets presented their case on German crimes in eastern Europe and the Soviet Union's western marches, their evidence testified to the magnitude of suffering inflicted: in the Soviet Union alone, 27 million people, two-thirds of them civilians, lost their lives at the hands of the Germans, with vast numbers exterminated in gas vans, shot and hanged in mass executions, transported to death camps and slave labour battalions or left to starve and freeze in prisoner-of-war camps. The Soviets dispatched 10 witnesses to Nuremberg, including survivors of Auschwitz, Majdanek and Babi Yar. In the end, the prosecutors called on four to testify in court: Hermitage director Joseph Orbeli (on German attempts to obliterate culture); Red Army medic Evgeny Kivelisha (on their maltreatment of prisoners of war); the farmer Iakov Grigoriev (on atrocities committed against civilians in his village) and poet Abraham Sutzkever (on the Holocaust). Sutzkever, the first Jewish witness to be called to the stand, had escaped, with his wife Freydko, the Vilna ghetto through the drains before joining a partisan group in northern Byelorussia. He recounted how in 1941 the German 'manhunters' in Vilna orchestrated a pogrom that had left the streets coated with 'red rain' and dragged men out of their homes, never to be seen again. Then, he added, they incarcerated the survivors in the ghetto and murdered tens of thousands more, reducing the city's 80,000-strong Jewish community to 600 people.

Yet two issues involving the Soviets festered throughout the proceedings. The first concerned the massacre by Lavrenty Beria's NKVD – the Soviet Union's security force – of 22,000 Polish officers and intellectuals in Katyn Forest and other sites in the spring of 1940. The Soviets tried to cover this up by disinterring some of the corpses, planting new evidence on them and pinning the blame on the Germans who occupied the same area from mid-1941 onwards. The Soviet chief prosecutor Roman Rudenko insisted on adding the Katyn massacre to the Nuremberg indictment despite the strong reservations of the Americans and British, who suspected that the Soviet Union had more to answer for than they let on. Problems ensued when Lev Smirnov tried to cross-examine the defence witnesses. One of them, Eugen Oberhauser, chief signals officer of the German regiment occupying the forest, pointed out that if Berlin had ordered the killing of 11,000 Poles in the vicinity he would have known about it, and they would have avoided locating their advance regimental headquarters in the

midst of the burial pits. Another witness, Friedrich Ahrens, stated that after he arrived in late 1941 he and his soldiers came across mounds containing human bones, which were later exhumed. When Smirnov, trying to catch Ahrens out, asked how deep the opened graves were, Ahrens did not know; the stench was nauseating, he said, and he had always sped past in his car trying to escape it.

The second issue concerned the secret protocols annexed to the 1939 German-Soviet Non-Aggression Pact, in which the parties agreed to partition eastern Europe between them. At the trial, this obviously created difficulties for the Soviets, and for the credibility of the tribunal as a whole, given that one signatory, Joachim von Ribbentrop, was on trial for conspiring to embark on aggressive war, and the other, Vyacheslav Molotov, was very much at large as the Soviet foreign minister. Hirsch charts the assiduous efforts of Rudolf Hess's counsel Alfred Seidl to enter the text of the protocols into the Court record, to the obvious discomfort of the Soviet prosecutors. (When the issue arose in Court, Rudenko played straight into Seidl's hands by saying that he had no knowledge of the protocols, prompting Seidl to suggest calling as a witness someone who *did* know: 'Foreign Commissar Molotov'.) These exchanges took place as the Cold War was taking hold, driving the prosecution teams apart, and Seidl was a beneficiary of American attempts to discredit the Soviet Union. Shortly afterwards, he told the Court that a member of the US Army, whom he would not name, had given him copies of the original documents. Meanwhile outside the Court, copies also made their way into the hands of the Nuremberg-based correspondent for the *St Louis Post-Dispatch*, who not only published them but also named the source of them – a leading member of the American prosecution team. The protocols were secret no longer, incriminating the Soviet Union alongside Germany in a conspiracy to commit crimes against peace.

Hirsch's book is primarily an historical account of the trial, not an analysis of the law shaping it. After discussing some of the issues that arose at the London conference, legal milestones such as the London Agreement and the annexed Nuremberg Charter² make only cameo appearances in the story (and none at all in the index). Instead, Hirsch's aim, as a historian, is to reconstruct the Soviet role through the many confidential reports flowing back to Moscow from prosecutors and judges, their NKVD shadows and members of the Soviet press corps, almost all of whom viewed the proceedings as a series of political events, albeit cast in legal idiom. This flow of reports was apparently unstoppable: when the judges sequestered themselves in the Nuremberg Palace to write the judgment, Iona Nikitchenko managed to evade the precautions taken to preserve the secrecy of their deliberations and sent drafts back to Moscow before the judgment was handed down. (As always, instructions came back the other way: Nikitchenko was to keep trying to persuade his colleagues, who were inclined to acquit a few of the defendants, to sentence all to hang.)

The book handles the political developments with aplomb, but the legal questions a little less well. One theme addressed by Hirsch is the crucial role played by the Soviet

² United Nations, Agreement for the prosecution and punishment of the major war criminals of the European Axis ('London Agreement'), 8 August 1945, 82 UNTC 280; United Nations, Charter of the International Military Tribunal – Annex to the Agreement for the prosecution and punishment of the major war criminals of the European Axis ('London Agreement'), 8 August 1945, 82 UNTC 284.

jurist Aron Trainin, who proposed trying the German leaders for embarking on aggressive war. His work is summarized adroitly, but there is little attempt to explain *why* his ideas took the form they did and why they were taken up with such alacrity by the other prosecuting powers. She notes, for example, that when he published his influential book *Ugolovnaia otvetstvennost' giterovtsev* in 1944 (soon translated as *Hitlerite Responsibility under Criminal Law*), he argued that material and political responsibility for waging aggressive wars rested with the state but that criminal responsibility lay with the individuals vested with its authority – namely, Hitler and his ministers and generals. The reason that Trainin was so interested in the possibilities of the charge he dubbed ‘crimes against peace’ was because he recognized that it possessed a unique feature that set it apart from other international crimes: it was a crime of *leadership*. Unlike, say, war crimes, which are usually committed by lower-rank officers and men, crimes against peace are necessarily committed by national leaders because they, and only they, can set the machinery of war in motion. This is why the Allies were drawn to the glittering promise of the aggression charge despite its obvious retroactivity: it offered them the prosecutorial device for targeting the individuals they most wanted to see in court – those at the very top of the Nazi hierarchy.

This was only part of Trainin’s proposed legal strategy, however. As Hirsch notes, he wished to target not only the regime’s political and military leaders but also the financiers and industrialists who had provided the money and arms to sustain the German war effort. In order to tie these economic figures in with the others, he proposed using the same capacious doctrine of complicity that he had crafted for use at the 1938 Moscow trial, arguing that whether or not a German banker or captain of industry had personal contacts with Hitler and his circle, they were all bound together by their shared aim of advancing the criminal enterprise – namely, the conquest and exploitation of other nations. But what is not explained is why this doctrine, first used to eviscerate the Bolshevik old guard, should so pique the Allies’ interest. The other powers had their own reasons for wishing to try the economic figures: France, like the Soviet Union, had been plundered, and its citizens worked to death as slave labourers, while the Americans, ever pragmatic, wished to break the power of the German cartels. Trainin’s great contribution was, first, to propose a new internationalized mode of liability capable of drawing diverse actors into the prosecutorial net and, second, to fuse this with the novel charge of international aggression, thereby laying the groundwork for the indictment of a group of national leaders at Nuremberg. These linked ideas duly appeared in the Nuremberg Charter as counts one and two dealing with ‘common plan or conspiracy’ and crimes against peace.

When working out this strategy, Trainin was not operating in a vacuum. Hirsch does not dig deep into the influences on his work – one figure excepted – but there were plenty of earlier Soviet ideas and initiatives for him to pick through, from Vladimir Lenin’s theory of imperialism (focusing on the capitalist drivers of war), to Maxim Litvinov’s definition of aggression (offering a yardstick for illegal uses of force), to Molotov’s call for an international trial in 1942 (especially of Hess, whom the Soviets wished to pluck from the grasp of the British). Trainin may also have picked up straws in the wind from abroad, where, from 1942 onwards, Hersch Lauterpacht, Marcel

de Baer and Bohuslav Ečer were also mooted the idea of trying the Germans for aggression. Yet, as Hirsch shows in abundant detail, when seeking guidance, Trainin looked above all to his powerful patron, Andrei Vyshinsky, the Soviets' *éminence grise* at Nuremberg. As well as making his own pungent contributions to the Nuremberg indictment and judgment through Rudenko and Nikitchenko, Vyshinsky took Trainin under his wing, inspired his interest in complicity and aggression, put his ideas into practice at the Moscow trials, edited and introduced his books and used him as an emissary to London and Nuremberg. Theirs was a most fruitful relationship, and, based on the compelling evidence presented, one must surely go a step further than Hirsch and conclude that if Trainin was a progenitor of Nuremberg, then so too was Vyshinsky.

Another major theme in the book is Hirsch's contention that the Nuremberg tribunal exerted significant influence over the development of the international human rights regime that emerged in the decades following the war. Yet her presentation of the relationship between these two international initiatives is unpersuasive, not least because she makes two contradictory arguments. On the one hand, she presents the tribunal as being a vehicle for human rights, stating that 'Nuremberg saw the crystallization of high-minded ideals about justice and human rights' (at 10) and that those involved in the proceedings 'laid a foundation for the development of new international laws and institutions devoted to the protection of human rights in wartime and in peacetime' (at 13). On the other hand, she cautions against the myth-making emanating from the USA that 'celebrated Nuremberg as the birthplace of postwar human rights' (at 415) and portrayed it as 'ushering in a new era of international human rights' (at 7). These messages are at odds with each other – did Nuremberg lay the basis for human rights or not? – and suggest a lack of clarity about the relationship between these two enterprises.

When the Allies at the San Francisco and London conferences of mid-1945 set in train the UN human rights commission and the Nuremberg tribunal, they envisaged these bodies playing distinct, but complementary, roles – one of them designed to topple the gods of war and the other to build the house of peace. Hirsch presumes that they exerted a strong gravitational pull on each other, but there is considerably less evidence of this than might be expected. Looked at from the Nuremberg side, 'human rights' were referred to infrequently during the proceedings. One obvious reason for this was that the prosecution and defence counsel were operating within the terms set by the Charter, so that discussions of murder, enslavement, ill treatment, persecution and other crimes were framed as either war crimes or crimes against humanity rather than as human rights abuses. Hirsch, however, does give a handful of instances in which rights were explicitly mentioned. The French prosecution counsel Auguste Champetier de Ribes, for example, referred to 'inalienable rights' appearing in the constitutions of 'all civilised nations', and the German defence counsel Rudolf Merkel stated that a finding of collective guilt against members of the Gestapo would shake the world's faith in 'fundamental human rights'. But these two examples, and the few others alluded to, are not sufficient to sustain Hirsch's claim that 'the Nuremberg Trials had become a laboratory for the articulation and development of a new language about human rights' (at 363).

If anything, Nuremberg was more notable for its silence on rights than for their articulation, and deliberately so: from the outset, the Allies consciously avoided setting a precedent for encroachments on sovereignty in the name of rights – that was Hitler’s game, they said, recalling the Sudeten Germans in Czechoslovakia. Indeed, as Hirsch notes elsewhere in the book, this concern about sovereignty had arisen at the London conference. There, Jackson had stressed that a government’s actions against its own citizens would not normally justify external interference, and that the only grounds for trying the Germans for running concentration camps within their own borders was that this activity furthered the conspiracy to wage aggressive wars: ‘We see no other basis on which we are justified in reaching the atrocities which were committed inside Germany ... by authorities of the German state.’ This approach was hardly a foundation upon which to build an international regime dedicated to human rights.

From the different perspective of the UN human rights commission, it is clear that its delegates, while scarred by the war and appalled by the iniquities of the Nazi regime, avoided any discussion of Nuremberg-style international accountability for human rights abuses. Indeed, initiatives on these lines were actively discouraged by the major powers: an Australian proposal for an international human rights court, for example, was soon dismissed. (The rights of numbers of people, such as the multiple victims of crimes against humanity or the groups subjected to genocide, were discussed elsewhere.) Instead, the commission espoused a sovereigntist approach to the rights of individuals, seeing them as being exercised and protected within the confines of the state. So, when individuals from around the world started petitioning the commission over the abuses inflicted on them by their own governments, the delegates decided that they had no power to take action and, furthermore, that they should stop reading petitions. In their view, these missives were the business of the states concerned, not the commission – an approach entirely consistent with that espoused by Jackson at the London conference. Nuremberg’s calculable influence on the human rights regime was thus less to do with ‘high minded ideals’ and more to do with deference to sovereignty.

That said, Hirsch’s book has great strengths, especially its command and presentation of the archival and other materials. She recounts how, before the trial, Roman Rudenko disappeared from Berlin and then suffered a fake bout of ‘malaria’ in Moscow as he struggled to carry out his superiors’ instructions on the drafting of the indictment; how members of the Soviet press corps endured the double indignity of bland American food and cramped quarters at the press camp at Faber Castle (four to a room and a malfunctioning furnace); how the interpreter Tatiana Stupnikova struggled to maintain her composure as she learned of the German-Soviet protocols while translating Ribbentrop’s testimony into Russian; and how the farmer Iakov Grigoriev’s anguish at the murder of his wife and son was conveyed by both his testimony and his clenched hands as he gave it. Details like these bring the tribunal to life. Hirsch’s wide research and exemplary account of the proceedings will ensure that her book occupies a prominent place in the literature about the trial.

So, what more can be said about Nuremberg? The official archives in Washington, London and Paris, as well as in Moscow, have not yet yielded all their secrets: there

is much more to be written, for example, about the negotiations at the London conference, where the counts were created, and about the intelligence war between the Allies at Nuremberg, tantalizingly hinted at in some documents already available. In the meantime, each new generation of researchers will re-evaluate the tribunal in the light of their own times, as interest in international criminal justice ebbs and flows. One may therefore be tempted to ask: what is Nuremberg's lasting legacy? To which the reply must surely be (to quote the famous aphorism on the French revolution): 'it's too early to tell.'

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Martina Buscemi, Nicole Lazzerini, Laura Magi and Deborah Russo (eds). **Legal Sources in Business and Human Rights: Evolving Dynamics in International and European Law**. Leiden and Boston: Brill Nijhoff, 2020. Pp. 339. €138.00. ISBN: 9789004401174

Business and human rights as a field of research requires a considerable array of knowledge far beyond international and domestic human rights law. These include domestic corporate law, public international law, domestic tort and contract law, international investment law, constitutional law, international humanitarian law, domestic and international criminal law, European Union (EU) law, domestic and international environmental law, international institutions law, comparative law and private international law as well as business management, business ethics, financial decision-making and organizational studies. Thus, business and human rights is a field that is exciting and dynamic and that also makes conceptual and applied research in it very demanding.

This book engages with many of these areas of law, directly or indirectly. It even adds more by including a chapter on financial security and markets law. The overall aim is to analyse the field of business and human rights law from a particular focus – the theory of sources of international and European law – and the aim of the skilled editors is to 'to explain how and to what extent the evolving dynamics of the normative process in the respective fields of analysis affect the legal sources of international and EU law in relation to B&HRs [business and human rights]' (at 2). The three 'dynamics' affecting these legal sources are: the extent to which international legal obligations are binding on corporations; the participation of corporations in international law-making processes; and the strengthening of soft law regulation to form normative standards. Accordingly, the editors seek to explain, within the book, the effects of alternative processes of regulation on the traditional state-only sources and