



Beth A. Griech-Polelle (ed.)

# The Nuremberg War Crimes Trial and its Policy Consequences Today

2<sup>nd</sup>, revised and extended edition



Nomos



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## Preface: The Spirit of Nuremberg—Idealism

*Henry T. King, Jr.*

Harold Nickelson, a British journalist, came to Nuremberg to have a look at the proceedings before the International Military Tribunal. Later he wrote: “[I]n the courtroom at Nuremberg something more important was happening than the trial of a few captured prisoners. The inhuman was being confronted with the humane, ruthlessness with equity, lawlessness with patient justice, and barbarism with civilization.” In a few words Nickelson captured the idealism that gave Nuremberg its forward thrust. Under the leadership of Robert Jackson we had the vision of a better world, and we moved through Nuremberg to achieve it.

It wasn’t easy, because there were those, including Winston Churchill and Joseph Stalin, who wanted to avoid a trial and expedite matters through summary executions. Such a procedure would not have been a benchmark for a better world. Summary execution would have meant that the world stood still morally and that its leaders had not tried to build a better future for all of mankind. But a public trial held significant risks. Germany had surrendered unconditionally, but there was a fear that the defendants could use the trials to incite violence against the victorious powers.

There was also a big element of personal risk for those such as myself who participated in Nuremberg. I gave up a secure legal position on Wall Street to participate in an undertaking whose outcome and impact on the future were unknown. The American public did not seem ready for Nuremberg. Isolationists and those just tired of the war saw it as prolonging U.S. involvement. There were, in fact, many who attempted to dissuade me from going to Nuremberg because “You will lose your place in life on the avenue of success.” The question each of us had to ask was: ‘Are those risks greater than the need to stand up against Nazi atrocities and the possibility that they would be repeated?’ Our answer was, and still is, No!

Let’s take a look at how Nuremberg became a reality. As World War II was drawing to a close, the Allied leaders needed to settle the question of what to do with the former leaders of Nazi Germany, most of whom were in the custody of the United States. As I indicated previously, two important people favored summary execution but—on the advice of his Secre-

tary of War, Henry L. Stimson—President Franklin Roosevelt leaned strongly toward a trial until his unanticipated death on April 12, 1945. The very next day, April 13, 1945, Justice Robert H. Jackson of the United States Supreme Court gave a speech before the annual meeting of the American Society of International Law in which he advocated a trial—a fair trial. In his address Jackson indicated that he wanted no part of a “show” trial designed only to convict. Convictions, he said, should be based solely on fully supported evidence. If the evidence was not there to support a conviction, the individual should be acquitted.

Jackson’s observations on a prospective trial of Nazi war criminals were acknowledged by the White House on May 2, 1945, when President Truman appointed him as his plenipotentiary in planning with the Allies for the trial. On June 6, 1945, Jackson reported back to the President, outlining his plans for the substantive aspects of the trial, including the charges he felt should be the basis for it. The first crime was aggressive war, which was styled as crimes against peace. Jackson felt that this was a fundamental crime and consisted of planning, preparation, and waging wars of aggression and wars in violation of international treaties. The second charge recommended by Jackson was war crimes, that is, crimes against civilians and prisoners of war in violation of the laws of war. This was based on the Hague and the Geneva Conventions governing conduct of warfare, which most nations of the world adhered to.

The third charge was crimes against humanity, which dealt with multiple types of assault on civilians, particularly including murder and persecution of individuals on grounds of race, religion, or national origin. This was indeed a sweeping charge designed to cover all assaults on civilians not considered war crimes. Hitler was once asked by his generals what the world would think if they killed every man, woman and child in Poland. His response was, “Who remembers the Armenians?” referring to the Turkish army’s genocide of 1.5 million Armenians beginning in 1915. The crimes against humanity charge gave notice that the world would no longer turn a blind eye to crimes against civilians just because they were committed by a sovereign state.

Jackson also advocated a conspiracy charge to cover those who conspired to commit the foregoing crimes, recognizing that these atrocities did not happen in a vacuum. Those most responsible often did not get their own hands dirty, but that should not prevent their being held accountable. By stressing the treaties and customary international law the Nazis violated, he preempted the defense that Nuremberg was applying *ex post facto* laws. This accomplished two things. It helped codify existing international law, laying the groundwork for modern prosecutions in *ad hoc*

tribunals and the International Criminal Court (ICC). But more important to those of us at Nuremberg, it reinforced Jackson's vision of a fair trial, not victor's justice.

In his report to President Truman, Jackson also advocated the elimination of two prospective defenses by the Nazi war criminals, namely sovereign immunity and superior orders. He felt that if these two defenses were allowed in combination, then no one could be convicted because no one could be held responsible. Regarding the sovereign immunity defense, Jackson thought there should be the fullest responsibility where authority was highest. No longer, he felt, should those who exercise authority in the name of the nation escape responsibility for their deeds; he recommended that they be called to full account. Regarding the superior orders defense, he felt that the Nazi leaders who would be subject to trial should not be able to hide behind the defense that they were just obeying their superiors; he felt that those who committed criminal acts should be called to account and punished for their actions. Jackson exercised great foresight in eliminating this defense, because in Nazi Germany, an absolute dictatorship, most important orders were issued in Hitler's name, and Hitler was nowhere to be found, having, as we later determined, committed suicide in his Berlin bunker on April 30, 1945.

The Allies met in London in the early summer of 1945 to discuss Jackson's draft of a proposed procedure for the trials. Neither the British nor the French requested substantive changes, although the French disliked the conspiracy charge because they felt that conspiracy, to the extent it existed, merged with the substantive crime itself. With the USSR it was a different story. Their representatives argued that the aggressive war count should apply only to the Nazis' actions, because they felt that the generic approach could be extended to cover some of their own activities. For the most part Jackson held the line on this one. The compromise reached in the London Agreement and Nuremberg Charter called only for the prosecution of the Axis powers' war criminals, but the definitions were stated in generic terms so as to be universally applicable in the future.

Another issue debated in London was the presumption of guilt or innocence. The Soviet representatives wanted a presumption of guilt with regard to the defendants, while Jackson wanted a presumption of innocence, which would put the burden on the prosecutor to prove the defendants' guilt and give each defendant the benefit of the doubt, elements that are now widely considered essential for a fair trial. Here again Jackson prevailed, and his foresight on this issue gave much increased credibility to the results of the trials.

The next issue faced was the location of the trial. The USSR representatives wanted it to be held in Berlin. Justice Jackson argued for Nuremberg, which had the largest undamaged courthouse in Germany. Moreover, Nuremberg was of great symbolic significance, because it was the situs of the Nazi party headquarters and of the huge Nazi party rallies where Hitler had proclaimed his challenges to the world. Nuremberg symbolized Nazism at its zenith, and it was important to correct the record as to the true implications of Nazism, which were, indeed, criminal.

The next issue was the selection of the prospective defendants, most of whom were in U.S. custody. Jackson felt that precedence should be given to the leaders of each walk of German life, military or diplomatic, police or industrialist. Here he again prevailed, and it was he, working with the other Allies, who targeted the individuals to be tried at Nuremberg: Joachim von Ribbentrop, the Nazi Minister of Foreign Affairs—found guilty on all four counts; Reichsmarschall Herman Göring, Commander of the Luftwaffe—guilty on all four counts; Gustav Krupp von Bohlen und Halbach, chairman of the Association of German Industrialists and a major arms manufacturer who used slave labor from occupied countries and concentration camps—indicted on all four counts; Julius Streicher, a publisher who used his newspaper and children's books to incite anti-Semitism—convicted of crimes against humanity.

Jackson also thought that the defendants should be well-represented, and he arranged for the Allied Control Commission to assume the costs of defense counsels and also for such counsel to be largely of the defendants' own choosing. With regard to presenting the case against the defendants at Nuremberg, Jackson felt that, as far as the U.S. prosecution was concerned, the evidence against the Nazis would basically convict themselves and the result would have greater long-term credibility. The outcome of all these negotiations was the London Charter of August 8, 1945, which provided the basis for the trials.

Nuremberg officials began on November 20, 1945, but the real opening was on November 21, when Justice Jackson delivered the opening statement for the United States of America, setting forth what Nuremberg was all about. Some high points are worthy of particular note:

First, Jackson stated: "The complaining party at the bar here today is civilization." By this he meant that the trial was to make a break with the barbarism of the past—barbarism on so great a scale that it had cost 50 million lives in World War II and reached new limits of degradation never before experienced in history.

Second, Jackson called the trial "one of the most significant tributes ever paid by power to reason." He meant that reason was now to be the order



of the day, and that the guilt of the defendants would be determined through the use of reason in a fair trial. Summary execution of the defendants by the Allied powers based on their military dominance was not to be permitted. The force of law was, indeed, to replace the law of force.

Third, Jackson said, “As we pass a poison chalice to the lips of these defendants, we pass it to our lips as well,” meaning that the trial was to represent equity and that the Allies themselves who brought the charges against the Nazi defendants were to be governed in their future behavior by the standards established at Nuremberg. He felt that if Nuremberg was to have lasting meaning, the principles established there should comprise benchmarks for the behavior of all peoples of the world then and in the future—that, indeed, they should have universal application in the interests of fairness and equity.

In sum, what Jackson wished to convey through his opening statement was that Nuremberg was to mark the beginning of a new era in human history, and indeed, he was the architect of Nuremberg and this was his vision, which is as valid today as it was 60 years ago.

Jackson’s foresight in focusing on documents from the Nazis’ own files as proof of their guilt bore fruit in the judgment of the International Military Tribunal, which said in effect that the Nazis had convicted themselves with the evidence submitted. The judgment was equitable in that three defendants were acquitted because the evidence was not there to support their convictions. The fears people had before the trials had not been realized. Granting the defendants a fair trial and the right to publicly defend their actions had not resulted in destabilizing the Allies’ occupation and rebuilding-efforts. Hermann Göring is widely seen as having gotten the better of Jackson during the cross-examination, and yet he was still convicted—condemned not by clever words, but by the weight of the evidence.

I came home from Nuremberg filled with the spirit of Nuremberg, but the public was not enthusiastic and the bar refused to recognize Nuremberg for what it was—a complete break with the past. Despite having done well at Yale Law School, which then as now ranks among the best, I had trouble getting a job when I returned, partly because of Senator Robert Taft of Ohio and others of his ilk who excoriated Nuremberg. In addition, the Cold War had intervened, and the U.S. and the USSR were engaged in deep conflict on the issues of the day.

With the ending of the Cold War in the late 1980s, Nuremberg has to a considerable extent achieved the recognition it has always deserved. The Nuremberg principles are being followed in UN-sponsored and other tribunals, and an international court has been formed and charged with the enforcement of what was substantively established at Nuremberg. In a

number of areas of the world a new regime of international human rights is the order of the day.

Much progress has been made, but today the United States, which through Jackson created Nuremberg, is fighting a rearguard action against the advances of the Nuremberg principles, which Jackson believed should be applied in judging the conduct of all nations and leaders. The U.S. has turned its back on the International Criminal Court, which would institutionalize Nuremberg, and, by holding prisoners without trial and subjecting them to torture, has disregarded the Geneva Conventions of 1949 governing the treatment of prisoners taken in the course of hostilities. Progress is using our resources to create a better, more just world, not manipulating language and digging for loopholes to lower the minimum standards of decency.

The fears the world faces today are not new. Even courageous people such as Winston Churchill feared that providing Nazi leaders a fair and public trial would undermine the fragile security brought about by the Allied victory. Nuremberg faced those fears and proved that the rule of law is not such a fragile thing, that it strengthens democracies even when applied to those who would deny it to others. What is needed now is a revival of the spirit of Nuremberg. A better and more peaceful world based on justice is within our grasp; with the major powers at peace and no longer on the brink of war, we have a golden opportunity to build a more secure future for generations to come. This was in effect our goal at Nuremberg, and at considerable self-sacrifice. I hope that there are those among the current generation who will take it upon themselves to follow in our footsteps.

So—let idealism and vision be the order of the day. Let us use conferences such as this as a means to rekindle the enthusiasm which brought about Nuremberg. We can, indeed, achieve a better world if we are willing.

## Table of Contents

Introduction: The Legacy of Nuremberg <i>Beth A. Griech-Polelle</i>	13
--	----

### ***Section I: The Immediate Postwar Trials and Their Short-Term Effects***

On the Way to Nuremberg: The Soviets Commission for the Investigation of Nazi War Crimes <i>Marina Yu. Sorokina</i>	23
--	----

German Participation in the Nuremberg Trials and Its Implications for Today <i>Christoph J. M. Safferling</i>	41
--	----

The Appropriation by German Courts in French-occupied Baden of Control Council Law No. 10's Definition of Crimes against Humanity in the Prosecution of Nazi-era Defendants, 1946–1951 <i>Michael S. Bryant</i>	55
--	----

“Violation of Human Dignity” and Other Crimes Against Humanity in Austrian War Crimes Trials <i>Winfried R. Garscha</i>	71
--	----

Brother, Black Sheep, or Bastard? Situating the Tokyo War Crimes Trial in the Nuremberg Legacy, 1946–1948 <i>James Burnham Sedgwick</i>	83
--	----

The Nuremberg Trials and American Jurisprudence: The Decline of Legal Realism, the Revival of Natural Law, and the Development of Legal Process Theory <i>Rodger D. Citron</i>	103
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*Table of Contents*

***Section II: The Present-Day Impact of Nuremberg on International Law***

The International Criminal Court and the Ethics of Selective Justice <i>Aaron Fichtelberg</i>	135
The United Nations War Crimes Commission: A Model for Complementarity today? <i>Dan Plesch and Leah Owen</i>	159
In Search of Imperfect Justice: Genocidal Rape and the Legacy of Nuremberg and Tokyo <i>Tazreena Sajjad</i>	193
The Documentary Record of Nuremberg in the Twenty-First Century <i>Judith Haran</i>	239
United States Military Law of War Doctrine: Making the International Criminal Court Irrelevant to the Ground Combat Forces of the United States in the Early Twenty-First Century <i>Rex A. Childers</i>	259
Subject Index	271
Index of Persons	273