

Boston College International and Comparative Law Review

Volume 30

Issue 1 *Sharpening the Cutting Edge of International
Human Rights Law: Unresolved Issues of War Crimes
Tribunals*

Article 5

12-1-2007

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Allan A. Ryan

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Recommended Citation

Allan A. Ryan, *Nuremberg's Contributions to International Law*, 30 B.C. Int'l & Comp. L. Rev. 55 (2007),
<http://lawdigitalcommons.bc.edu/iclr/vol30/iss1/5>

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NUREMBERG'S CONTRIBUTIONS TO INTERNATIONAL LAW

ALLAN A. RYAN*

Abstract: This Article explores the establishment of the International Military Tribunal at Nuremberg beginning with the Moscow Declaration in 1943 and focusing on the Charter of the Tribunal in 1945, which, along with its charges, altered the course of international human rights law. Focusing on the way the Charter and its charges were devised, the author notes that the Tribunal's existence was not a certainty after World War II and in fact it almost did not occur due to intense political debate that occurred in both domestic and international arenas. The Article argues that the creation of the Nuremberg Tribunal was the most significant development in human rights law in the twentieth century, as it has been used as the model for the tribunals established to deal with the horrors that occurred in Yugoslavia and Rwanda.

INTRODUCTION

The International Military Tribunal at Nuremberg (IMT) in 1945–46 was the most significant development in human rights law in the twentieth century. Although the trial of twenty-two leaders of Nazi Germany by the United States, France, Great Britain, and the Soviet Union was in itself a considerable accomplishment, the importance of Nuremberg lies chiefly in what the process ordained. Not simply a war crimes trial, it was also the first true trial for violations of human rights, and serves as the bridge from the traditional law of war to the law of human rights that marked the latter half of the twentieth century. In doing so, Nuremberg changed forever the presumptions of national sovereignty, individual responsibility, and personal accountability that had underlain international law since the rise of nation-states three centuries before.

It did so by establishing three principles of utmost importance. First, the Charter of the Tribunal explicitly held individuals accountable under international law for their actions. No longer could men claim that international law applied only to states and that they were

* Professor Ryan is an Adjunct Professor of Law at Boston College Law School, and former Director of the Office of Special Investigations, U.S. Department of Justice.

shielded from personal liability. Second, the Charter defined a new category of crime—“crimes against humanity”—to overcome two traditional limitations of international law. Crimes against humanity defined those actions the defendants had taken prior to World War II, or separate from it, where the traditional law of war could not be applied.¹ In addition, it defined the crimes that Germany had committed against its own citizens, chiefly Jews—an arena that most considered beyond the reach of international law. “Crimes against humanity” had nothing to do with combat, weapons, or armies. Finally, it established that the leaders of an enemy nation could be held accountable in a judicial proceeding: a trial drawn largely from the Anglo-American adversarial tradition, including, remarkably, due process guarantees first laid down in the U.S. Constitution of 1789.

For nearly fifty years after its end, Nuremberg stood as an isolated episode—interesting and historically significant, but unique; a chapter that had marked the end of World War II, but had little application to the hard realities of the Cold War. When the Cold War ended, however, and the United Nations (U.N.) moved to address the horrors of Yugoslavia and Rwanda, it turned to Nuremberg for its model and inalterably changed the course of human rights.

The significance of Nuremberg is that it did not have to happen. It was the result of an intensely political process, both domestically and internationally, that played out before any judge donned a robe to hear the evidence of Nazi horrors. There was no precedent, no list of crimes to be charged, no guide as to how four different nations should proceed, and often no consensus on the purpose of the trial or what was to be achieved. The full story of Nuremberg is far beyond the scope of this work, but this Article focuses on how the charges were finally devised. One cannot understand Nuremberg without understanding that it was first a political process that only later culminated in a trial and judgment.

I. BACKGROUND

A. *The Nature of Hitler's War*

The defining characteristic of the Holocaust—Nazi Germany's twelve-year campaign to annihilate the Jews of Europe—was the vast,

¹ As explained below, the Charter was drafted in a peculiar way that, technically, did not reach crimes against humanity that had taken place prior to the outbreak of war—a significant historical limitation, to be sure, but not one that survived the Charter.

pervasive, and intricate network of government, party, and “private sector” resources that were deployed to carry it out. It would have been impossible to achieve such a result without concerted effort by virtually every organ of German life and their counterparts in puppet and occupied countries.

Adolf Hitler became Chancellor of Germany in 1933 as head of the National Socialist Workers Party (NSDAP, or Nazi Party), and his government embarked on an insidious and increasingly intrusive program to deprive German Jews of their civil and political rights.² In 1939, World War II began when Germany invaded Poland; in 1940, the Nazi war machine rolled westward through Holland and Belgium and into France; and in 1941 it turned eastward, invading the Soviet Union and quickly establishing its rule nearly to Moscow.³

In 1941, special killing units traveled with or just behind the German army as it moved eastward. Their task was to find, remove, and kill Jews in those areas, which they did largely through firing squads. This method of killing was inefficient, time-consuming, and expensive, and so in 1941 Germany created the first of four death camps on Polish soil. From that date until the Nazi collapse in 1945, some six million European Jews were dispossessed of their homes and property, separated from their families, transported by trains to the East, and put to death in gas chambers, their possessions confiscated and sent back to Berlin. As late as 1944, when the Allies had already landed in France and were pushing the German forces back to Berlin, Germany was rushing Hungarian Jews to their deaths at Auschwitz. To carry out this enormous campaign, Hitler created a new bureaucracy—the Reich Security Home Administration (RSHA)—which itself required the support and cooperation of a vast network of public bureaucracy and private industry: transportation, labor, military, banking and finance, diplomacy, and communications.

Relatively little of this had to do with war itself. Many elements of the German Army were implicated in war crimes and in the persecution of Jews, but the Holocaust was not a military offensive. It was a so-

² Jews were first meticulously defined—a Jew was anyone with one Jewish grandparent—and then denied places in national universities and the civil service, deprived of their right to vote, interred along with political prisoners in concentration camps, made to wear yellow stars, deprived of property if they emigrated, and then restricted in their emigration. In 1938, on the night known as *Kristallnacht*, synagogues, homes, and businesses owned by Jews were ransacked and burned by Nazi partisans supported by the government.

³ Germany ruled Poland directly from Berlin through a German governor-general; it established a puppet regime in occupied areas of France; and it set up collaborationist governments in Latvia, Lithuania, Estonia, and the occupied areas of the Soviet Union.

cial offensive, initiated in 1933 long before the war began. The death camps were behind the front lines, staffed and administered by the Nazi Party's security organization, not the military. Jews interred or killed in concentration camps were not prisoners of war; they were kidnapped civilians.

B. *The Beginnings of Nuremberg*

The world had never seen anything like it: an entire government of a major world power, aided by a massive party organization and a sophisticated infrastructure of private industry, mobilized to eliminate the Jews of Europe. These developments were no secret to the Allies and on November 1, 1943, with the Allied invasion of Europe in advanced planning, President Roosevelt, Prime Minister Churchill, and Marshal Stalin issued the "Moscow Declaration," promising that when the war was done:

[T]hose German officers and men and members of the Nazi party who have been responsible for, or have taken a consenting part in [Nazi] atrocities, massacres and executions, will be sent back to the countries in which their abominable deeds were done in order that they may be judged and punished according to the laws of these liberated countries and of the free governments which will be created therein. . . . The above declaration is without prejudice to the case of the major criminals whose offences have no particular geographical localisation and who will be punished by a joint decision of the Governments of the Allies.⁴

It was by no means clear, however, that the fate in store for the "major criminals whose offenses have no particular geographical localisation" would be a trial.⁵ It was one thing to say that a German officer who had overseen the roundup of Jews in a French village should be made to stand trial in France after the war; it was quite another to conclude that the major Nazi leadership should have their fate decided by judges acting under rules of trial procedure and according to evidence presented by lawyers.

⁴ The Moscow Declaration (Nov. 1, 1943), in *THE AMERICAN ROAD TO NUREMBERG: THE DOCUMENTARY RECORD 1944-1945*, at 13-14 (Bradley F. Smith ed., 1982) [hereinafter *AMERICAN ROAD: THE DOCUMENTARY RECORD*].

⁵ *See id.* at 14.

Only in the aftermath of the Allied invasion of Europe on June 6, 1944 did attention turn to the question of how the Allies should deal with the vanquished Germany.⁶ On this question, there were two broad and competing schools of thought in Washington. One, led by Secretary of the Treasury Henry Morgenthau, Jr., advocated that Germany and the Germans be harshly punished through a program of “pastoralization” that would effectively demolish German industry and render the nation a vassal state, powerless to consider aggression and war for generations to come.⁷ The other school of thought, led by Secretary of War Henry Stimson, would set Germany on its feet as soon as possible, restoring at least some degree of autonomy under occupation, and encouraging the Germans to understand that their salvation lay in peaceful and responsible partnership with the West.⁸

1. Stimson's Proposal

The question of dealing with Nazi leaders was only one part of this broader debate, but it was an important part. Much of the wrangling over how to deal with the *Gestapo* (the state secret police), the *Schutzstaffel* (SS) (the elite military unit that served as Hitler's bodyguards and as a special police force), the leadership of the Nazi party, and those who had joined the party and its various tentacles of terror was driven by a fear that if Nazism itself was not thoroughly obliterated it would rise again.⁹ In September 1944, when German defeat seemed inevitable, Morgenthau presented to President Roosevelt a plan that called for “the arch-criminals of this war whose obvious guilt has generally been recognized by the UN” to be “apprehended as soon as possible” and “be put to death forthwith by firing squads” of U.N. soldiers.¹⁰ Secretary of War Stimson answered with a novel proposition:

⁶ In this context, the Allies were the United States, Great Britain, and the Soviet Union (and Roosevelt, Churchill, and Stalin were known as the “Big Three”). Although the French were eventually to join as one of the four powers signing the Charter of the IMT, it was occupied by the Germans until the liberation of Paris in August, 1944; General de Gaulle, leader of the Free French in exile, was not included in summit meetings with Roosevelt, Churchill, and Stalin.

⁷ See, e.g., THE ROAD TO NUREMBERG 28–29, 36–37 (Bradley F. Smith ed., 1981) [hereinafter SMITH, ROAD TO NUREMBERG].

⁸ See *id.* at 37, 38.

⁹ See generally *id.* at 48–74. Nobody in Washington or London assumed that defeat of Nazi Germany would bring with it a quick and total repudiation of fascism, though that is exactly what happened.

¹⁰ Henry Morgenthau Jr., Appendix B: Punishment of Certain War Crimes and Treatment of Special Groups (Sept. 5, 1944), in AMERICAN ROAD: THE DOCUMENTARY RECORD, *supra* note 4, at 28.

The method of dealing with these ["arch-criminals"] and other criminals requires careful thought and a well-defined procedure. Such procedure must embody, in my judgment, at least the rudimentary aspects of the Bill of Rights, namely, notification to the accused of the charge, the right to be heard and, within reasonable limits, to call witnesses in his defense. . . . [T]he very punishment of these men in a dignified manner consistent with the advance of civilization, will have all the greater effect upon posterity. . . . I am disposed to believe that at least as to the chief Nazi officials, we should participate in an international tribunal constituted to try them.¹¹

Roosevelt was initially sympathetic to Morgenthau's approach. In London, too, the Lord Chancellor reported to the War Cabinet:

I am strongly of the opinion that the method by trial, conviction and judicial sentence is quite inappropriate for notorious ringleaders such as Hitler, Himmler, Goering, Goebbels and Ribbentrop. Apart from the formidable difficulties of constituting the court, formulating the charge, and assembling the evidence, the question of their fate *is a political, not a judicial, question*. It could not rest with judges, however eminent or learned, to decide finally a matter like this, which is of the widest and most vital public policy.¹²

The Lord Chancellor recommended that his government take the position that when "major criminals [fall] into Allied hands, the Allies will decide how they are to be disposed of, and the execution of this decision will be carried out immediately."¹³

Roosevelt and Churchill met in Quebec in mid-September 1944 and reportedly saw eye-to-eye both on Morgenthau's policy of crippling the German economy, and on the advantages of summary execution. When word of this impending policy leaked to the press, however, there was widespread criticism of such a harsh and vindictive plan, and, always sensitive to the political winds, Roosevelt retreated, leaving the matter an open question. Stimson, joined by Secretary of State Cordell

¹¹ Communication from Secretary of War (Stimson) to the President (Sept. 9, 1944), in *AMERICAN ROAD: THE DOCUMENTARY RECORD*, *supra* note 4, at 30–31.

¹² Lord Chancellor Sir John Simon, Major War Criminals, memorandum (Sept. 4, 1944), in *AMERICAN ROAD: THE DOCUMENTARY RECORD*, *supra* note 4, at 32.

¹³ Colonel Murray C. Bernays, G-1, Subject: Trial of European War Criminals (Sept. 15, 1944) [hereinafter Bernays], in *AMERICAN ROAD: THE DOCUMENTARY RECORD*, *supra* note 4, at 33.

Hull and Secretary of the Navy James V. Forrestal, took the opportunity to press the case for a trial, drafting for the President (though it was never sent to him) a plan that answered several troublesome issues: how to deal with a huge number of possible defendants whose individual trials would far exceed the Allies' capacity; and how to reach atrocities that had taken place before the war or apart from military action and thus were not war crimes, and were, in addition, directed by a government against its own citizens and thus arguably beyond the scope of traditionally understood international law.¹⁴ Stimson urged that the objective of prosecution should be "not only to punish the individual criminals, but also to expose and condemn the criminal purpose behind each individual outrage," expanding the world's focus from individual crimes to "the results of a purposeful and systematic pattern created by [Nazi leaders] to the end of achieving world domination."¹⁵ This emphasis on the concerted effort of the Nazis—the forest rather than the trees—was to dominate U.S. thinking in both the planning and the eventual conduct of the trial at Nuremberg.

The proposal developed in the War Department was to conduct an initial trial on a charge of conspiracy, a uniquely Anglo-American legal concept that defines the plotting of a crime by two or more people as a crime separate from the one they intend to commit.¹⁶ A person is guilty of conspiracy if he does even a single overt act in furtherance of it, and evidence of one conspirator's evil acts can be used against all the other defendants, including those who did not participate in those acts or even know of them, so long as each defendant played some overt role toward the accomplishment of the conspiracy's overall objective.¹⁷ No one had ever before suggested that conspiracy was a crime under international law.

As Colonel Bernays, of the War Department's Special Project Branch, envisioned it, the Nazi party, the government and its state agencies, such as the SS, and their various leading officials would be charged with "conspiracy to commit murder, terrorism, and the de-

¹⁴ Draft Memorandum for the President from the Secretaries of State, War and Navy, Subject: Trial and Punishment of European War Criminals (Nov. 11, 1944), in *AMERICAN ROAD: THE DOCUMENTARY RECORD*, *supra* note 4, at 41–44.

¹⁵ *Id.* at 44.

¹⁶ *Id.* at 42–43.

¹⁷ For example, if several people conspire to rob a bank, the murder of the bank guard in the course of the holdup incriminates, in a conspiracy to murder, those persons whose only role was to procure the weapons, regardless of whether they anticipated the murder or even opposed it.

struction of peaceful populations in violation of the laws of war.”¹⁸ This would provide a platform on which the entire Nazi program could be laid bare through documents and testimony. Following the certain conviction of these defendants in the main trial, there could be a series of subsequent trials in which any member of the government, the party, or its kindred agencies could be convicted of conspiracy merely upon proof of membership in the organization.¹⁹ The understanding was that these subsequent trials would be both sweeping and quick.

The proposal encountered opposition from the Army’s Judge Advocate General, and from the Justice Department, but through negotiation and subtle redrafting of contentious points, Stimson, Secretary of State Hull, and Attorney General Francis Biddle were able to present a memorandum to President Roosevelt on January 22, 1945 that contained the essence of the conspiracy/criminal organization theory, as well as the two-stage system of trials.²⁰ The memo barely mentioned the word “conspiracy,” but spoke of a “premeditated criminal plan or enterprise, which either contemplated or necessarily involved” the commission of “mass murders, imprisonments, expulsions and deportations of populations; the starvation, torture and inhuman treatment of civilians; the wholesale looting of public and private property on a scale unparalleled in history; and, after initiation of ‘total’ war, its prosecution with utter ruthless disregard for the laws and customs of war.”²¹

The very scope of the crimes—extending over twelve years and all of Europe—presented logistical problems of “appalling dimensions” in finding and organizing the evidence, in connecting specific crimes to specific individuals, and in staging the trials themselves.²² As the Secretaries stated, the prewar atrocities:

[A]re neither “war crimes” in the technical sense, nor offenses against international law; and the extent to which they may have been in violation of German law, as changed by the Nazis, is doubtful. Nevertheless, the declared policy of the United Nations is that these crimes, too, shall be punished;

¹⁸ See Bernays, *supra* note 13, at 36.

¹⁹ Though the draft proposal did not say so, the idea posed serious questions of fairness: what an individual actually did—if indeed he had done anything at all—would be irrelevant, as would even his purpose or intent in joining the organization.

²⁰ See Memorandum for the President, Subject: Trial and Punishment of Nazi War Criminal (Jan. 22, 1945) [hereinafter Jan. 22 Memorandum], in *AMERICAN ROAD: THE DOCUMENTARY RECORD*, *supra* note 4, at 117–22.

²¹ *Id.* at 118.

²² *Id.* at 119.

and the interests of postwar security and a necessary rehabilitation of German peoples, as well as the demands of justice, require that this be done.²³

Rejecting the idea of summary execution as “violative of the most fundamental principles of justice” (and likely to produce martyrs as well), the Secretaries further stated:

We think that the just and effective solution lies in the use of the judicial method. Condemnation of these criminals after a trial, moreover, would command maximum public support in our own times and receive the respect of history. The use of the judicial method will, in addition, make available for all mankind to study in future years an authentic record of Nazi crimes and criminality.²⁴

The Secretaries stuck to the idea of two-stage process. First, an initial trial of the major German leaders and the organizations they led, charging defendants “both with the commission of their atrocious crimes, and also with joint participation in a broad criminal enterprise which included and intended these crimes, or was reasonably calculated to bring them about.”²⁵ The criminal enterprise would be defined:

[T]o permit full proof of the entire Nazi plan from its inception and the means used in its furtherance and execution, including the prewar atrocities and those committed against their own nationals, neutrals, and stateless persons, as well as the waging of an illegal war of aggression with ruthless disregard for international law and the rules of war.²⁶

The second stage would be individual trials of members who were members of the groups convicted at the first trial in which membership would be sufficient evidence of guilt. In a concession to those who had criticized the fairness of this idea, however, the Secretaries noted that, in addition to proof of membership, “[p]roof would also be taken of the nature and extent of the individual’s participation” so that punishment “would be made appropriate to the facts of his particular case.”²⁷

²³ *Id.*

²⁴ *Id.* at 120.

²⁵ Jan. 22 Memorandum, *supra* note 20, at 120.

²⁶ *Id.*

²⁷ *Id.* at 121.

Several aspects of this proposal are noteworthy. The Secretaries were acutely aware that a conventional charge of war crimes would be inadequate to reach prewar crimes and the massive persecution of “civilians,” and could not illuminate the broad scope of the Third Reich’s terrors. The answer to that was the charge of conspiracy; the idea of new class of crimes, “crimes against humanity,” had not yet crystallized. For the first time, the idea of “waging an illegal war of aggression” was proposed—though as an object of the conspiracy, not a crime in and of itself. Overall, the proposal was innovative, but not radical—“triumphs of caution and moderation.”²⁸

2. International Stalemate

The impending meeting of the Big Three—the U.S., U.K., and Soviet Union—in Yalta in early February, 1945 hastened the creation of the memo, but much to the Secretaries’ disappointment, the President remained noncommittal and, worse, did not broach the subject at Yalta.²⁹ The British, in the dark on these political maneuverings in Washington, were proceeding on the assumption that Hitler and the other top leaders would be summarily executed, and that lower-ranking Nazis would be sent back for trial to the countries in which their crimes had taken place. The British invited a U.S. delegation to London in early April 1945 to work out a plan for dealing with war criminals, but the conference produced only ambiguity and stalemate. Lord Simon, the Lord Chancellor, proclaimed that he was “very worried by the prospect of a trial which might be drawn out almost indefinitely, in which all sorts of things might be raised and discussed—whether legal or historical—leading to controversy and debate in the world at large, with a reaction which we can hardly calculate.”³⁰ That same day he also asked:

[W]hat is the real charge which Allied people and the world as a whole make against Hitler? It is the totality of his offences against the international standard which civilized countries try to observe which make him the guilty man that he is. . . . If the method of public trial were adopted, the comment must be expected from the very start to be that the whole thing is a “put-up job” designed by the Allies to justify

²⁸ AMERICAN ROAD: THE DOCUMENTARY RECORD, *supra* note 4, at 56.

²⁹ *Id.* at 135.

³⁰ Memorandum to Judge Rosenman From Lord Simon (Lord Chancellor) (April 6, 1945), in AMERICAN ROAD THE DOCUMENTARY RECORD, *supra* note 4, at 151–52.

a punishment they have already resolved on. . . . [I]t is by no means unlikely that a long trial will result in a change of public feeling as to the justification of trying Hitler at all. Will not some people begin to say "The man should be shot out of hand"? [I]s there not a danger of the trial being denounced as a farce?³¹

Washington was unmoved. Responding to Simon, Assistant Secretary of War John J. McCloy, who had become the driving force for war crimes policy in Stimson's War Department, answered forcefully the contention that a trial would be unable to deal with the entire scope of Nazi depredations before the war and apart from it:

It is true that all the Axis has done should be brought into the grounds of punishment. The offenses charged should include the preparation for war, the prewar atrocities and the launching of aggressive war in violation of Germany's treaty obligations as well as the ruthless conduct of war in violation of international law and custom. The very breadth of the offense, however, is not in itself argument against judicial action. It is a most important reason for a trial, for it is highly desirable that there be established and declared by actual decision, after adequate hearing and determination of the facts, the principles of international law applicable to the broad, vicious Nazi enterprise. In texture and application, this law will be novel because the scope of the Nazi activity has been broad and ruthless without precedent. The basic principles to be applied, however, are not novel and all that is needed is a wise application of those principles on a sufficiently comprehensive scale to meet the situation. International law must develop to meet the needs of the times just as the common law has grown, not by enunciating new principles but by adapting old ones³²

Britain and the United States were talking past each other, and each was hardening its position. There was no word from the President, no guidance, no letter to Churchill urging quick resolution along U.S. lines. The U.S. delegation sat glumly in London, watching the entire enterprise unravel.

³¹ *Id.* at 156–57.

³² *Id.* at 161.

C. *Creation of the International Military Tribunal Charter*

Then, on April 12, President Roosevelt died. Harry Truman, “a man of quick and firm decision, little inclined to the artful, evasive tactics of his predecessor,” was quickly briefed on the Stimson-Hull-Biddle memorandum and of the stalemate with the British over execution versus trial.³³ He decided “that there must be a trial and that the basic American policy position was sound. Emboldened by the strong presidential mandate that had so long eluded them, the American planners raced forward on a number of fronts.”³⁴

1. Jackson’s Plan

Truman appointed U.S. Supreme Court Justice Robert H. Jackson to take the newly created position of Chief of Counsel for the Prosecution of Axis Criminality. Characteristically, Jackson took immediate charge of U.S. policy, moving quickly and boldly to shape it to his liking. Over the next month, he and his new staff formulated an executive agreement for an “International Military Tribunal” with one judge and one alternate each from the United States, Great Britain, Soviet Union, and France to try the “major criminals” of the Axis powers.³⁵ The agreement did not define the crimes to be charged, though it did define several “criminal” acts, including “[I]aunching a war of aggression” and post-1933 “[a]trocities and offenses[,] . . . including atrocities and persecutions on racial or religious grounds” that were “in violation of any applicable provision of the domestic law of the country in which committed.”³⁶

The chief advantage of the conspiracy theory had been that it could reach all acts of the Nazi government and party from 1933. In the end, however, the defendants would be found guilty of conspiracy and not the acts themselves, which were thought to be beyond the competence of international law. Jackson’s early theory was that the crimes themselves could be punished if they were crimes under local law at the time they were committed. The obvious drawback to this theory, however, was that Hitler’s administration had changed many of Germany’s laws in the 1930s to allow precisely the persecution that followed. Jack-

³³ AMERICAN ROAD: THE DOCUMENTARY RECORD, *supra* note 4, at 138.

³⁴ *Id.*

³⁵ Executive Agreement Relating to the Prosecution of European Axis War Criminals (Drafts 3 & 4) (May 19, 1945), *in* AMERICAN ROAD: THE DOCUMENTARY RECORD, *supra* note 4, at 206.

³⁶ *Id.*

son's plan preserved the principle of conspiracy by providing that the IMT should "apply the general rule" that crimes committed by one participant in a "criminal plan" are attributable to all participants.³⁷ The agreement he drafted was not centered on conspiracy as the unifying theme of the charges, as earlier U.S. versions had. That role was filled, in Jackson's vision, by the charge of waging a war of aggression.

Jackson's plan did preserve the idea that organizations could be tried and convicted by the IMT, but it took a further step away from making individual membership enough for conviction in future trials. Rather, an individual member of a convicted organization would bear the burden of proving "any circumstances relating to his membership or participation therein which are relevant either in defense or in mitigation."³⁸ This was profoundly ambiguous because Jackson's plan did not even hint at what "defense" might be enough for an individual to establish or what "circumstances" might be "relevant" to that end. The plan left that task for further study by Jackson and the other prosecutors.

In the face of this strong U.S. proposal, Jackson's considerable persuasive powers, and the assent of France and the Soviet Union, the British War Cabinet gave in and abandoned its opposition to a trial. Plans were made for a conference in London to draw up the Charter of the Tribunal itself, based on Jackson's plan.

2. The Road to the Charter

As he departed for London in June 1945, Jackson briefed President Truman on his plan. The plan to proceed against the organizations had changed little, though Jackson acknowledged that individual members, following the presumed conviction of the organizations, would be allowed to prove "personal defenses or extenuating circumstances, such as that he joined under duress."³⁹ It was the case against the individual major Nazi criminals—though it was still uncertain who the defendants would be—that gave Jackson the stage on which to lay out the three charges that would eventually form the nucleus of the Charter. His orientation was both political and legal:

Those acts which offended the conscience of our people were criminal by standards generally accepted in all civilized coun-

³⁷ *Id.*

³⁸ *Id.* at 208.

³⁹ Robert H. Jackson, *Atrocities and War Crimes: Report from Robert H. Jackson to the President*, 12 DEPARTMENT OF STATE BULLETIN 1071, 1074 (1945) [hereinafter Jackson Report].

tries, and I believe that we may proceed to punish those responsible in full accord with both our own traditions of fairness and with standards of just conduct which have been internationally accepted.⁴⁰

Nazi Germany was not “a legitimate state pursuing the legitimate objective of a member of the international community” but rather “a band of brigands who had seized the instrumentality of a state.”⁴¹

Having thus separated the defendants from the state itself to charge them as individual bandits who had conspired with each other in a monstrous plan of persecution, aggression, and mass murder, Jackson laid out the three substantive charges. First, war crimes.⁴² Second, “atrocities and offenses, including atrocities and persecutions on racial and religious grounds, committed since 1933.”⁴³ Though he did not call them “crimes against humanity” at this point, Jackson boldly asserted that they had been “assimilated as a part of international law” by the Hague Convention of 1907.⁴⁴ Jackson knew that no one could argue, or would want to, that the Nazi horrors had not offended civilized peoples, the “laws” of humanity, and the “dictates” of the public conscience, but he surely knew that the Hague Convention had no thought of instituting these principles as international law.⁴⁵ He used the Hague Convention as the legal platform on which to support “[t]he feeling of outrage” in the U.S. over the course of the war, so as to “punish acts which have been regarded as criminal since the time of Cain and have been so written in every civilized code.”⁴⁶

As the third charge, Jackson specified “[i]nvasions of other countries and initiation of wars of aggression in violation of International Law and treaties.”⁴⁷ This crime came to be called “the crime against peace” in the Charter, or the “crime of aggressive war,” and he relied chiefly on the Kellogg-Briand Pact of 1928, signed by most nations of the world, that renounced war as an instrument of national policy and

⁴⁰ *Id.* at 1074–1075.

⁴¹ *Id.* at 1075.

⁴² *See id.* at 1076.

⁴³ *Id.* at 1076.

⁴⁴ Jackson Report, *supra* note 39, at 1076.

⁴⁵ The DeMartens Clause of the Hague Convention had appealed to “the principles of the law of nations as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience.” *See* SMITH, ROAD TO NUREMBERG, *supra* note 7, at 241.

⁴⁶ Jackson Report, *supra* note 39, at 1075.

⁴⁷ *Id.* at 1076.

pledged to resolve international disputes by “pacific” means.⁴⁸ “This Pact constitutes only one in a series of acts which have reversed the viewpoint that all war is legal and have brought International Law into harmony with the common sense of mankind, that unjustifiable war is a crime,” Jackson wrote to the President.⁴⁹ He continued:

An attack on the foundations of international relations cannot be regarded as anything less than a crime against the international community. . . . We therefore propose to charge that a war of aggression is a crime, and that modern International Law has abolished the defense that those who incite or wage it are engaged in legitimate business.⁵⁰

Jackson did not pretend, and indeed could not, that the trial would be applying well-settled principles. It would advance international law into places it had never been, which is exactly what Jackson wanted:

International Law is. . . . an outgrowth of treaties or agreements between nations and of accepted customs. . . . Unless we are prepared to abandon every principle of growth for International Law, we cannot deny that our own day has its right to institute customs and to conclude agreements that will themselves become sources of a newer and strengthened International Law. International Law is not capable of development by legislation, for there is no continuously sitting international legislature. Innovations and revisions in International Law are brought about by the action of governments designed to meet a change in circumstances. . . . Hence I am not disturbed by the lack of precedent for the inquiry we propose to conduct. . . .⁵¹

Telford Taylor, a gifted young Army lawyer on Jackson’s staff (and who succeeded Jackson as Chief of Counsel for the trials after the IMT), provided trenchant analysis that significantly influenced Jackson’s presentation of his case at Nuremberg. According to Taylor, the trial’s most important accomplishment was:

⁴⁸ *Id.* at 1077.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ Jackson Report, *supra* note 39, at 1076.

To give meaning to the war against Germany. To validate the casualties we have suffered and the destruction and casualties we have caused. To show why those things had to be done. The conviction and punishment of Axis criminals are desirable objectives in themselves, but in order to accomplish the larger objectives the conviction and punishment must be obtained by procedures and for reasons which will help to make the war meaningful and valid for the people of the Allied Nations and, it is not beyond hope, for at least some people of the Axis nations.⁵²

Dividing the prosecution's case into the "illegal launching" of wars of aggression phase and the "commission of atrocities" phase, Taylor dryly noted that the first phase was:

[B]ased on the assumption that it is, or will be declared, a punishable offense to plan and launch (and lose?) an aggressive war, particularly if treaties are thereby violated. Although the phrase "illegal launching" is a "law idea", and although much legal paraphernalia will be and must be invoked to validate the assumption, the thing we want to accomplish is not a legal thing but a political thing.⁵³

No one has ever analyzed the crime of aggressive war so well in so few words. Whether it is a punishable offense to launch an aggressive war, only those who lose it are likely to be tried, and therein lies the abiding criticism of Nuremberg: that it was "victors' justice," the winners lashing out at the losers. Taylor's recognition that acceptance of the illegal war doctrine would have to come from political consensus, not a judicial decree, is inarguably correct. Taylor dismissed "victors' justice" in a single sentence: "Only the most incorrigible legalists can pretend to be shocked by the conclusion that the perpetrator of an aggressive war acts at peril of being punished for his perpetration, even if no tribunal has ever previously decided that perpetration of aggressive war is a crime."⁵⁴ As to the atrocities, still a legal dilemma insofar as they were not traditional war crimes, Taylor had a similar rebuttal:

⁵² Telford Taylor, *An Approach to the Preparation of the Prosecution of Axis Criminality* (Early June, 1945) [hereinafter Taylor, *Axis Criminality*], in *AMERICAN ROAD: THE DOCUMENTARY RECORD*, *supra* note 4, at 209.

⁵³ *Id.* at 210.

⁵⁴ *Id.* at 211.

No one will be shocked by the doctrine that people who direct or do inhuman and barbarous things in the course of losing a war will be punished. Many would be shocked by the conclusion that such people may go scot-free unless a pre-existent law or rule can be cited.⁵⁵

Taylor had brilliantly identified the plan's greatest strength and its most prominent weakness. Contrary to the assumptions that had guided U.S. war crimes planning up to that point, Taylor declared punishment incidental, for how can there be meaningful "punishment" for crimes so calculated, vast, and hideous? The purpose of the trial was the trial itself: to show the world, present and future, by fair procedures, that the destruction and casualties that the *Allies* had caused were necessary to end the Third Reich.

Jackson and his counterparts met in London during the summer of 1945 to draft the Charter of the Tribunal, to prescribe the procedures that it would follow, to choose the defendants, and to draft the indictment. It was not a smooth summer. Jackson was innately suspicious of the Russians, and held out until the end the possibility that the U.S. might go their own way, with or without the British and French, leaving the Russians to try what they would. The idea of conspiracy as a separate crime baffled the French and the Russians, and the British and the U.S. were at loggerheads over the size of the trial. The idea of aggressive war as a crime concerned the other three nations, and the French-Soviet counterproposal—that aggressive war be characterized as a crime only when undertaken by the Axis—was anathema to Jackson, who saw that aggressive war could only be a crime under international law if it applied to all nations. The British, meanwhile, were reluctant to explore too deeply the economic and fiscal aspect of the rise of the Reich, lest it cast too much light on the role of British banks in the 1930s. The idea of trying organizations first, and then running their members through summary trials afterwards, continued to pose persistent questions of procedure and fairness, and the Soviets could not understand why it was necessary to put the organizations on trial when the Allies had already condemned them as criminal outfits.

The very nature of the trial itself was proving difficult to agree upon, with the French and the Russians accustomed to the continental, or inquisitorial, system where the judge marshaled the evidence and

⁵⁵ *Id.* at 212.

questioned the witnesses, and the British and the Americans pushing for an adversarial process, with lawyers presenting the evidence before neutral judges and each side vigorously cross-examining the witnesses called by the other. Even the logistics of preparing for the trial were vexing: there were not enough translators for the documents being brought in by the boxful, and the parties did not even agree that Nuremberg should be the site until late in the summer. On top of that, the search for evidence was not proceeding quickly, nor producing very auspicious results, particularly on the critical elements of conspiracy. Jackson had begun the summer thinking that the other Allies would quickly understand that his plan was the obvious roadmap for a trial. They did not, and he had little patience for their criticism, questions, and redrafted charters.

II. Discussion

In the end, Jackson—largely—prevailed. The Charter of the IMT, issued on August 8, 1945, was an enormously important document—more important in many ways than the eventual judgment of the Tribunal itself, because the Charter created the Tribunal and bound the judges to its terms.⁵⁶ The Charter defined three charges: (1) war crimes, which had never been controversial; (2) “crimes against humanity,” which was intended to reach the depredations against civilians before and during the war; and (3) “crimes against peace,” the “planning, preparation, initiation or waging of a war of aggression or a war in violation of international treaties.”⁵⁷

A. *The Definition of Crimes Under the Charter*

The drafting and redrafting of the Charter in such a contentious atmosphere had left its definitions far from perfect. The Charter defined crimes against humanity to include crimes “before or during the war” and the drafters specifically rejected the requirement that they be in violation of the domestic law in the country of their commission.⁵⁸ At first reading the definition seemed broad enough: “murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population . . . or persecutions on political, racial or religious grounds”⁵⁹ But there was an important

⁵⁶ BRADLEY F. SMITH, REACHING JUDGMENT AT NUREMBERG 212–20 (1977).

⁵⁷ Taylor, *Axis Criminality*, *supra* note 52, at 215.

⁵⁸ *See id.* at 215.

⁵⁹ *Id.*

qualification: such crimes must have been committed “in execution of or in connection with any crime within the jurisdiction of the Tribunal.”⁶⁰ Since the Nazi campaign against the Jews before the war began could not fairly be characterized as “in execution of” or “in connection with” either aggressive war or war crimes, the effect of this limitation was to exclude the persecution of Jews before 1939.

In addition, the Charter sharply curtailed the conspiracy theory, which had been the foundation of U.S. policy. As Jackson had originally drafted it, conspiracy was a fourth crime, equal to the other enumerated categories of crimes. A British revision, however, had placed the conspiracy provision within the paragraph defining crimes against peace, so the Charter provided that conspiracy to wage aggressive war was a crime, but there was no similar provision for a conspiracy to commit war crimes or, significantly, crimes against humanity. This was a “disastrous blow” to the original U.S. proposal.⁶¹ “[W]hile it might plausibly be urged that prewar anti-Jewish actions were a necessary part of a conspiracy to perpetrate greater atrocities after the war came, it was difficult to argue that the prewar harassment of Jews was a necessary preparation for aggressive war.”⁶²

In the end, these provisions caused less mischief than they might have caused. The Tribunal, in its judgment, appeared to make a point of declaring the limitations technical and unimportant:

With regard to crimes against humanity, there is no doubt whatever that political opponents were murdered in Germany before the war, and that many of them were kept in concentration camps in circumstances of great horror and cruelty. . . . The persecution of Jews during the same period is established beyond all doubt. . . . The Tribunal is of the opinion that revolting and horrible as many of these crimes were, it has not been satisfactorily proved that they were done in execution of, or in connection with, any such crime. The Tribunal therefore cannot make a general declaration that the acts before 1939 were Crimes against Humanity within the meaning of the Charter, but from the beginning of the war in 1939 war crimes were committed on a vast scale, which were also crimes against humanity; and insofar as the inhumane acts charged in the indictment, and committed after the begin-

⁶⁰ *See id.*

⁶¹ TELFORD TAYLOR, *THE ANATOMY OF THE NUREMBERG TRIALS* 76 (1992).

⁶² *Id.*

ning of the war, did not constitute war crimes, they were all committed in execution of, or in connection with, the aggressive war, and therefore constituted crimes against humanity.⁶³

1. Rejection of the Acts of State and Superior Order Defenses

In addition to the definition of the crimes, Article 7 of the Charter specifically provided that the “official position” of the defendants as high government officials “shall not be considered as freeing them from responsibility or mitigating punishment.”⁶⁴ As Jackson stated: “We do not accept the paradox that legal responsibility should be the least where power is the greatest.”⁶⁵ Related to that was the Article 8 provision, which stated that “the fact that a Defendant acted pursuant to an order of his Government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment if the Tribunal determines that justice so requires.”⁶⁶ Contrary to what has become popular opinion, the IMT at Nuremberg did not introduce the theory that “I was just following orders” is not a defense. That prohibition had existed under the codes of many nations, including the United States and Germany, since World War I or before. The Nuremberg Charter, however, applied it directly and forcefully. The very act of bringing charges against individual men, and putting them in the dock to answer those charges, stripped of any defense of official immunity or superior orders, was an enormous step.⁶⁷ In his opening statement, Jackson told the judges:

[T]he idea that a state, any more than a corporation, commits crimes, is a fiction. Crimes always are committed only by persons. While it is quite proper to employ the fiction of responsibility of a state or corporation for the purpose of imposing a collective liability, it is quite intolerable to let such a legalism become the basis of personal immunity.

The Charter recognizes that one who has committed criminal acts may not take refuge in superior orders nor in

⁶³ Judgment of the International Military Tribunal (Sept. 30–Oct. 1, 1946) [hereinafter IMT Judgment], in 22 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 498 (1948) [hereinafter TRIAL OF THE MAJOR WAR CRIMINALS].

⁶⁴ Charter of the International Military Tribunal (Aug. 8, 1945) [hereinafter IMT Charter], in 1 TRIAL OF THE MAJOR WAR CRIMINALS, *supra* note 63, at 12 (1947).

⁶⁵ Jackson Report, *supra* note 39, at 1073.

⁶⁶ See IMT Charter, *supra* note 64, at 215–16.

⁶⁷ See *id.*

the doctrine that his crimes were acts of states. These twin principles working together have heretofore resulted in immunity for practically everyone concerned in the really great crimes against peace and mankind. . . . Under the Charter, no defense based on either of these doctrines can be entertained.⁶⁸

B. *The Indictment and the Trial*

The trial itself began with Jackson's opening, followed by opening statements by the chief prosecutors of the three other nations, on November 21, 1945.⁶⁹ There were twenty-two individual defendants.⁷⁰ The prosecution also charged six organizations as being criminal organizations under Article 9 of the Charter.⁷¹

The indictment was a lengthy document, alleging four counts.⁷² Count I charged each defendant with having "participated as leaders, organizers, instigators or accomplices in the formulation or execution of a Common Plan or Conspiracy to commit, or which involved the commission of, Crimes Against Peace, War Crimes, and Crimes against Humanity" and, as co-conspirators are, "individually responsible for their own acts and for all the acts committed by any persons in the execution of" the plan or conspiracy.⁷³ Count II charged sixteen of the twenty-two defendants with crimes against peace, in that they "participated in the planning, preparation, initiation, and waging of wars of aggression, which were also wars in violation of international treaties, agreements and assurances."⁷⁴

⁶⁸ Robert H. Jackson, Prosecutor's Address of Nov. 21, 1945 [hereinafter Jackson, Prosecutor's Address], in 2 TRIAL OF THE MAJOR WAR CRIMINALS, *supra* note 63, at 150.

⁶⁹ *Id.*

⁷⁰ The twenty-two individuals charged were Hermann Goering, Rudolph Hess, Joachim von Ribbentrop, Wilhelm Keitel, Ernst Kaltenbrunner, Alfred Rosenberg, Hans Frank, Wilhelm Frick, Jules Streicher, Walter Funk, Hjalmar Schacht, Karl Doenitz, Erich Raeder, Baldur von Schirach, Fritz Sauckel, Alfred Jodl, Franz von Papen, Arthur Seyss-Inquart, Albert Speer, Constantin von Neurath, Hans Fritzsche, and Martin Bormann.

⁷¹ The six organizations charged were the Reich Cabinet; the Leadership Corps of the Nazi Party; the SS, generally speaking the Party's executive branch, and also its security and intelligence arm; the SD, the secret state police, known as the Gestapo; the SA, or Brownshirts, an early group of Party fascists who were subjugated by the SS in 1934; and the General Staff and High Command of the German Armed Forces.

⁷² It took an entire day to read the indictment at trial. See Indictment, International Military Tribunal [hereinafter IMT Indictment], in 22 TRIAL OF THE MAJOR WAR CRIMINALS, *supra* note 63, at 30-94.

⁷³ *Id.* at 31.

⁷⁴ *Id.* at 43-44.

Count III charged eighteen of the defendants with war crimes between the invasion of Poland on September 1, 1939 and surrender. Specifically, the indictment charged “methods of combat and of military occupation in direct conflict with the laws and customs of war, and the perpetration of crimes committed on the field of battle during encounters with enemy armies, against prisoners of war, and in occupied territories against the civilian population of such territories.”⁷⁵ There followed fourteen pages of specifics, setting forth in considerable detail such events as murder and ill-treatment of civilians in occupied areas, deportation of civilians for slave labor, murder and ill-treatment of prisoners of war, killing of hostages, plunder of public and private property, and the wanton destruction of towns not justified by military necessity.⁷⁶

Finally, Count IV charged eighteen defendants with crimes against humanity, specifying (in broad detail but with considerably less detail than Counts II and III), the murder, extermination, enslavement, and deportation of civilian populations before and during the war, and the persecution on political, racial, and religious grounds of Jews and of others thought to be “in conflict with the aims of the Nazis.”⁷⁷

C. *The Judgment of the Tribunal*

The trial continued, with some breaks, until August 31, 1946 when the eight judges retired to consider their verdicts.⁷⁸ They deliberated for a month and read their judgment over the course of two days before a packed courtroom and the world’s press.⁷⁹ The judgment itself, though justly famous, is somewhat anticlimactic. The Tribunal did not consider itself at liberty to expand or contract the Charter’s provisions, or even to question them. The crimes it judged were the crimes the Charter defined, no more and no less; the defenses it disallowed, such as the doctrine of superior orders, it disallowed because the Charter said that it must do so. “The law of the Charter is decisive,” said the judges, “and binding upon the Tribunal.”⁸⁰ Of seventy-four counts in

⁷⁵ *Id.* at 45.

⁷⁶ *See id.* at 45–59.

⁷⁷ IMT Indictment, *supra* note 72, at 70.

⁷⁸ Strictly speaking, there were four judges and four alternates, but all eight men sat on the bench, deliberated, and signed the judgment. The two U.S. judges were Francis Biddle, a former Attorney General, and John J. Parker, a federal appeals court judge from West Virginia.

⁷⁹ *See* IMT Judgment, *supra* note 63, at 411–589.

⁸⁰ *Id.* at 461.

the indictment, the Court returned guilty verdicts on fifty-two and not-guilty verdicts on twenty-two. Fifteen of the defendants were acquitted of at least one charge while seven were convicted on all counts.⁸¹

Count I of the Indictment, charging participation in a common plan or conspiracy, fared the worst; although the indictment charged all twenty-two of the defendants with it, the court acquitted fourteen of them after first ruling that, because of the way the Charter was drafted, the conspiracy count pertained only to the charge of aggressive war, and thus the indictments alleging conspiracy to commit war crimes and crimes against humanity were invalid.⁸² Each of the eight defendants convicted of conspiracy in that respect was also convicted of Count II, which was the charge of aggressive war itself (or “crimes against peace” in the Charter’s terminology). Four of the defendants convicted of aggressive war were acquitted of the conspiracy count and four more were acquitted of both. As to war crimes, sixteen of the eighteen defendants so charged were convicted, and as to crimes against humanity, there were likewise sixteen convictions on eighteen indictments. Apart from the misfit conspiracy count, there were convictions on forty-four of the remaining fifty-two counts, including twenty-eight on the thirty-two counts of war crimes or crimes against humanity.

1. The Court’s Reasoning

The Charter required that the Tribunal give the reasons on which its judgment was based, and the judges produced a 154-page document that discussed the evidence in detail and weighed each of the counts of the indictment against each individual defendant and the six organizations charged as criminal. It is an orderly and lawyerly treatise, beginning with a lengthy historical account of the rise of Nazism in Germany; the re-armament and the planning of war and the occupations of Austria and Czechoslovakia in 1938; the opening of war against Poland in 1939, followed by the invasions of Norway and Denmark in 1940, Belgium, the Netherlands, and Luxembourg, and then Yugoslavia and Greece, and finally the Soviet Union, all in 1941; and the declaration of war against the United States six months later. The judges concluded that these were aggressive acts of war, not undertaken in self-defense or at the invitation of the victims. They were

⁸¹ Schacht, Papen, and Fritzsche were acquitted on all counts. The Russian judge filed a dissenting opinion on these acquittals but did not quarrel with the decision to acquit the other defendants on one or more charges.

⁸² See IMT Judgment, *supra* note 63, at 524–87.

undertaken to expand German power and territory; to secure critical natural resources, ports and other strategic advantages for the continuation of the war; to neutralize neighboring countries that might threaten German expansion; and to strengthen Germany's grip on Europe. Because the Charter defined the crime against peace as a war of aggression *or* a war "in violation of international treaties, agreements or assurances,"⁸³ the court went on to point out that the German invasion of Western Europe violated a number of treaties and agreements of nonaggression that Germany had made with its victims, both before and during the defendants' reign.⁸⁴

In addition, the Court was plainly concerned at the defense, vigorously asserted by the defendants' lawyers and which lingers today, that the charge of crimes against peace was fundamentally unfair because aggressive war had never before been defined as a crime. *Nullem crimen sine lege* was the time-honored principle: no crime unless a law makes it so, at the time it was done.⁸⁵ The Court stated that the maxim reflects a "principle of justice," and as such it cannot be applied to protect those "who in defiance of treaties and assurances have attacked neighboring states without warning . . . for in such circumstances the attacker must know that he is doing wrong, and so far from it being unjust to punish him, it would be unjust if his wrong were allowed to go unpunished."⁸⁶ The defendants "must have known that they were acting in defiance of all international law when in complete deliberation they carried out their designs of invasion and aggression."⁸⁷

Turning aside this argument did not solve the more troublesome underlying contention that the Tribunal clearly wanted some affirmative ground to justify a conclusion that aggressive war was not merely unlawful but an actual crime.⁸⁸ It turned to the Kellogg-Briand Treaty

⁸³ IMT Charter, *supra* note 64, at 12 (art. 6(a)).

⁸⁴ See IMT Judgment, *supra* note 63, at 459–61.

⁸⁵ See *id.* at 462. The principle of *nullem crimen sine lege* is included in the U.S. Constitution, which prohibits Congress from passing any "ex post facto law." U.S. CONST. art. I, § 9.

⁸⁶ IMT Judgment, *supra* note 63, at 462.

⁸⁷ *Id.*

⁸⁸ The point was not a technical one: in ordinary civil law, one who breaches a contract may have to pay, but he does not get indicted or go to jail for his act. The rules of international law were considerably looser than those governing ordinary contracts; a government that breaches an agreement cannot be haled into court and made to pay. It can be cajoled, criticized, sanctioned, or shunned, but these are political and not legal reactions. Violating a pact of peace by sending Panzer divisions across the border is no ordinary breach of agreement, but the defendants' best hope on the aggressive war charge was to have the Court view the charge as an attempt to make a legal issue out of what was really a political issue and to toss the entire charge out. The Court did not.

of 1928.⁸⁹ That treaty had committed its signatories to resolve “disputes or conflicts of whatever nature or whatever origin” only by “peaceful means.”⁹⁰ According to the Tribunal, “the solemn renunciation of war as an instrument of national policy necessarily involves the proposition that such a war is illegal in international law; and that those who plan and wage such a war, with its inevitable and terrible consequences, are committing a crime in so doing.”⁹¹ The Court invoked the words of U.S. Secretary of State (later Secretary of War) Stimson in 1932—significantly, before the Nazis came to power in Germany and thus not a self-serving criticism of Hitler’s aggression—that the Kellogg-Briand Treaty had made war “an illegal thing” and those nations that engage in it “law breakers.”⁹²

Still, Stimson had not said—quite—that it was a crime. The Court pointed out that the Hague Convention of 1907, prohibiting mistreatment of prisoners and the use of poisoned weapons among other forbidden acts of war, had not actually said that *those* were crimes, and yet military courts had no difficulty in punishing those who had done them; waging war was “equally illegal, and of much greater moment,” than those.⁹³ Clearly echoing Jackson, the judges went on,

The law of war is to be found not only in treaties, but in the customs and practices of states which gradually obtained universal recognition, and from the general principles of justice applied by jurists and practiced by military courts. This law is not static, but by continual adaptation follows the needs of a changing world.⁹⁴

Further seeking to shore up the Kellogg-Briand Pact, the Court cited a resolution of the League of Nations in 1927, and two earlier League protocols that had never been formally ratified, all of which explicitly condemned wars of aggression as an “international crime.”⁹⁵ It pronounced itself satisfied that “[t]he prohibition of aggressive war demanded by the conscience of the world” means that “resort to a war

⁸⁹ See IMT Judgment, *supra* note 63, at 460–61.

⁹⁰ See *id.* at 463.

⁹¹ See *id.*

⁹² See *id.*

⁹³ See *id.*

⁹⁴ See IMT Judgment, *supra* note 63, at 464.

⁹⁵ *Id.* at 464–65.

of aggression is not merely illegal, but is criminal.”⁹⁶ “War is essentially an evil thing,” the Court said.⁹⁷ It continued:

Its consequences are not confined to the belligerent states alone, but affect the whole world. To initiate a war of aggression, therefore, is not only an international crime; it is the supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole.⁹⁸

With that point out of the way, the Tribunal had no difficulty rejecting defendants’ arguments that the law of war applied only to states, not to individuals. The Charter itself obviously foreclosed that argument, because it authorized the indictment and conviction of these very defendants, and the Court could hardly entertain an argument that it should overturn the Charter that had created it and had directed it to pass judgment on those defendants. It did point out that individual soldiers had long been tried and sentenced for mistreatment of prisoners and other war crimes—as if to suggest, perhaps, that the idea of subjecting individuals to international law was not a particularly new or startling idea.⁹⁹

But of course it was. Soldiers, and before them, pirates, had indeed been put on trial for war crimes or piracy, though always by one-nation courts or military tribunals. The law applied to them was “international” law in the sense that all nations, more or less, adhered to it, but this was not a very important part of those proceedings. The defendants were on trial for individual acts of violence. Nuremberg was altogether new and different: the court was convened by four nations acting together (and supported by many others); the defendants were not soldiers; and the charges went far beyond war crimes, although they were included. The defendants were government officials, generals and admirals, a publisher, a banker, and diplomats; their crimes were state policies they had developed and implemented. The head of state would have been in the dock had he not killed himself. The Court was covering a lot of territory when, reflecting Robert Jackson’s rhetoric, it pronounced, “Crimes against international law are committed by men, not

⁹⁶ *Id.* at 427.

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ See IMT Judgment, *supra* note 63, at 465–66.

by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.”¹⁰⁰

2. Elaboration on the Superior Orders Defense

Then, in one of its few truly inscrutable passages, the Tribunal summarily rejected the defendants' argument that they were only carrying out Hitler's orders. Article 8 of the Charter had specifically taken that defense off the table, but the Court went on to add:

The provisions of this article are in conformity with the law of all nations. That a soldier was ordered to kill or torture in violation of the international law of war has never been recognized as a defense to such acts of brutality. . . . The true test, which is found in varying degrees in the criminal law of most nations, is not the existence of the order, but whether moral choice was in fact possible.¹⁰¹

“Moral choice” has an odd ring in this context. Neither the Charter nor the “law of most nations” takes “moral choice” as the test of whether a soldier may plead superior orders as a valid defense, and that would be a very difficult test to apply. When does a soldier *not* have a moral choice? The choice may put him in a perilous position indeed, if he elects to disobey the order, but nonetheless it is there. A soldier who is given a direct order to kill a prisoner of war, for example, or to lay mortar fire on a known hospital, is required to disobey it and if he does not he is guilty of a war crime, the order notwithstanding. It is easy to imagine circumstances in which disobedience of such an order is such an intimidating prospect for a young private in a war zone that a judge might be compassionate in handing down a sentence, but the order does not wash the crime away. If soldiers “do not cease on this account to be moral beings, responsible to one another and to God,”¹⁰² one might ask the Tribunal, when is moral choice not possible? The Tribunal did not elaborate on what it might have meant, and its pronouncement has been generally ignored in the subsequent development of the law of war.

¹⁰⁰ *Id.* at 466.

¹⁰¹ *Id.*

¹⁰² The Lieber Code of 1863, Instructions for the Government of Armies of the United States in the Field, *available at* <http://www.civilwarhome.com/liebercode.htm> (last visited Jan. 15, 2007).

It is also worth noting the very careful wording of Article 8: “The fact that the Defendant acted pursuant to order of his Government or of a superior shall not free him from responsibility” for his act.¹⁰³ The existence of the order does not, in and of itself, exculpate the defendant. The accepted law of superior orders is actually a bit more subtle than that. It provides that superior orders is not a defense *if* the soldier knew or should have known that the order was illegal. One can imagine a situation where a soldier does not know an order is illegal, not because he is ignorant of the law but because he might be ignorant of the facts. If he is ordered to shell a church because it is being used as an enemy observation post, and if it should turn out that it is still being used only as a church, then he has committed an act that violates the laws of war—destroying a place of worship. Here, however, he *can* plead superior orders as a defense, because he did not know and could not have been expected to know, given the circumstances, that what he was doing was illegal. Thus, Article 8 provided that a superior’s order was not an automatic defense, which is certainly true, but it did not delve into the circumstances that might make it a defense, and the Tribunal added nothing of value by its enigmatic observation that “moral choice” was the true test of a superior-orders defense.

3. Setbacks in the Judgment

Returning to the charges of the indictment, the Court handed the prosecution two setbacks. First, it ruled that the indictment was invalid under the Charter insofar as it charged conspiracy to commit war crimes and conspiracy to commit crimes against humanity.¹⁰⁴ It had always been the U.S. intention to make conspiracy a crime that incorporated the entire Nazi scheme—not only waging the war but committing war crimes and crimes against humanity. However, as the Charter was shuffled and reshuffled in the London negotiations, the critical language—“or participat[ion] 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”—was moved from the end of Article 6, where “foregoing” would have included all the crimes, to the paragraph defining crimes

¹⁰³ IMT Charter, *supra* note 64, at 12 (art. 8).

¹⁰⁴ See IMT Judgment, *supra* note 63, at 467–68.

against peace.¹⁰⁵ Thus “foregoing” related only to that crime, not the others.

Second, the Court held that while a conspiracy to wage aggressive war “has been established beyond doubt,” that conspiracy did not begin in the early days of the Nazi party, as the prosecution had contended.¹⁰⁶ To be a conspiracy, there must be a “concrete plan,” and there was no such plan for aggressive war until the mid-1930s.¹⁰⁷ Consequently, the Court would look to what each defendant had done beginning at that time to determine his guilt. Those who had left the scene before then, as a few of the defendants had, would be acquitted on that charge.

4. Tribunal's Findings on War Crimes

With the difficulties of aggressive war and conspiracy behind it, the Tribunal turned to the evidence of war crimes, and here it had no difficulty. War crimes had always been the least controversial of the four charges, because it was firmly rooted in the law of the nineteenth and twentieth centuries, and each of the four Allies was entirely familiar with what “violations of the laws or customs of war” comprised.¹⁰⁸ Moreover, the evidence was overpowering. “The truth remains that war crimes were committed on a vast scale, never before seen in the history of war. . . . [W]ar crimes were committed when and wherever . . . thought . . . to be advantageous. They were for the most part the result of cold and criminal calculation.”¹⁰⁹

5. Charges Against Nazi Organizations

The Court then turned to its penultimate task—the charges against the organizations. It was a nightmarish task just to determine how these organizations were defined, particularly those that went through repeated rounds of reorganization and consolidation with both state and party offices, and whose missions and responsibilities were constantly adjusted, officially and unofficially. Was someone who joined the *Sicherheitsdienst* (SD) (the German intelligence service) in

¹⁰⁵ IMT Charter, *supra* note 64, at 11 (art. 6).

¹⁰⁶ IMT Judgment, *supra* note 63, at 468–69.

¹⁰⁷ *See id.* at 467–68.

¹⁰⁸ IMT Charter, *supra* note 64, at 215.

¹⁰⁹ *See* IMT Judgment, *supra* note 63, at 469–70. The Tribunal concluded that the Charter's definition of crimes against humanity excluded pre-war crimes (including “[t]he persecution of Jews . . . established beyond all doubt”), but it left no doubt that, were it not for this peculiarity, such “revolting and horrible” though generally non-lethal acts would certainly qualify. *Id.* at 497.

1944 joining the same organization that had existed in 1939? Was a soldier in the *Waffen SS*—its military arm—a member of the same organization as a henchman in its domestic security operation?

But the Tribunal had a more serious concern. Mindful that under the Charter a declaration of an organization's criminality would lead the way to summary convictions of its members, the Tribunal warned, "this is a far-reaching and novel procedure. Its application, unless properly safeguarded, may produce great injustice."¹¹⁰ Moreover, it was plainly troubled by the thought of assembly-line convictions by a host of U.S., British, French, and Soviet courts operating independently, under their own laws and subject to domestic political demands, and handing out penalties including death. It recommended that "so far as possible," the Four Powers should agree on a standard set of "classifications, sanctions, and penalties" for use in the subsequent trials.¹¹¹

The Tribunal's most significant pronouncement was that membership in a criminal organization alone would not be enough to convict an individual. In doing so, the Tribunal came very close to negating the Charter itself,¹¹² but the judges finessed this point by reasoning that an organization, to be criminal, must be "a group bound together and organized for a common purpose," a definition which would "exclude persons who had no knowledge of the criminal purposes or acts of the organization . . ."¹¹³ Membership alone, therefore, could not support a conviction because some members might have had no knowledge of the organization's criminal purposes. Whether the judges intended it or not, this ruling sounded the death knell for subsequent trials based on group membership. The prosecution would have had to prove each individual's state of knowledge at the time he joined, and perhaps prove his intent and even his actual role in the organization as well. It would have been impossible to do that for the hundreds of thousands of SS and Nazi "Leadership Corps" members; even the *Gestapo*, with 15,000 or so members, presented a daunting prospect. The idea was abandoned and no one was tried by the U.S. for membership alone.¹¹⁴

¹¹⁰ *Id.* at 499.

¹¹¹ *Id.*

¹¹² See IMT Charter, *supra* note 64, at 12 (art. 10).

¹¹³ IMT Judgment, *supra* note 63, at 500.

¹¹⁴ TELFORD TAYLOR, FINAL REPORT TO THE SECRETARY OF THE ARMY ON THE NUERNBERG WAR CRIMES TRIALS UNDER CONTROL COUNCIL LAW No. 10, at 16–17 [hereinafter TAYLOR, FINAL REPORT]. The French followed suit and the British likewise limited their subsequent proceedings to charges of war crimes. *Id.* at 7–8. The Soviet Union's record of

Dealing with each of the groups in turn, the Court held that the Leadership Corps of the Nazi Party was a criminal organization, but it exempted those who had left the leadership before the beginning of the war.¹¹⁵ It reached similar conclusions as to the *Gestapo*, the SD, and the SS—each one a criminal organization—as to those who knew its purposes and became or remained members after the war began.¹¹⁶ The tribunal found that the SA was a criminal organization within the meaning of the Charter, though it was virtually defunct after 1934. Both the Reich Cabinet and the General Staff and High Command (the highest-ranking military advisers to Hitler) were found not criminal, on grounds that they were not really “organizations” but a few score officials who could be tried one by one for their individual acts as the evidence might justify.¹¹⁷ Perhaps fearing that the “acquittal” of the General Staff and High Command as a criminal organization might be read as an exoneration of the German military leadership (whose defense at trial had been that everything was Hitler’s idea and they could do nothing to stop him), the judges had particularly harsh words:

[These officers] have been responsible in large measure for the miseries and suffering that have fallen on millions of men, women, and children. They have been a disgrace to the honorable profession of arms. Without their military guidance the aggressive ambitions of Hitler and his fellow-Nazis would have been academic and sterile. . . . When it suits their defense they say they had to obey; when confronted with Hitler’s brutal crimes, which are shown to have been within their general knowledge, they say they disobeyed. The truth is they actively participated in all these crimes, or sat silent and acquiescent, witnessing the commission of crimes on a scale larger and more shocking than the world has ever had the misfortune to know¹¹⁸

The judges concluded their written opinion with a final section discussing the evidence as it pertained to each individual defendant, reaching its verdict on each charge against that particular defendant

war crimes prosecutions in its own courts remained a closely guarded secret under that government, and the full story is not yet known today.

¹¹⁵ See IMT Judgment, *supra* note 63, at 501–05.

¹¹⁶ See *id.* at 505–11, 512–17.

¹¹⁷ See *id.* at 519–20.

¹¹⁸ *Id.* at 522–23.

before moving on to the next. Of the nineteen convicted, twelve were hung and seven imprisoned on terms ranging from ten years to life.¹¹⁹

IV. ANALYSIS

Was it a fair trial? The fact that nineteen of twenty-two were convicted does not by itself tell us anything on that score; one should never confuse the fairness of the trial with the strength of the prosecution's case. Nor does the fact that not all defendants were truly "major" war criminals, or that many others of equal responsibility might have been, but were not, tried with them, shed light on the question of how these defendants, however chosen, were treated. As Telford Taylor stated:

In Germany the widespread responsibility for these crimes among the German leaders in the fields of government, arms, and industry posed problems not only of law but of judicial administration which were of truly staggering proportions. At the same time, the collapse and virtual disappearance of the German Government, the total and crushing defeat of Japan, and the intellectual and moral vacuum created in both those countries by years of tyranny followed by utter disaster, meant that the entire responsibility for stating the principles and shaping the policies in the field of war crimes was and had to be discharged by the victorious powers.¹²⁰

But, Jackson cautioned:

We must never forget that the record on which we judge these defendants today is the record on which history will judge us tomorrow. To pass these defendants a poisoned chalice is to put it to our own lips as well. We must summon such detachment and intellectual integrity to our task that this Trial will commend itself to posterity as fulfilling humanity's aspirations to do justice.¹²¹

Did the Nuremberg process do that? While fairness is to some extent a subjective judgment, one may identify specific procedures that, in the United States and elsewhere since the eighteenth century, have been generally accepted as providing such protection to the defendant

¹¹⁹ See *id.* at 588–89.

¹²⁰ TAYLOR, FINAL REPORT, *supra* note 114, at 103.

¹²¹ Jackson, Prosecutor's Address, *supra* note 68, at 101.

that it might be said that any trial that includes them is a fair one. Such procedures would include:

- Notice to the defendants of the charges against them, and adequate opportunity before trial to prepare a defense to the charges.
- The assistance of counsel.
- The right to be present at the trial, and to have it conducted in one's own language or with full translation.
- A presumption of innocence, and the burden of proving guilt on the prosecution, with the defendant to be acquitted if guilt is not clearly proven ("beyond a reasonable doubt" or some comparable standard).
- A verdict rendered by a neutral and objective judge or jury, based only on the evidence properly brought before the court.
- The right to confront witnesses for the prosecution, and to cross-examine them.
- The right to call witnesses or introduce other evidence on one's own behalf.
- Trial open to the public and the press.
- The right not to be a witness against one's self, but to testify on one's own behalf if desired.
- The right to an appeal of the judgment.

Measured against these ten criteria, the IMT was plainly a "fair" one. The Charter safeguarded all of the protections save the right to appeal. The defendants were given notice of the charges through the indictment, thirty days before the trial began, and they had German counsel of their choosing, many of whom were high caliber. The prosecution had the burden of proof and the judges—with the likely exception of the two Soviet judges, whose system did not acknowledge an independent judiciary, and who dissented from all acquittals—were in every objective sense neutral, basing their decisions of guilt or innocence on the evidence and the law as defined by the Charter. The Tribunal allowed the defendants to testify or not as they chose, to call witnesses, and to introduce documentary evidence.¹²²

¹²² One noteworthy event in the trial illustrates the interplay of several of these protections. Admiral Doenitz was charged with war crimes for having conducted unrestricted submarine warfare, including disregard of the provisions of a 1936 treaty requiring submarines to give notice to merchant ships that they were about to be torpedoed and to ensure the safety of passengers, crew, and papers before letting loose the torpedoes. It was a poor law—submarines are not capable of taking on survivors—and an ill-considered charge. Otto Kranzbuehler, Doenitz's very capable attorney, succeeded in obtaining an affidavit

It is impossible to read the lengthy opinion of the judges and not conclude that they diligently and responsibly weighed the evidence against the law and reached careful decisions on each count. One can of course quarrel with some of the individual verdicts, but if the fairness of the trial is to be judged by the care and restraint in the judgment itself, the Tribunal comes out well. The judges rejected the prosecution's assumption that conspiracy applied to all counts; it strongly curbed the case against the organizations; it acquitted a majority of the defendants on at least one count and set three of them free altogether. Although the Court condemned the Nazis' deeds in the strongest language, the judgments themselves were measured and always anchored to the evidence.

For some, the cloud of suspicion lingering over the trial has not been dispelled because the crimes of which the defendants stood charged were to some extent reflected in the Allies' own conduct—the internment of Japanese-Americans in the United States, the destruction of cities by Allied bombing raids, and the massacre of Polish officers by Soviets at Katyn Forest in Poland in 1942 (a charge which, incredibly, the Soviets pressed to have included in the indictment as having been done by Germans). While it is true that the Allies' conduct was not, at all times and in every respect, above reproach, there was, literally, a world of difference between Germany's aggressive conquests and devastating persecution and death, and the Allies' response. The purpose of the trial, after all, was to judge the Nazis, not the Allies, and the Allies did not forfeit their moral authority because they had sometimes acted unwisely or excessively in responding to the Nazi threat. By that time, this was also the consensus of the world community: the General Assembly of the U.N., a few weeks after the IMT's judgment, unanimously affirmed the “principles of international law recognized by the Charter of the Nuremberg Tribunal and the judgment of the Tribunal.”¹²³

from Admiral Chester Nimitz, commander of U.S. naval forces in the Pacific, stating that U.S. submarines had engaged in unrestricted submarine warfare as well. Based on that affidavit, the Tribunal absolved Doenitz of the charge. Although perhaps atypical, it is one example of how the protections of due process were extended in fact, not just in theory. TAYLOR, *supra* note 61, at 399–409. As Taylor points out, the defense tactic had to do with the definition of “merchant ship,” and thus it was not, at least formally, an argument that Doenitz could not be convicted because the U.S. was guilty too. Nevertheless, it was close. “[I]t was as clear as clear could be,” wrote Taylor, “that if Doenitz and Raeder deserved to hang for sinking ships without warning, so did Nimitz.” *Id.* at 409. The Tribunal sentenced Doenitz to ten years, the lightest sentence of any defendant.

¹²³ G.A. Res. 95 (I), at 188, U.N. Doc. A/64/Add. 1 (Dec. 11, 1946).

CONCLUSION

The trial at Nuremberg would not have taken place without the determination of the United States and its Allies to make it happen. It was conceived and shaped by months of internal debate in Washington and a long summer of negotiation in London that gave birth to the Charter, which produced the trial and gave the law to the judges. From that process, political in its conception and juridical in its execution, came a renovation of international law that has defined human rights, and even created human rights law. Individual responsibility for violations of human rights, international concern with a government's treatment of its own citizens, and accountability through a judicial process that gives the defendants important rights and places the final decision in the hands of judges and not military commanders or even presidents, are all, now, fundamental principles of international law and politics. Nuremberg made them so.