Joachim von Ribbentrop: A Plea for Sentence Mitigation

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Defense: Joachim von Ribbentrop
2488/2500

We have neither given nor received any unauthorized aid on this assignment.

-James Landenberger

- Cher Griffith

With respect to our client, Joachim von Ribbentrop, the defense wishes to make clear from the outset that *it does not in any way contest the jurisdiction of this court*. Many of our colleagues will argue that the Tribunal has no jurisdiction over the conduct of functionaries operating within a sovereign state that has not submitted to its jurisdiction. But the precedent set by the ICTY and ICTR, convened under similar circumstances, invalidates this argument. It can also be argued that since Germany consented to unconditional surrender at the end of the war, submission to a tribunal of this sort was given implied—if not express—consent. Our colleagues may also argue that several of the crimes defined in the Charter are of *ex post facto* nature, and are thereby inadmissible in this court. But the landmark case of *Israel v. Eichmann* (1962) set the strong precedent that in these types of cases (1) "The crimes created…must be deemed today as having always borne the stamp of international crimes" and (2) "It is the peculiar universal character of these crimes that vests in every State the authority to try and punish anyone who participated in their commission."[1] This precedent can be applied in the instant case to rebut *ex post facto* claims. With these legal considerations in mind, and with enthusiasm for the fundamental goodness of this Tribunal and its purpose, the defense humbly submits to the esteemed judges convened here today.

Article 27 of the IMT Charter states that "The Tribunal shall have the right to impose upon a Defendant, on conviction, death *or such other punishment as shall be determined by it to be just*."[2] As such, the court is endowed with a high degree of discretion regarding punishment. The defense urges that the court use consequentialist

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[1] Epps, Valerie, and Valerie Epps. International Law. Durham, N.C.: Carolina Academic Press, 2005. pg 118

[2] "Nuremberg Trial Proceedings Vol. 1 - Charter of the International Military Tribunal," Avalon Project – Documents in Law, History and Diplomacy, http://avalon.law.yale.edu/imt/imtconst.asp

logic in making its decisions; that it be sure to establish a lasting, meaningful precedent, but that in doing so it should exercise caution in meting out punishments, so that punishments *reach, but do not exceed,* the level needed to deter future offenders. As it relates to our client, the defense does not argue for complete acquittal – there are charges made against our client that we cannot refute. That said, there are other charges that are manifestly wrong. We ask, first, that the court set aside the natural sentiments of indignation that attend events such as these and consider seriously the *level of involvement* exercised by our client, and the extent of *mens rea* he possessed in the commission of the alleged crimes. Second, we ask that the punishment fit the crime. Accordingly, we argue that Ribbentrop's level of involvement and possession of *mens rea* does not warrant the death penalty, and we ask for a lesser sentence.

We begin by addressing the charges made against our client, showing his degree of culpability in each:

The prosecution's first charge against Mr. Ribbentrop is conspiracy and planning. As ambassador-at-large and subsequent Foreign Minister, the defense does not dispute that Ribbentrop shares some degree responsibility for the crimes of the Nazi regime. The prosecution argues Ribbentrop's "obvious"[3] guilt on the grounds that "the meetings that planned the entry of the Nazi's to power…were held in Ribbentrop's house," that his later appointment to Foreign Minister made him a "crucial person on the frontlines of the Nazi party by reaching out to other nations," and that he was appointed to the Secret Cabinet Council.[4] But the prosecution fails to substantiate its claim that these actions

[3] Prosecution, pg 3
[4] "Which we now know is where the majority of the planning for the war took place," Prosecution, pg.3

constitute a breach of International Law. The defense must also remind the court that in relation to planning and conspiracy, Ribbentrop was *not* present at the famous Hossbach conference, during which the most significant plans for German expansion were plotted. And at the meeting of the Wannsee Protocol of 1942, during which most of the anti-Semitic and otherwise bigoted policies of the Reich were formulated, Ribbentrop was also *not* present.

As for the prosecution's vague claim that Ribbentrop "committed acts which constitute…crimes against the peace [like the] violat[ion] of treaties and agreements,"[5] the only violation that is named involves the Treaty of Versailles, which Ribbentrop is supposed to have breached with the negotiation of the Anglo-German Naval Agreement and the annexation of Austria (in 1935 and 1938, respectively). The defense argues that these negotiations do not constitute Treaty violations, as the Versailles Treaty had already *been* dissolved – a breakdown caused by Allies themselves. The Treaty, which decisively limited German rearmament, stated that there should be a "general limitation of the armaments of *all* nations."[6] At the 1933 Geneva Disarmament Conference, Hitler called for France to disarm to the level of Germany or for Germany to be allowed to re-arm to the level of France, so that either way, the powers would be equal. France rejected this request, as did Britain,[7] thus violating the Treaty and prompting Germany to leave the conference. As Germany continued undocumented militarization, Britain's military

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[5] Ibid.
[6] "Primary Documents - Treaty of Versailles: Articles 159-213," http://www.firstworldwar.com/source/versailles159-213.htm (Accessed May 1, 2010). Emphasis added
[7] "While Churchill saw an important role for the League of Nations in limiting the arms of certain *other* nations, he did not want it to be an instrument guaranteeing a 'level playing field' in international affairs." See Speech of May 1932 re. Sir John Simmons "Qualitative Disarmament," WC3, 21. As reported in "Supporting Germany's Rearmament & The Steady Slide to WWII," pg 2

hegemony in Europe was threatened, making inevitable the signing of the Anglo-German Naval Agreement, which Ribbentrop negotiated.[8] By the convention *clausula rebus sic stantibus*, a provision that nullifies treaty agreements in the event of a fundamental change of circumstances, Ribbentrop's role in negotiating that Agreement does not constitute a violation of the Treaty, as the Treaty had already been flagrantly violated by two of the major signatories, to the extent that it was effectively nullified. In short, the singing of those agreements did not constitute crimes against the peace. In the same way, the annexation of Austria (1938) was also not an illegal activity, as it did not violate any Treaty that was still binding.

The prosecution claims that during the war Ribbentrop was involved in "the killing of Allied aviators, the destruction of the Peoples of Europe, and the persecution of the Jews"[9] which, it alleges, amount to war crimes and crimes against humanity. To support the first claim, they reference an undocumented, paraphrased order from Ribbentrop: "any Allied pilot seen attacking a German city should be killed, the same way that an Allied soldier who shot at innocent civilians would be."[10] We defend this statement, as it is permissible under the standard rules of engagement, which allow soldiers to fire when fired upon, and to protect civilians.[11]

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[8] Conot, Robert E. Justice at Nuremberg. New York: Harper & Row, 1983. pg 51.
[9] Prosecution, pg 4
[10] Prosecution, pg 4
[11] International Humanitarian Law - Treaties & Documents - Convention (IV) relative to the Protection of Civilian Persons in Time of War. Geneva, 12 August 1949
http://www.icrc.org/ihl.nsf/7c4d08d9b287a42141256739003e636b/6756482d86146898c125641e004aa3c5
International Committee of the Red Cross (Accessed May 1, 2010)

As for the "destruction of the European people" the prosecution cites Ribbentrop's installation of the Reich Protectors, who he instructed to burn farms and dwellings of Poles.[12] Provided these facts are true, the defense concedes that Ribbentrop in fact committed war crimes. However, we remind the judges that with respect to the witness who gave this testimony (Erwin von Lahousen), we have reason to suspect a strong bias against the Nazi regime. As the prosecution notes, Lahousen was a "key member of the German Resistance,"[13] and coordinated several attempts to undermine the Nazi regime. Von Lahousen worked closely with Admiral Wilhelm Canaris, who was executed by the Reich after a failed attempt to assassinate Hitler.[14] These activities leave his testimony open to suspicion under what Nancy Combs calls "group-based loyalties,"[15] which would sway his testimony against the defendant. Additionally, Nuremberg prosecutor Fritz Sauter revealed Lahousen's unreliability by demonstrating several clear contradictions in his testimony. [16]

As for Ribbentrop's involvement in the 'final solution' to the 'Jewish problem,' the defense concedes that "he ordered the German diplomatic representatives…to hasten the deportation of Jews to the East…[and] he took part in a conference…on the deportation of Jews from Hungary."[17] The prosecution also argues that Ribbentrop was

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[12] Prosecution, pg 5
[13] Ibid.
[14] Specifically, see "Operation Spark"
15 "Q&A: International Criminal Law Scholar's New Book Explores International Criminal Justice in the Absence of Facts," William & Mary Law School – Faculty Q&A, http://law.wm.edu/facultyqanda/qa-international-criminal-law-scholars-new-book-explores-international-criminal-justice-in-the-absence-of-facts.php (Accessed May 2, 2010)
[16] Conot, Robert E. Justice at Nuremberg. New York: Harper & Row, 1983. pg 157
[17] *Judgment: Ribbentrop*. Avalon Project- Judgment of the International Military Tribunal http://avalon.law.yale.edu/imt/judribb.asp

"more radical than Hitler himself."[18] The defense counters that Ribbentrop made his decisions not out of any agency of his own, but out of complete adoration and emulation of Hitler.

Princess Hohenlohe described Ribbentrop's monologue justifying anti-Semitism as "one of the greatest favors" to be done to Jews;[19] Prince von Bismarck observed that "[Ribbentrop is] such an imbecile he is a freak of nature,"[20] and Hermann Goering described him as "Germany's number-one parrot,"[21] referring to the significant fact that Ribbentrop never proposed policies of his own, only parroted the policies of Hitler. By means of the "Enabling Act," Hitler established himself as the only *real* decision-maker in the Nazi regime. In short, Ribbentrop was Hitler's mouthpiece and puppet.

Clearly, the accusations made by the prosecution are less clear-cut than they would have us think. Ribbentrop's involvement in the alleged crimes was predicated on his function as Foreign Minister. But as we have seen, though he held that position *in title,* he was largely ineffectual in the role. Arguably this was the very reason that Hitler promoted him to take the place of von Neurath, the former Foreign Minister, who was far more assertive in making policy decisions based on *his own* convictions, rather than the Fuehrer's. The consideration of his limited involvement and limited agency *alone* should suffice to mitigate our client's sentence, but if the judges are not convinced, we shall now present several *legal* considerations in support of mitigation.

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[18] Prosecution, pg 2
[19] Ibid., 52
[20] Ibid.
[21] Ibid.

As we have said, the prosecution has made several charges against Ribbentrop that we cannot refute. We do not aim to *justify* those crimes. Justification would require us to vindicate or legitimize them, on legal or other grounds. We do, however, aim to show grounds for *excuse*, which requires us only to show that though the acts were wrong, they were not blameworthy. Legal scholar Elies van Sliedregt observes that the distinction between 'justification' and 'excuse' is recognized in most common law systems, to the effect that "Conduct is only punishable when it satisfies the definitional elements of a crime; secondly, it is unlawful; and, finally, it is blameworthy."[22] When conduct is demonstrated in court to be excusable but not justifiable, the result is usually sentence mitigation. Lest the court relegate this standard to domestic courts only, it should be noted that Sliedregt also observes a general trend toward assimilation of common law standards, particularly the excuse-mitigation standard, into the realm of international law (see below). Furthermore, the defense sees no reason why common law standards should be inadmissible in this forum, as the drafters of the IMT Charter themselves have appealed to common law in the formulation of Count Four of the indictments (i.e. conspiracy).

Having established that mitigation on the basis of excuse is valid in the international arena, the relevant grounds for excuse include these:

Diminished Responsibility

[22] Sliedregt, Elies van "Defences in International Criminal Law." Presented at the conference *Convergence of Criminal Justice Systems: Building Bridges Bridging the Gap*, The International Society for the Reform of Criminal Law. 17th International Conference, 25 August 2003. pg 7

For an alleged criminal to bear full responsibility for a crime he must possess *mens rea* (literally 'guilty mind'), or criminal intent. Sentences may be mitigated if *mens rea* is not fully possessed. Claiming insanity can function as a full defense; short of that, one can claim that one's mental capabilities during the commission of a crime were temporarily impaired, rendering them partially excusable, and eligible for sentence mitigation.[23]

Diminished responsibility has already debuted on the international stage. In *Celebici*, a case before the ICTY, the Appeals Chamber established that "the 'defense' of diminished mental responsibility in Rule 67(A)(ii)(b) is not a complete defense, but can be raised by the defendant as a matter in mitigation of sentence."[24] The defense argues, under that pretense, that Ribbentrop can be interpreted as having an abnormal affliction of mind during his time as Foreign Minister. What he exhibited during that time was irrational loyalty amounting to a form of cultic allegiance to Hitler and Hitler's policies, resulting in an unquestioned faith of the goodness of Hitler's ends. The disquieting effects of Hitler's poisonous magnetism can be witnessed in some of the other defendants, who did not fare as well as our client. Rudolf Hess, for example, was under such mental duress during his years in the Reich that now, back to his senses, he has gone completely insane.

Indoctrination

[23] The Homicide Act of 1957, passed in Britain, provides that "Where a person kills or is a party to the killing of another, he shall not be convicted of murder if he was suffering from such abnormality of mind…as substantially impaired his mental responsibility for his acts and omissions…" (I.2.1). If a defendant can prove an 'abnormality of mind' he may have his sentence reduced from murder to manslaughter.
[24] Ibid., pg 8

Similar to diminished responsibility in its focus on *mens rea*, indoctrination (or the 'brainwashing defense') has appeared in several high-profile cases in the U.S., including the Patty Hurst case (1976), and as recently as 2006 in the Lee Boyd Malvo case, where it was claimed that young Malvo was indoctrinated by his older, more militant accomplice to the extent that he lacked mental agency in connection with the 'Beltway sniper' killings of 2002. It might be argued that Ribbentrop underwent some form of indoctrination beginning with the compulsory reading of *Mein Kampf,* from which point on he was continuously poisoned by Nazi ideology. Being of low intelligence,[25] Ribbentrop was especially vulnerable to this program.

Inevitability

'The Masetti approach,' upheld in a dissenting opinion in *Erdemovic* (ICTY), holds that in the case of Masetti and his men (who were ordered to carry out an execution), the refusal to execute would have been to no avail, since the victims "would have been executed anyway."[26] Thus, Masetti and his men deserved sentence mitigation. The Masetti case is analogous to the instant case. Granted, Ribbentrop was not in a 'choice-of-two-evils' situation as is stipulated by the Masetti case, but the inevitable nature of Hitler's ends may still provide a measure of excuse for our client.

Tu quoque

[25] See "Ordinary Mind" – Conot, Robert E. Justice at Nuremberg. New York: Harper & Row, 1983. pg 152
[26] Epps, Valerie, and Valerie Epps. International Law. Durham, N.C.: Carolina Academic Press, 2005. pg 435

The defense of *tu quoque* (literally 'you too') "allows for the commission of a war crime to the extent of, and because of, the adversary's wrongful behavior."[27] Naval Commander Karl Doenitz used it successfully to defend his attacks on British merchant ships, under the pretense that the U.S. had conducted unrestricted submarine warfare also.

Let us not forget the crimes committed by the Soviets against German prisoners of war. And let us not forget that it was France and Britain who breached the Versailles Treaty first. The hands of the Allies are not entirely clean.

In light of these mitigating excuses, and in light of the factual analysis given above, it is clear both that Ribbentrop's level of involvement and degree of *mens rea* in the alleged crimes was limited, and that there are legitimate legal grounds for sentence mitigation (excuse). The prosecution wishes to uphold in the same consequentialist logic that was used against Aloys Simba and Drazen Erdemovic in the majority rulings of the ICTR and ICTY respectively. The prosecution further wishes to uphold the value of 'predictability' advocated by Antonin Scalia. We do not reject this approach. In fact, we uphold it, and *it is for this very reason that we contend our client should not be put to death*. The Tribunal has the opportunity to set meaningful precedent, to prevent atrocities from occurring in the future, but in doing so it must exercise caution in sentencing, lest this precedent be misused to pervert future judicial outcomes. The Tribunal must punish to *deter*, not to *avenge*. Punish to avenge, and vengeance becomes standard. Erdemovic, a man who was in the thick of the action, who was directly ordering gratuitous genocidal

[27] Sliedregt, Elies van "Defences in International Criminal Law." Presented at the conference Convergence of Criminal Justice Systems: Building Bridges Bridging the Gap, The International Society for the Reform of Criminal Law. 17th International Conference, 25 August 2003. pg 7

executions, was sentenced to *ten years in prison*. How ‘predictable’ will it be if Ribbentrop, who possessed *less* practical control and a *lesser* extent of *mens rea*, is given a *death sentence*? This kind of sentencing is not predictable at all; to the contrary, it is erratic. For these reasons we plead for sentence mitigation.