



5-2017

# A Court Pure and Unsullied: Justice in the Justice Trial at Nuremberg

Stephen J. Sfekas

*Circuit Court for Baltimore City, Maryland*

Follow this and additional works at: <http://scholarworks.law.ubalt.edu/ublr>

 Part of the [Fourteenth Amendment Commons](#), [International Law Commons](#), and the [Legal History Commons](#)

### Recommended Citation

Sfekas, Stephen J. (2017) "A Court Pure and Unsullied: Justice in the Justice Trial at Nuremberg," *University of Baltimore Law Review*: Vol. 46 : Iss. 3 , Article 4.

Available at: <http://scholarworks.law.ubalt.edu/ublr/vol46/iss3/4>

This Peer Reviewed Article is brought to you for free and open access by ScholarWorks@University of Baltimore School of Law. It has been accepted for inclusion in University of Baltimore Law Review by an authorized editor of ScholarWorks@University of Baltimore School of Law. For more information, please contact [snolan@ubalt.edu](mailto:snolan@ubalt.edu).

## A COURT PURE AND UNSULLIED: JUSTICE IN THE JUSTICE TRIAL AT NUREMBERG\*

Hon. Stephen J. Sfekas\*\*

*Therefore, O Citizens, I bid ye bow  
In awe to this command, Let no man live  
Uncurbed by law nor curbed by tyranny . . . .  
Thus I ordain it now, a [ ] court  
Pure and unsullied . . . .*<sup>1</sup>

### I. INTRODUCTION

In the immediate aftermath of World War II, the common understanding was that the Nazi regime had been maintained by a combination of instruments of terror, such as the Gestapo, the SS, and concentration camps, combined with a sophisticated propaganda campaign.<sup>2</sup> Modern historiography, however, has revealed the critical importance of the judiciary, the Justice Ministry, and the legal profession to maintaining the stability of the regime.<sup>3</sup>

As an example, although the number of persons confined to concentration camps from 1933 to 1934 rose to as many as 100,000 people, most were quickly released.<sup>4</sup> The number of concentration camp inmates thereafter fell to 4,000–5,000 persons at any given time during the 1930s.<sup>5</sup> However, the number of political prisoners sentenced by the civilian courts had risen to 23,000 by the mid-

---

\* Portions of this article will be published as a chapter under the title “Taming the Furies: The Justice Trial at Nuremberg-1947” in *Advances in International Law and Jurisprudence: New Roles for the Judiciary in Upholding the Rule of Law*, coeditors Prof. Thomas Boudreau, Ph.D., and Dr. Prof. Juan Carlos Sainz-Borga, to be published by The Elias-Clark Group, 2017.

\*\* Stephen J. Sfekas is a Senior Judge of the Circuit Court for Baltimore City, Maryland. He received a BSFS from the School of Foreign Service at Georgetown University in 1968, an M.A. in history from Yale University in 1972, and a J.D. from the Georgetown University Law Center in 1973.

1. AESCHYLUS, *The Furies*, in THE ORESTEIA TRILOGY 138 (Alan Weissman ed., E.D.A. Morshead trans., Dover Thrift ed. 1996) (1909) (emphasis added).

2. RICHARD J. EVANS, THE THIRD REICH IN HISTORY AND MEMORY 100–05 (Oxford Univ. Press 2015).

3. *Id.* at 100–02.

4. *Id.* at 100.

5. *See id.*

1930s.<sup>6</sup> What is most striking about this phenomenon is that most judges and lawyers in 1933 were not in fact members of the Nazi Party, and, as the Nazi regime lasted only for twelve years (1933–1945), the great majority of the legal profession up to the very end of the regime had been trained prior to the Nazi accession to power.<sup>7</sup>

As the legal profession loomed large in the operation of the regime, it also loomed large in the post-war war crime trials at Nuremberg. Five of the twenty-two defendants in the International Military Tribunal (IMT), were lawyers, including: Ernst Kaltenbrunner, the head of the Reich Security Office (the Gestapo, the SD, and the concentration camps);<sup>8</sup> Hans Frank, general counsel to the Nazi Party, and later head of the Government General of Poland;<sup>9</sup> Arthur Seyss-Inquart, who as chancellor of Austria for a short time, signed the agreement by which Austria was annexed by Germany, and later was head of the occupation of the Netherlands;<sup>10</sup> Wilhelm Frick, who was Minister of the Interior until 1943 when he became the governor of the Protectorate of Bohemia and Moravia (now the Czech Republic), from 1943 to 1945;<sup>11</sup> and Constantin Von Neurath, Foreign Minister of Germany from 1932–1938, and governor of the Protectorate of Bohemia and Moravia from 1939 to 1943.<sup>12</sup> All five of the IMT lawyer defendants were convicted of war crimes and crimes against humanity.<sup>13</sup>

In the twelve subsequent trials conducted by American authorities at Nuremberg, under the leadership of Telford Taylor (chief of prosecution), generally referred to as the Nuremberg Military Tribunals (NMT), a large number of second level Germans were tried on a variety of charges.<sup>14</sup> The third trial, *United States v. Altstötter*,

---

6. *Id.* at 101.

7. INGO MÜLLER, *HITLER'S JUSTICE: THE COURTS OF THE THIRD REICH* 38–39 (Deborah Lucas Schneider trans., Harvard Univ. Press 1991) (1987).

8. THOMAS J. SHAW, *WORLD WAR II LAW AND LAWYERS: ISSUES, CASES, AND CHARACTERS* 420–21 (2013).

9. *Id.* at 419–20; *see also* ANN TUSA & JOHN TUSA, *THE NUREMBERG TRIAL* 495 (1983); IAN KERSHAW, *HITLER: 1936-1945: NEMESIS* 239 (2000).

10. SHAW, *supra* note 8, at 285–88.

11. *Id.* at 344.

12. *Id.* at 342; TUSA & TUSA, *supra* note 9, at 498–99.

13. SHAW, *supra* note 8, at 288, 342, 344, 420–21. *See generally* TELFORD TAYLOR, *THE ANATOMY OF THE NUREMBERG TRIALS: A PERSONAL MEMOIR* (Skyhorse Publ'g, Inc. 2013) (1993) [hereinafter TAYLOR I] (providing an excellent account of the IMT); TUSA & TUSA, *supra* note 9 (providing additional accounts of the IMT).

14. KEVIN JON HELLER, *THE NUREMBERG MILITARY TRIBUNALS AND THE ORIGINS OF INTERNATIONAL CRIMINAL LAW* 1–2 (2011); TELFORD TAYLOR, *FINAL REPORT TO THE SECRETARY OF THE ARMY ON THE NUREMBERG WAR CRIMES TRIALS UNDER CONTROL COUNCIL LAW NO. 10* (1949) [hereinafter TAYLOR II]. Heller and Taylor provide the best overall treatment of the twelve Nuremberg Military Tribunals. Taylor's work is

which is the subject of this article, has come to be known as the “Justice Trial” because the sixteen original defendants were prominent judges, prosecutors, and Justice Ministry officials of the Nazi regime.<sup>15</sup>

Telford Taylor, who would serve as chief of prosecution for all of the trials and who would deliver the opening statement in the Justice Trial, commented that this trial would be of particular interest to lawyers and judges because of the anomaly that judges and prosecutors of one country were trying judges and prosecutors from another country for crimes committed within the judicial process.<sup>16</sup> Indeed, German judges and justice officials were tried on German soil, in many cases for crimes against German citizens and for acts of injustice apparently sanctioned under German law.<sup>17</sup>

The trial permits an exploration of the problem of what constitutes justice from the perspectives of both the Americans conducting the

---

an excellent, near contemporary account of the trials by the chief prosecutor in the NMT trials. The twelve trials produced 132,855 pages of transcript, from 1,300 witnesses and 30,000 documents. The judgments in the twelve trials run to 3,828 pages. HELLER, *supra* note 14, at 3. Taylor felt strongly that the record of the cases should be readily available to document the proceedings of the court, however, the sheer volume of material made it impracticable to publish the entirety of the trials. Therefore, after completion of the trials, his staff combed through the transcript to put together an edited version of the most important components of the transcript, key documents, and the final opinion. *See generally* 3 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10 (1951) [hereinafter JUSTICE TRANSCRIPT] (consisting of 1,250 pages excerpted from the record of the Justice Trial).

15. JUSTICE TRANSCRIPT, *supra* note 14, at 3. Early on, Taylor decided that each trial would focus on particular groups from elite German society, rather than on particular events or subject matters. Thus, Trial I was the “Doctor’s Trial,” which involved the medical officials who had authorized or undertaken medical experiments of doubtful scientific value, or engaged in involuntary euthanasia of so-called undesirable populations. In addition, there were trials of high ranking German officers (“High Command Trial”), German commanders in the Balkans (“Hostages Trial”), industrial leaders (“Krupp Trial,” “I.G. Farben Trial,” and “Flick Trial”), the senior professional civil service (“Ministries Trial”), special police units (“Einsatzgruppen Trial”), and of course, the Justice Trial of German judges and justice officials. *See generally* TAYLOR II, *supra* note 14, at 159–217 (discussing the organization of grouped trials).

16. TAYLOR II, *supra* note 14, at 110–12.

17. *See id.* at 169. Unfortunately, this trial would have been mostly forgotten if not for the film *Judgment at Nuremberg*, which was based largely on this trial (indeed, the prosecution’s opening statement in the movie is verbatim from the first several pages of Taylor’s opening), and, but for the recent revival of interest in the Nuremberg trials after the creation of war crime proceedings in the aftermath of the conflicts in the former Yugoslavia, Rwanda, Cambodia, and the creation of the International Criminal Court.

trial and the Germans who were on trial in their capacities as judges or justice officials. Indeed, this trial can best be interpreted as an attempt to establish universal standards of justice: one that would both govern the way the trial was conducted as well as one to which the German judicial officials would be held accountable.

The trial poses three questions. First, was the trial procedurally fair? As the court's opinion implicitly set forth the minimum criteria for a fair trial, the trial itself establishes the test for the fairness of its own processes. This question is of particular interest in that the IMT and NMT trials took place before the landmark equal protection, due process, and criminal law decisions of the United States Supreme Court. Second, was the trial substantively fair? That is, were the defendants charged and convicted of crimes recognized as such under international law? Third, regardless of legal culpability, was justice done? Of particular interest are the arguments in mitigation raised by the defendants and the subsequent impact of the NMT trials.

The thesis of this article is that the NMT trials in general and the Justice Trial in particular were procedurally and substantively fair. Indeed, the German defendants were in some cases afforded procedural protections that would not be constitutionally required under American law until the criminal law decisions of the Supreme Court almost two decades later.<sup>18</sup> Similarly, the substantive charges were justified under international law despite the novelty of the charge of crimes against humanity.<sup>19</sup> Finally, despite the early termination of sentences, justice was done.<sup>20</sup>

Part II will briefly describe the evolution of the German legal system during the pre-war Nazi years.<sup>21</sup> Part III will describe the development of the international war crimes program under the London Charter, Allied Control Council Law Number 10 (ACC 10), and Office of Military Government-Germany, United States Ordinance No. 7 (OMGUS 7).<sup>22</sup> Part IV will recount the Justice Trial and its aftermath.<sup>23</sup> Part V will address the three questions posed in this introduction.<sup>24</sup>

---

18. *See infra* Sections V.A–B.

19. *See infra* Section V.B.

20. *See infra* Part V.C.

21. *See infra* Part II.

22. *See infra* Part III.

23. *See infra* Part IV.

24. *See infra* Part V.

## II. THE EVOLUTION OF THE GERMAN LEGAL SYSTEM IN THE PRE-WAR NAZI YEARS

*I sit in one of the dives  
On Fifty-Second Street  
Uncertain and afraid  
As the clever hopes expire  
Of a low dishonest decade . . . .*<sup>25</sup>

Before the Nazi accession to power in 1933, Germany had a well-established, internationally respected legal system. It had the rule of law, enforcement of contracts, protection of rights, and other features of western European legal systems of the time.<sup>26</sup> However, certain features of the German legal system left it vulnerable to the kinds of changes that took place in the Nazi era.

The system had grown up in the authoritarian and positivist traditions of the German Empire. The judiciary never came to terms with the fall of the German Empire and the establishment of the Weimar Republic and democratic norms after World War I.<sup>27</sup> As an example, German judges (recruited from the judicial track at German law schools), had to serve an initial unpaid and untenured probationary period of several years before reaching full judicial status.<sup>28</sup> Therefore, judicial candidates had to have independent means of financial support during the probationary period. The lack of tenure also meant that politically or ethnically marginal persons could be weeded out before they could finish the probationary period.<sup>29</sup> As a result, there were very few left-wing or Jewish judges, and left-wing agitators consistently received longer prison terms than conservative agitators during the 1920s. As an example, Hitler had to serve only a short sentence in minimum security imprisonment after his abortive coup d'état in 1923.<sup>30</sup> By contrast, the leaders of the People's Republic of Bavaria, an abortive communist coup d'état, received lengthy sentences.<sup>31</sup>

Furthermore, similar to other members of the German middle class, the judiciary lost savings during the hyperinflation of the early years of the Republic and lost income and status during the period of

---

25. W.H. AUDEN, *September 1, 1939*, in ANOTHER TIME 98, 98 (1940) (emphasis added).

26. See MÜLLER, *supra* note 7, at XV.

27. *See id.* at 10.

28. *Id.* at 6.

29. *Id.* at 6–7.

30. *Id.* at 16.

31. *Id.* at 11–12.

budgetary austerity, which occurred at the beginning of the Great Depression.<sup>32</sup> The judiciary was also inclined to blame the Republic for the alleged “stab in the back,” which had led to an armistice while German armies still occupied France and what was perceived as a humiliating Versailles Treaty ending World War I.<sup>33</sup> The judiciary was primed for the accession to power of an authoritarian, nationalist alternative to the democratic parties which controlled the Weimar Republic.<sup>34</sup>

Additionally, the Nazis came to power within the letter, although not the spirit, of the law. Hitler was invited to form a government on January 30, 1933.<sup>35</sup> He immediately called for new elections to secure a majority.<sup>36</sup> On February 28, 1933, a fire of suspicious origins broke out in the Reichstag building.<sup>37</sup> Hitler immediately blamed the Communist Party for the fire, claiming that it was a first step towards an overthrow of the government.<sup>38</sup> He then invoked Article 48 of the Weimar Constitution, which permitted the President to suspend civil liberties when faced with an internal crisis.<sup>39</sup>

After several weeks of terror, the Nazi Party paramilitary organization, the *Sturmabteilung* (literally “Stormtroopers,” frequently referred to as the SA), with the acquiescence of the government, assaulted opposing politicians, destroyed campaign offices and opposition newspapers, and intimidated supporters of opposing parties.<sup>40</sup> Additionally, the police arrested leaders of the Communist Party and harassed the leaders of the Social Democratic and Catholic Center Parties (the latter two being the only parties with

---

32. Stephen J. Sfekas, *The Enabler, the True Believer, the Fanatic: German Justice in the Third Reich*, 26 J. JURIS. 189, 194 (2015).

33. *Id.*

34. See MÜLLER, *supra* note 7, at 12; Sfekas, *supra* note 32, at 195.

35. Sfekas, *supra* note 32, at 195.

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.* Weimar Constitution, Article 48, section 2 reads:

If the public safety and order in the German Reich are seriously disturbed or endangered, the national President may take the measures necessary for the restoration of public safety and order, and may intervene if necessary with the assistance of the armed forces. For this purpose he may temporarily set aside in whole or in part, the fundamental rights established in Articles 114, 115, 117, 118, 123, 124, and 153.

Weimar [Constitution] Aug. 11, 1919, ch. 3, art. 48 (Ger.). The latter articles were the German equivalent of the First, Fourth, and Fifth Amendments of the United States Constitution. See Sfekas, *supra* note 32, at 195.

40. Sfekas, *supra* note 32, at 195–96.

a genuine commitment to democracy).<sup>41</sup> Despite this, the Nazis were able to get only forty-three percent of the vote.<sup>42</sup> However, by combining their newly elected deputies with those of other right-wing parties, the Nazis acquired a working majority of the Reichstag.<sup>43</sup> By intimidating the Center Party and excluding the Communist deputies from the Reichstag, Hitler achieved the two-thirds majority needed to pass the Enabling Act, which amended the Weimar Constitution to permit Hitler to rule by decree.<sup>44</sup> Thus, the dictatorship was established.<sup>45</sup>

The first decree passed after the Enabling Act barred Jews and members of the left-wing parties from the professional civil service and also disbarred all Jewish lawyers, with some exceptions.<sup>46</sup> The remaining non-Jewish lawyers and judges were required to swear a personal oath to Hitler.<sup>47</sup> There is no evidence of resistance or protest from the remaining judges or lawyers to any of these developments.<sup>48</sup>

During the 1930s, “race” in the German sense<sup>49</sup> became a dominant legal category, especially after the passage of the so-called Nuremberg racial laws.<sup>50</sup> Jews were increasingly barred from the protections of the law and access to the courts, and were treated much more harshly in the criminal law.<sup>51</sup>

Additionally, a decree in the mid-1930s permitted judges to rule on cases by analogy.<sup>52</sup> If a judge felt that the specified punishment in a

41. *Id.* at 196.

42. IAN KERSHAW, *HITLER: 1889-1936: HUBRIS* 461 (1998).

43. *See id.* at 461–62; Sfekas, *supra* note 32, at 195–96.

44. *See* KERSHAW, *supra* note 42, at 438–39, 460–62; JUSTICE TRANSCRIPT, *supra* note 14, at 163.

45. KERSHAW, *supra* note 42, at 436.

46. *Id.* at 474–75; JUSTICE TRANSCRIPT, *supra* note 14, at 163.

47. MÜLLER, *supra* note 7, at 36–38.

48. *Id.* at 37.

49. Americans typically think of race as being a matter of skin color. German race theory treated what Americans would view as ethnic groups as being separate races. Thus, the Germans considered Jews and Poles to be of separate races from non-Jewish Germans, whereas Americans would not do so.

50. JUSTICE TRANSCRIPT, *supra* note 14, at 180–81, 626–27.

51. *See id.* at 1082–83, 1112–14.

52. The Extracts from the Law of 28 June 1935 which amended the Criminal (Penal) Code provided:

Article 2

Whoever commits an act which the law declares as punishable or which deserves punishment according to the fundamental idea of a penal law or the sound sentiment of the people, shall be punished. If no specific penal law can be directly



criminal law was insufficiently harsh, he could analogize the offense to a more serious crime and impose a harsher penalty. If the judge felt that an act did not violate any criminal law, but nevertheless objected to the defendant's act, he could analogize the act to a prohibited act and find the defendant guilty anyway. Under law by analogy, no one could ever be certain whether any act was illegal or what the penalty would be for an illegal act.<sup>53</sup>

German law also developed the notion of the nullity plea and the extraordinary plea.<sup>54</sup> In the case of the nullity plea, if a prosecutor felt that a penalty was insufficient, he could request that the Justice Ministry nullify the penalty and make it harsher.<sup>55</sup> In the case of the extraordinary plea, if the prosecutor did not agree with an acquittal, he could ask that the acquittal be set aside and a conviction entered.<sup>56</sup>

Early in the regime, two new courts were created.<sup>57</sup> The Special Courts were created at the regional level to hear cases involving internal subversion.<sup>58</sup> The People's Courts were created at the national level to deal with external subversion.<sup>59</sup> The Nazis had complete control over personnel of these new courts, and these courts were largely staffed with committed Nazis.<sup>60</sup> Obviously, the jurisdiction of the two courts overlapped with one another, as well as

---

applied to the act, it shall be punished according to the law whose underlying principle can be most readily applied to the act.

Article 170a

If an act deserves punishment according to the sound sentiment of the people, but is not declared punishable in the law, the prosecutor will examine whether the underlying principle of a penal law can be applied to the act and whether justice can be helped to triumph by analogous application of that penal law.

Article 267a

If the trial shows that the defendant has committed an act which deserves punishment according to the sound sentiment of the people, but is not declared punishable by the law, the court will examine whether the underlying principle of a penal law applies to the act and whether justice can be helped to triumph by analogous application of that penal law.

*Id.* at 176–78.

53. *See id.*

54. Sfekas, *supra* note 32, at 200.

55. *Id.* at 200, 214.

56. *Id.* at 200–01, 214.

57. *Id.* at 198.

58. *Id.* at 199.

59. *Id.*

60. *Id.*

the jurisdiction of the ordinary criminal courts. Cases began to migrate from the ordinary criminal courts to the Special and People's Courts, and ultimately, from the Special Courts to the more radical People's court.<sup>61</sup> Virtually every judge and prosecutor charged in the Justice Trial was associated with these two courts.

By the time the war began, the German legal system had become a prime buttress of the Nazi regime. Under the pressures of the war, and particularly as the war began to deteriorate for the Germans, the courts and the Justice Ministry became increasingly radicalized. Law by analogy was used to impose draconian punishments for offenses, and the Justice Ministry imposed new policies, such as the Night and Fog program and the Law Against Poles and Jews, to intimidate and persecute the populations of newly occupied territories.<sup>62</sup> Although in absolute numbers the total persons killed or imprisoned by the civilian judiciary was dwarfed by the total persons murdered by the SS, Gestapo, and extermination camps, the German legal system made its substantial contribution to the horrors of the Nazi regime.<sup>63</sup>

### III. THE LONDON CHARTER, ALLIED CONTROL COUNCIL LAW NO. 10, AND OFFICE OF MILITARY GOVERNMENT-GERMANY, U.S. NO. 7

*You must put no man on trial before anything that is called a court . . . under the forms of judicial proceedings if you are not willing to see him freed if not proven guilty.*<sup>64</sup>

#### A. *The London Charter*

In 1942, the Governments-in-Exile of nine German occupied nations meeting at St. James Palace in London issued a call for the punishment of persons committing war crimes in their respective countries by means of "organized justice."<sup>65</sup> This Declaration of St. James received little notice, but was the first call for a trial of war

---

61. MÜLLER, *supra* note 7, at 51–53; *see also* H.W. KOCH, IN THE NAME OF THE VOLK: POLITICAL JUSTICE IN HITLER'S GERMANY 51–55 (1989).

62. Sfekas, *supra* note 32, at 200, 204–11.

63. The Ministry of Justice of the Federal Republic of Germany estimated that civilian courts during the Third Reich ordered 32,000 judicial executions, the majority of which occurred during the war. Koch estimated a total of 16,560. *Id.* at 218–19.

64. Robert H. Jackson, Assoc. Justice of the Supreme Court of the U.S., Address at the American Society of International Law Annual Meeting: The Rule of Law Among Nations 15–16 (Apr. 13, 1945), [https://www.roberthjackson.org/wpcontent/uploads/2015/01/Rule\\_of\\_Law\\_Among\\_Nations.pdf](https://www.roberthjackson.org/wpcontent/uploads/2015/01/Rule_of_Law_Among_Nations.pdf).

65. TAYLOR I, *supra* note 13, at 25.

criminals rather than summary justice.<sup>66</sup> Subsequently, the Western Allies organized the United Nations War Crimes Commission to investigate war crimes including the “bestial policy of extermination of the Jewish people in Europe.”<sup>67</sup>

In November 1943, the foreign ministers of Great Britain, the United States, and the Soviet Union met and issued the Moscow Declaration.<sup>68</sup> This declaration provided that Italian Fascist chiefs and generals suspected of war crimes would be “arrested and handed over to justice,” and that Austria would be treated as a victim nation and not as a participant in German aggression.<sup>69</sup> With respect to German war crimes there were two provisions of note. The Declaration provided that:

At the time of the granting of any armistice to any government which may be set up in Germany, those German officers and men and members of the Nazi party who have been responsible for, or have taken a consenting part in the above 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 the joint decision of the Governments of the Allies.<sup>70</sup>

This Declaration created the basic framework for the war crimes trials. First, crimes committed by identifiable Germans in occupied

---

66. *See id.*

67. *Id.* at 26. The term “United Nations” became the preferred term describing the Allied Powers during the war. The Commission was not an arm of the modern day United Nations Organization which was created after the war. This Commission would be superseded by the IMT and NMT trials and various other national tribunals and did not play a role in the investigation of war crimes. However, under the leadership of a notable Australian jurist, Lord Robert Anderson Wright of Durley, the Commission collected and published law reports on all of the major international and national war crimes trials after the war, including the thirteen Nuremberg trials. Lord Wright wrote excellent analyses of the war crimes trials including an overview of all the trials in the fifteenth volume of the series. *See* 1–15 UNITED NATIONS WAR CRIMES COMM’N, LAW REPORTS OF TRIALS OF WAR CRIMINALS (1947–1949).

68. *See* STAFF OF THE COMM. & THE DEP’T OF STATE, A DECADE OF AMERICAN FOREIGN POLICY: BASIC DOCUMENTS, 1941–49, S. DOC. NO. 123, at 9 (1st Sess. 1950).

69. *Id.* at 11–13.

70. *Id.* at 13–14.

countries would be returned to these countries for trial. Second, there would be a subset of major criminals, such as Hitler himself, whose crimes affected all of Europe and whose fate would be settled by the major powers. As the war drew to a close, the question of what to do with the major criminals became acute. Among the options considered were: (1) summary execution of up to 50,000 German offenders, which was proposed by Joseph Stalin at a dinner at the Yalta Conference, perhaps jocularly (Winston Churchill strongly objected, and Franklin D. Roosevelt did not take the proposal seriously);<sup>71</sup> (2) exile of the major leaders; (3) summary execution of the leading Nazis (this would remain the favored British position until the end of the London Conference in August 1945);<sup>72</sup> (4) do nothing and let them go;<sup>73</sup> and (5) an international tribunal for the major offenders.<sup>74</sup>

The issue was crystallized for the Allies when word of the so-called Morgenthau plan leaked to the public. This proposal by the Secretary of the Treasury, Henry Morgenthau, initially endorsed by Roosevelt and Churchill, would have called for the deindustrialization of Germany and the transformation of the country into a pastoral and agricultural economy.<sup>75</sup> This proposal was heavily criticized and ultimately rejected.<sup>76</sup> It did, however, result in intensified post-war planning. Two key developments tipped the balance towards an international trial.

The first was a memorandum proposed by Colonel Murray Bernays, chief of the Special Projects Branch of the War Department, which proposed a trial of major war criminals, along with a trial of criminal organizations such as the SS.<sup>77</sup> If an organization were found to be a criminal enterprise, further proceedings could take place against former members of the organization, which could be limited to disposition because guilt would have been established by mere membership.<sup>78</sup>

---

71. TAYLOR I, *supra* note 13, at 29–30.

72. *Id.* at 29–33.

73. TUSA & TUSA, *supra* note 9, at 26.

74. TAYLOR I, *supra* note 13, at 28.

75. TUSA & TUSA, *supra* note 9, at 50–51, 60.

76. *Id.* at 60–61.

77. *See* TUSA & TUSA, *supra* note 9, at 54–55.

78. *See* COLONEL MURRAY BERNAYS, MEMORANDUM FOR JUDGE ROSENMAN 2–3 (1945). Bernays' memorandum set forth what would be viewed as a practical way to try the massive numbers of Nazi war criminals. Although the memo would convince the American government of the need for war crimes trials, Bernays himself played no role at Nuremberg.

The second key development was the appointment of Justice Robert H. Jackson by Harry Truman (who became president after the death of Roosevelt on April 12, 1945) to be the chief United States prosecutor at the war crimes trials.<sup>79</sup> Truman's appointment occurred on May 2, 1945, and was one of Truman's earliest and most inspired appointments.<sup>80</sup>

Even at this point, Justice Jackson had had an extraordinary career. He first met Franklin D. Roosevelt while Roosevelt was still Governor of New York, and Jackson followed Roosevelt to Washington after he became President.<sup>81</sup> Jackson held an increasingly significant number of government jobs, culminating in his service as Solicitor General in 1938 and U.S. Attorney General in 1940.<sup>82</sup> He was appointed to the Supreme Court in July 1941.<sup>83</sup> Most significantly was Jackson's role in *Korematsu v. United States*, which upheld the military order that resulted in the internment of loyal Japanese citizens of the United States without any semblance of due process or indication of wrongdoing. Jackson wrote an eloquent and scathing dissent denouncing the denial of due process and the use of racial and ethnic categories in the internment order.<sup>84</sup>

On April 13, 1945, shortly before his appointment, Jackson gave a speech before the American Society of International Law, in which he stated:

I am not so troubled as some seem to be over problems of jurisdiction of war criminals or of finding existing and recognized law by which standards of guilt may be determined. But all experience teaches that there are certain things you cannot do under the guise of judicial trial. Courts

---

79. See TAYLOR I, *supra* note 13, at 44–45 (stating that after Justice Jackson gave a speech on war crimes on April 13, 1945, President Truman expressed his wish to appoint Justice Jackson as the country's representative and Chief Counsel for war crimes).

80. See Douglas O. Linder, *The Nuremberg Trials: Chronology*, FAMOUS WORLD TRIALS, <http://law2.umkc.edu/faculty/PROJECTS/FTRIALS/nuremberg/NurembergChronology.html> (last visited Apr. 1, 2017).

81. See generally TAYLOR I, *supra* note 13, at 43 (discussing how Jackson met important people in New York such as Franklin Roosevelt and how subsequently Jackson went on to greater appointments such as Attorney General).

82. *Id.*

83. *Id.* Justice Jackson would be the last and possibly the only Supreme Court Justice in the twentieth century who did not attend college and never completed law school. He left Albany Law School after one year, but was able to pass the New York State Bar Exam. See Phil C. Neal, *Justice Jackson: A Law Clerk's Recollections*, 68 ALB. L. REV. 549, 549 (2004); *Solicitor General: Robert H. Jackson*, U.S. DEP'T JUST., <https://www.justice.gov/osg/bio/robert-h-jackson> (last visited Apr. 1, 2017).

84. *Korematsu v. United States*, 323 U.S. 214, 245–46 (1944) (Jackson, J., dissenting).

try cases, but cases also try courts. . . . [T]here is no reason for a judicial trial except to reach a judgment on a foundation more certain than suspicion or current rumor. . . . But, further, you must put no man on trial if you are not willing to hear everything relevant that he has to say in his defense and to make it possible for him to obtain evidence from others. . . . [Y]ou must put no man on trial under the forms of judicial proceedings if you are not willing to see him freed if not proven guilty.<sup>85</sup>

This speech, which was likely the cause of Truman's appointment of Jackson,<sup>86</sup> would be the basis of American policy. Justice Jackson would lead the United States delegates to the London Conference and would be the dominant personality at the conference.

In August 1945, representatives of the major Allied Powers—the United States, Great Britain, France, and the Soviet Union—met in London to determine what was to be done with the major Nazi war criminals.<sup>87</sup> The London Charter, which resulted from the conference, set the tone and parameters for the IMT and for the NMT trials that followed, including the Justice Trial. The London Conference dealt with three categories of issues: (1) the logistics of a trial, (2) the charges to be brought, and (3) the procedures, including rules of evidence to be used.

### 1. Logistics

The logistics issues were difficult but readily resolved. The trial would be held at the Palace of Justice in Nuremberg, Germany, primarily because Nuremberg, unlike most German cities, had an intact courthouse connected to an intact jail, with sufficient housing and office space to support the personnel associated with the trial.<sup>88</sup> Furthermore, Nuremberg was in the U.S. zone of occupation, which meant that the United States, as the wealthiest of the allied countries, would provide the support services for the trial.<sup>89</sup> Additionally,

---

85. Jackson, *supra* note 64, at 15–16.

86. John Q. Barrett, "One Good Man": *The Jacksonian Shape of Nuremberg*, in *THE NUREMBERG TRIALS: INTERNATIONAL CRIMINAL LAW SINCE 1945*, at 129, 132 (Herbert R. Reginbogin & Christoph J. M. Safferling eds., 2006).

87. See TAYLOR I, *supra* note 13, at 59.

88. *The Nuremberg Courtroom: Why Nuremberg?*, U.S. HOLOCAUST MEMORIAL MUSEUM, <https://www.ushmm.org/wlc/en/article.php?ModuleId=10007089> (last visited Apr. 1, 2017).

89. See TAYLOR I, *supra* note 13, at 61.

Nuremberg had great symbolic power as the site of the annual Nazi Party rallies and the place where the Nuremberg racial laws were announced.<sup>90</sup>

Language issues would bedevil all the proceedings, particularly the IMT, as all documents and all testimony had to be translated from the language of the original into English, French, German, and Russian, respectively. Colonel Leon Dostert of the U.S. Army and engineers at IBM solved the language problem by developing the technologies of simultaneous interpretation and creating the listening and recording technologies by which each participant could hear the trial in his or her own language by earphones.<sup>91</sup> Throughout the thirteen trials, the U.S. Army maintained a massive staff of interpreters to translate documents into the respective languages. Telford Taylor notes that, at its peak, the NMT trials required a support staff of over 1,300 persons.<sup>92</sup>

## 2. The Charges

Although the logistics issues were complex, they were not a subject of major division among the Allies. The choice of charges and trial procedures, however, caused major difficulties and took weeks of negotiation to resolve.<sup>93</sup> Jackson came to the London Conference convinced that the greatest evil—the one that subsumed all others—was the waging of aggressive war itself.<sup>94</sup> The Holocaust, war crimes, slave labor, displacement of populations, starvation of civilians, mass destruction of property, theft of art treasures, and sexual abuse of civilians all flowed from or were part of preparation for aggressive war. Accordingly, Jackson insisted that one of the charges be crimes against the peace, and the other parties agreed.<sup>95</sup> As this was not one of the charges in the Justice Trial, this shall not be discussed further.

However, Jackson also insisted on the inclusion of a separate charge of conspiracy to wage aggressive war, as well as charges of

---

90. *Id.*

91. TUSA & TUSA, *supra* note 9, at 218–19. Dostert later founded what was formerly the School of Languages and Linguistics at Georgetown University. FRANCESCA GAIBA, THE ORIGINS OF SIMULTANEOUS INTERPRETATION: THE NUREMBERG TRIAL 161 (1998). His system is in use in international proceedings to this day. *Id.* at 62.

92. TAYLOR II, *supra* note 14, at 43–44, 157–58.

93. *See id.* at 63 (illustrating that the reason for the difficulties and length of negotiations was due to a large number of unanswered questions that needed to be resolved).

94. *See* TAYLOR I, *supra* note 13, at 66–67, 76–77 (discussing Jackson's strong feelings on the waging of aggressive war and his persistence in advocating for its inclusion as a separate charge).

95. *Id.* at 65–66, 76–77; TAYLOR II, *supra* note 14, at 139–40.

war crimes and crimes against humanity.<sup>96</sup> The conspiracy charge would be a controversial component of all the trials. The difficulty with conspiracy as an independent charge is that conspiracy, although a part of the common law tradition of the United States and the United Kingdom, is not part of the civil law tradition of France, Germany, the Soviet Union, or most of the other belligerent powers.<sup>97</sup> The French, in particular, argued that conspiracy was not part of the customs of war or of customary international law since it was not accepted as law by the legal system used by the majority of affected countries.<sup>98</sup> This issue was important because the charges of crimes against the peace required the actual invasion of a country. Thus, the charge would only apply to events immediately leading up to September 1, 1939, the day that Germany attacked Poland, and the events and persons directly involved in planning and implementing the invasion.<sup>99</sup>

Jackson's conception was much broader. In his view, everything leading up to the beginning of the war, including the Nazi seizure of power, the rearmament of Germany, the expansion of the Army, the persecution of Jews and political opponents in Germany, were all part of a plan leading to the initiation of war.<sup>100</sup> Furthermore Jackson believed that the subsequent war crimes were a continuation of the same conspiracy.<sup>101</sup> The British shared Jackson's perspective on the law of conspiracy, but the French and Soviets strongly opposed it.<sup>102</sup> The issue was resolved by an agreement that the charge of conspiracy would be limited to crimes against the peace, but would not extend to war crimes or crimes against humanity.<sup>103</sup>

The second problem with the charges arose out of the limitations on the traditional notion of war crimes. Unlike the other charges in the indictments, a body of law relating to war crimes had developed by 1945.<sup>104</sup> Prior to 1863, war crimes were primarily a matter of customary international law based on "the laws and customs of war

---

96. TAYLOR I, *supra* note 13, at 76–77; TAYLOR II, *supra* note 14, at 139–40.

97. TAYLOR I, *supra* note 13, at 35–36, 65–66.

98. *Id.*

99. TAYLOR II, *supra* note 14, at 63, 69, 139–40, 146–48.

100. *Id.* at 139–40.

101. See TUSA & TUSA, *supra* note 9, at 73, 86–87.

102. TAYLOR I, *supra* note 13, at 36; TUSA & TUSA, *supra* note 9, at 86.

103. TAYLOR I, *supra* note 13, at 75–76.

104. See *id.* at 25–28 (providing historical background on the development of the body of law relating to war crimes).



among civilized nations.”<sup>105</sup> During the American Civil War, Abraham Lincoln commissioned Francis Lieber, a legal scholar, to develop a code of conduct for Union armies to deal with the Southern armies and the hostile civilian population.<sup>106</sup> The resulting code, known generally as “Lieber’s Code” and more recently and more appropriately known as “Lincoln’s Code,” was incorporated into General Order Number 100 and was issued by President Lincoln to govern the conduct of all armies in the American Civil War.<sup>107</sup>

For the first time, this code attempted to clarify and set out the law of war. The code was viewed as a significant success, and it was gradually adopted by European countries to govern the conduct of their armed forces in times of war.<sup>108</sup> Lincoln’s Code thereafter became one of the primary sources for the Hague Conventions of 1899 and 1907.<sup>109</sup> Prior to World War II, there was further modification of Lincoln’s Code in the Geneva Convention of 1929.<sup>110</sup> The laws of war, as defined by these treaties, had a number of important limitations which complicated the effort to bring the defendants to justice. First, the laws of war require a war; second, the war must be between belligerent powers.<sup>111</sup> Thus, the laws of war as declared in the Conventions would not apply at all before September 1, 1939, nor would they apply to offenses committed by Germany in Germany or on German allies. As an example, the persecution of Jews in Czechoslovakia or Austria would not be a war crime because both countries had been absorbed by Germany prior to September 1, 1939, and the absorption had not been contested by the international community. Similarly, the persecution and extermination of Jews in Hungary after April 1944, would not have been a war crime as Hungary technically was an ally of Germany.

To deal with this issue, the London Conference concluded that certain offenses of a sufficiently substantial nature associated with war crimes or the waging of war would constitute crimes against humanity. Indeed, the Hague Convention notes in the preamble that:

---

105. JOHN FABIAN WITT, *LINCOLN’S CODE: THE LAWS OF WAR IN AMERICAN HISTORY* 118 (2012); TAYLOR I, *supra* note 13, at 6, 8.

106. TAYLOR I, *supra* note 13, at 8–9; WITT, *supra* note 105, at 1–2.

107. See TAYLOR I, *supra* note 13, at 9; WITT, *supra* note 105, at 8.

108. WITT, *supra* note 105, at 342–45.

109. *Id.* at 349–50.

110. Geneva Convention Relative to the Treatment of Prisoners of War art. 1, July 27, 1929, 47 Stat. 2021.

111. Hague Convention Respecting the Laws and Customs of War on Land art. 2, July 29, 1899, 32 Stat. 1803 [hereinafter Hague Convention of 1899] (“The provisions contained in the Regulations mentioned in Article 1 are only binding on the Contracting Powers, in case of war between two or more of them.”).

Until a more complete code of the laws of war is issued, the High Contracting Parties think it right to declare that in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity, and the requirements of the public conscience.<sup>112</sup>

Thus, the Hague Conventions were not intended to be a comprehensive declaration of all the rules of war or of “the laws of humanity[] and the requirements of the public conscience.” Therefore, the London Conference concluded that international law encompassed the offense of “crimes against humanity.”<sup>113</sup> However, the London Charter put an important limitation on this charge, one that would change significantly in Allied Control Council Law No. 10 and OMGUS 7, which covered the NMT Trials. Under the London Charter, a crime against humanity was:

[M]urder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, *before or during the war*, or persecutions on political, racial or religious grounds *in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.*<sup>114</sup>

Thus, a crime against humanity within the contemplation of the London Charter could be committed before the war or in Germany or in its allies, regardless of the domestic law of Germany, if it were “in execution of or in connection with any crime within the jurisdiction of the Tribunal.”<sup>115</sup> A crime against humanity, therefore was predicated on the commission of a separate crime within the Tribunal’s jurisdiction (i.e., war crimes, crimes against the peace or conspiracy to commit crimes against the peace). As Jackson’s conception of the conspiracy charge incorporated acts as early as

---

112. *Id.* at 248.

113. TUSA & TUSA, *supra* note 9, at 498; *see also* Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis art. 6(c), Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279 [hereinafter London Charter].

114. London Charter, *supra* note 113, 59 Stat. at 1547, 82 U.N.T.S. at 288 (emphasis added).

115. *Id.*

January 30, 1933, a crime against humanity could include acts committed in Germany or Greater Germany or German allies from 1933 onward.

### 3. Procedures

The differences between civil law and common law traditions presented a major problem in designing the procedures to be used in the IMT. Common law criminal trials, such as those of the United States and Great Britain, rely on the prosecution to present evidence to prove the defendant guilty beyond a reasonable doubt.<sup>116</sup> The indictment, therefore, is short and intended to provide notice of the charge only.<sup>117</sup> The defense has the right to cross-examine or to present evidence of its own.<sup>118</sup> The judge's involvement is limited to rulings on the law, admissibility of evidence, and asking clarifying questions.<sup>119</sup> Before the decision in *Brady v. Maryland*, 373 U.S. 83 (1963), the defendants in American courts had extremely limited discovery, so trial by surprise was routine.<sup>120</sup>

In the civil law tradition, the prosecutor prepares a lengthy and detailed indictment with relevant documents attached and witness affidavits summarizing the testimony of each of the witnesses to be called.<sup>121</sup> The defense may suggest additional witnesses and documents, but the defense receives complete discovery when it receives the indictment.<sup>122</sup> The trial is conducted before a multi-judge panel.<sup>123</sup> One of the judges reviews the indictment and accompanying materials and decides whether the case should move forward.<sup>124</sup> The judges then decide which witnesses will be heard in person, and the court conducts the questioning.<sup>125</sup> Thus, the lawyers

---

116. Donald A. Dripps, *The Constitutional Status of the Reasonable Doubt Rule*, 75 CALIF. L. REV. 1665, 1670 (1987).

117. See Jessica Smith, *The Criminal Indictment: Fatal Defect, Fatal Variance, and Amendment*, 3 UNC SCH. GOV'T 3, 3 (2008).

118. See U.S. CONST. amend. VI.

119. See *United States v. Liddy*, 509 F.2d 428, 438 (D.C. Cir. 1974) (establishing that while a judge has discretion to ask clarifying questions, the judge must exercise restraint in doing so).

120. See *Brady v. Maryland*, 373 U.S. 83, 87 (1963).

121. See generally VIVIENNE O'CONNOR, *PRACTITIONER'S GUIDE: COMMON LAW AND CIVIL LAW TRADITIONS* 25–26 (2012) (discussing the indictment process in a civil law system).

122. See *id.* at 26–27.

123. Loïc Cadiet, *Introduction to French Civil Justice System and Civil Procedural Law*, 28 RITSUMEIKAN L. REV. 331, 333–34 (2011).

124. TUSA & TUSA, *supra* note 9, at 76.

125. *Id.* at 77.

are relatively passive and the judges play the most active role in prosecuting the case.<sup>126</sup>

The London Charter authorized judges to develop rules of procedure to govern the IMT. The rules of procedure, as in civil law practice at the time, provided for: (1) the right to counsel of the defendant's choice; (2) the appointment of counsel if the defendant did not have one; (3) the right of the defendant to compulsory process; (4) the right of the defendant to receive copies of all the documents made a part of the indictment and have access to other documents in the prosecution's possession translated into German.<sup>127</sup>

It should be noted that these rules of procedure were adopted prior to the U.S. Supreme Court decisions in *Mapp v. Ohio*, 367 U.S. 643 (1961), *Gideon v. Wainwright*, 372 U.S. 335 (1963), *Brady v. Maryland*, 373 U.S. 93 (1963), and *Miranda v. Arizona*, 384 U.S. 436 (1966), so that defendants were accorded more rights than the existing constitutional minimums in American law at the time.<sup>128</sup>

In practice, the IMT used a hybrid between civil and common law principles for the presentation of cases.<sup>129</sup> Notably, the case did not rely on strict rules of evidence.<sup>130</sup> The prosecution relied heavily on captured German documents, which were organized into evidence books with affidavits explaining where and when the documents were discovered and certifying the accuracy of translation.<sup>131</sup> The practice of having the prosecutor read portions of the document into the record and make an oral presentation of the significance of the document packet also developed. Much of the testimony in both cases was by way of affidavit.<sup>132</sup> However, the parties had the right to require a party to call a witness who had rendered an affidavit. A version of this practice was to be used in the NMT trials.<sup>133</sup>

The trial lasted from November 1945 through July 1946.<sup>134</sup> Nineteen of the twenty-two defendants were found guilty.<sup>135</sup> Twelve

---

126. TAYLOR I, *supra* note 13, at 63–64.

127. London Charter, *supra* note 113, 59 Stat. at 1550–54, 82 U.N.T.S. at 294–98.

128. TUSA & TUSA, *supra* note 9, at 85.

129. *Id.*

130. London Charter, *supra* note 113, 59 Stat. at 1551, 82 U.N.T.S. at 296.

131. TUSA & TUSA, *supra* note 9, at 190–91.

132. *See id.* at 200–01 (showing the effect of affidavits by victims such as Jacob Vernick, a survivor of Treblinka, who stated that “writing his statement had given him the only reason to continue his life”).

133. *See generally id.* at 85 (detailing how defendants were given a full indictment prior to trial which included all of the relevant evidence and were permitted to give a final statement without prosecutor challenge and not under oath).

134. *See* Quincy Wright, *The Law of the Nuremberg Trial*, 41 AM. J. INT’L L. 38, 41 (1947).

received death sentences, three received life sentences, four received a significant sentence, and three were acquitted.<sup>136</sup>

B. *Allied Control Council Law No. 10*

It had always been contemplated that the IMT would be the first trial of major Nazi war criminals, but that others would likely follow. However, the logistical, cultural, and legal difficulties of conducting a lengthy and complex trial in four languages with hybrid procedures and law derived from two different systems of law caused widespread reluctance at the prospect of repeating the experience.<sup>137</sup> Justice Jackson ultimately decided that the United States would not participate in a following trial under the same circumstances.<sup>138</sup>

The Allied Control Council, which consisted of the commanders of the four occupying armies in Germany, issued Allied Control Council Law Number 10 (ACC 10), which established a new process for trying the remaining major war criminals.<sup>139</sup> Under ACC 10, responsibility for future trials would be in the hands of the respective occupation zones.<sup>140</sup> The occupying authority in each zone would have the ability to convene a military tribunal to try German defendants within its custody under the general framework of ACC 10.<sup>141</sup> ACC 10 set forth a number of general principles regarding subsequent trials:

1. The occupying authorities other than the occupying zone conducting the trial would give full cooperation in transferring defendants, serving subpoenas, and producing witnesses and documents.<sup>142</sup>
2. The principles and provisions of the Moscow Declaration and the London Charter were incorporated by reference into the directive.<sup>143</sup>

---

135. *Id.*

136. *See id.*

137. *See* TAYLOR II, *supra* note 14, at 26–27.

138. *See id.*

139. *See* Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity (Dec. 20, 1945), *reprinted in* TAYLOR II, *supra* note 14, at 250, 253 [hereinafter ACC 10].

140. *Id.* at 251–52.

141. *See id.* at 251.

142. *Id.* at 251–53.

143. *Id.* at 250.

Most importantly however, ACC 10 clearly defined the scope of jurisdiction of the subsequent trials in Article II and the specifications of the crimes with which the defendant could be charged.<sup>144</sup>

Article II, Section (a) set forth the crime of “crimes against the peace” and used the same definition as the London Charter.<sup>145</sup> Similarly, Article II, Section (b) defined war crimes in the same manner as the London Charter.<sup>146</sup>

The third crime, crimes against humanity, as set forth in Article II, Section (c) differed in important respects from the definition in the London Charter. The definition of the crime in Article 6 of the London Charter included “murder, extermination, enslavement, deportation, and other inhumane acts . . . in execution of or in connection with any crime within the jurisdiction of the Tribunal.”<sup>147</sup> However, the corresponding language of ACC 10 reads “[a]trocities and offenses, including but not limited to murder, extermination, enslavement, deportation, imprisonment, torture, rape or other inhumane acts . . .” and dropped the limiting clause “in connection with any crime within the jurisdiction of the Tribunal.”<sup>148</sup>

The definition of ACC 10 therefore is substantially broader than the definition of the London Charter in important respects. First, the list of acts constituting acts against humanity is broadened to include imprisonment, torture, and rape. The inclusion of rape is of some note given the massive number of sexual assaults by the Red Army during its invasion of Germany and to a lesser extent by the French Army.<sup>149</sup>

The specific reference to imprisonment also makes it clear that the acts of German judges, prosecutors, and other justice officials would fall within the jurisdiction of the court. The definition by inclusion of the term “including but not limited to” also makes clear that the offenses which follow are intended as examples of the crimes, not a comprehensive listing of the elements of the crime.

---

144. *See id.* at 250–51.

145. *See id.* at 250; London Charter, *supra* note 113, 59 Stat. at 1547, 82 U.N.T.S. at 288.

146. *See* ACC 10, *supra* note 139, at 250; London Charter, *supra* note 113, 59 Stat. at 1547, 82 U.N.T.S. at 288.

147. London Charter, *supra* note 113, 59 Stat. at 1547, 82 U.N.T.S. at 288.

148. *See* ACC 10, *supra* note 139, at 250; London Charter, *supra* note 113, 59 Stat. at 1547, 82 U.N.T.S. at 288.

149. *See* RICHARD BESSEL, *GERMANY 1945: FROM WAR TO PEACE* 152–58 (2009); TONY JUDT, *POSTWAR: A HISTORY OF EUROPE SINCE 1945*, at 20–21 (2005). Lowe estimates that two million German women may have been raped in the Russian invasion of Germany. KEITH LOWE, *SAVAGE CONTINENT: EUROPE IN THE AFTERMATH OF WORLD WAR II* 55 (2012).

The deletion of the reference to “in execution of or in connection with any crime” represented an evolution of thinking as to what constituted crimes against humanity. There had been concerns at the London Conference about crimes against humanity.<sup>150</sup> Were they simply a logical extension of war crimes and therefore within the tradition of international law, or were they, in fact, a new crime? If the latter, the defendants might have a strong argument about the ex post facto application of the law. The “in connection with” language therefore emphasized that this was a natural extension of existing law rather than a new law.

As did the definition in the London Charter, crimes against humanity in ACC 10 applied to any civilian population, including offenses against German civilians, “whether or not in violation of the domestic laws of the country where perpetrated.”<sup>151</sup> The directive also stated that the defendant’s official position would not free the defendant from criminal responsibility, and the fact that a defendant was following orders did not constitute a defense to charges but might be considered in mitigation.<sup>152</sup>

From the perspective of judges and defense counsel, the definitions of the crimes created serious problems. The defendants might have defenses against the charge of war crimes since the crime requires there to be a war and applies only to offenses committed against belligerent populations. By September 1, 1939, the day that World War II began, Austria and Czechoslovakia had already been incorporated into greater Germany.<sup>153</sup> After the conquest of Poland, portions of Poland known as the “Incorporated Eastern Territories” were formally incorporated into Germany.<sup>154</sup> Therefore, offenses committed in the former Austria, Czechoslovakia and the incorporated portions of Poland arguably were taking place in Germany, and thus were not war crimes. Most of the actions of the defendants in fact took place in Germany so defined.

Crimes against humanity, however, were not limited as to place since the definition applied to any population. The offense did not require the existence of a war, meaning acts before September 1,

---

150. See generally London Charter, *supra* note 113, 59 Stat. at 1547, 82 U.N.T.S. at 288 (including crimes against humanity as a separate offense contemplated and punishable under the London Charter).

151. ACC 10, *supra* note 139, at 250.

152. *Id.* at 251.

153. JUSTICE TRANSCRIPT, *supra* note 14, at 997–98.

154. *Id.* at 594.

1939, arguably could be charged.<sup>155</sup> Finally, the exclusion of reliance on the domestic law as an excuse eliminated an additional defense.<sup>156</sup>

The definition of a crime against the peace included a specific statement that “participation in a common plan or conspiracy for the accomplishment of any of the foregoing” would also be an offense. There is no such reference to conspiracy in the definition of war crime or crimes against humanity.<sup>157</sup>

The final potential charge was membership in an organization found to be a criminal organization by the IMT. Liability, however, would be established only if the defendant knew of the criminal nature of the organization.<sup>158</sup>

ACC 10 did not establish trial procedures nor even require any of the occupying authorities to take any particular action. In response, the British, for example, issued a royal warrant limiting further prosecutions to trials of war crimes, especially those associated with British citizens.<sup>159</sup> Similarly, the French conducted trials in their zone only for crimes committed in France during the occupation period.<sup>160</sup>

The United States, however, decided to continue the prosecution of major war criminals under ACC 10. In response to ACC 10, the Office of the Military Government-Germany, United States (OMGUS) issued Ordinance Number 7 (OMGUS 7), which established the procedures for the conduct of the Nuremberg Military Tribunals to be held in the American zone.<sup>161</sup>

OMGUS 7 ostensibly was intended to implement ACC 10, but not to make substantive changes in its provisions. Yet, the ordinance altered ACC 10 in its first sentence, which reads: “The purpose of this Ordinance is to provide for the establishment of military tribunals which shall have power to try and punish persons charged with offenses recognized as crimes in Article II of Control Council Law No. 10, including conspiracies to commit any such crimes.”<sup>162</sup>

---

155. See ACC 10, *supra* note 139, at 251 (listing the required elements of the offenses).

156. See *id.* at 250.

157. See *id.*

158. See *id.* at 250–51.

159. See generally *id.* at 254–257 (stating the regulations for governing the trials of war criminals).

160. 3 UNITED NATIONS WAR CRIMES COMM’N, LAW REPORTS OF TRIALS OF WAR CRIMINALS 100–02 (1948) (discussing Ordinance No. 36 of February 25, 1946 by the French Commander-in-Chief).

161. Office of the Military Government-Germany, United States Zone, Ordinance No. 7, art. I (effective on Oct. 18, 1946), *reprinted in* TAYLOR II, *supra* note 14, at 286 [hereinafter OMGUS 7].

162. *Id.*



However, ACC 10 and the London Charter recognized conspiracy only with respect to crimes against the peace, but not as part of war crimes or crimes against humanity. The balance of the OMGUS 7 would be less controversial.

Article II established the tribunals. The tribunals would consist of three judges and one alternate judge.<sup>163</sup> Each judge would have to be a member of the bar in good standing of any American jurisdiction with at least five years' experience.<sup>164</sup> As a practical matter, the great majority of the judges were current or retired judges of state appellate courts.<sup>165</sup> Article IV sets forth basic precepts of the trials:

1. The defendant would receive copies of the indictment and of relevant documents at a reasonable time, translated into German;
2. The trial would be conducted in or translated into German;
3. The defendant would have the right to counsel of his own choice, and the court would appoint counsel for anyone unrepresented. The counsel would be compensated by the occupying forces;
4. The defendant would have the right to be present at all stages of the proceeding;
5. The defendant would have the right to present evidence on his own behalf and cross-examine prosecution witnesses;
6. The defendant would have the right to request the tribunal to produce witnesses or documents.<sup>166</sup>

Additionally, the tribunal would have the power to issue subpoenas, administer oaths, or to impose sanctions for contempt of court.<sup>167</sup> Article XI set forth the order of proceedings.<sup>168</sup>

Article VII is of particular interest as it lays out the rules of evidence. It states that the tribunal would not be bound by the technical rules of evidence and that it shall admit any evidence into

---

163. *Id.*

164. *Id.*

165. HELLER, *supra* note 14, at 41. Heller includes brief biographical material as to each participating judge. *Id.* at 85–105. Chief Justice Carl Vinson would not permit any sitting federal judge to participate in the Nuremberg trials as he felt the federal court case load was too great to permit federal judges to be absent from their duties for extended periods of time. *Id.* at 41.

166. *See* OMGUS 7, *supra* note 161, at 287.

167. *See id.* at 288.

168. *Id.* at 289.

the record which it deems to have probative value.<sup>169</sup> The tribunals were specifically authorized to admit: “affidavits, depositions, interrogations [the term “interrogations” likely refers to interrogations performed by military intelligence], and other statements, diaries, letters, the records, findings, statements and judgments of the military tribunals . . . .”<sup>170</sup> However, the opposing party must be given an opportunity to question the affidavit or probative value of such evidence.<sup>171</sup> In most respects, the evidentiary rule laid out in OMGUS 7 closely resembles the rules typical of federal and state administrative hearings.<sup>172</sup> In general, the trial would be conducted in accordance with proceedings in American or British courts.

#### IV. THE TRIAL

*But a court is far more than a courtroom; it is a process and a spirit. It is the house of law. This the defendants know, or must have known in times past. I doubt that they ever forgot it.*<sup>173</sup>

##### A. *The Defendants, Lawyers, and Judges*

The sixteen defendants were largely judges and prosecutors of the People’s Court and Special Courts and the balance were officials of the Ministry of Justice, specifically:

1. Judges of the Peoples Court: Karl Engert, Gunther Nebelung, Oswald Rothaug, Hans Petersen;
2. Prosecutors of the Peoples Court: Paul Barnickel, Ernst Lautz;
3. Judges of the Special Court: Hermann Cuhorst, Rudolf Oeschey, Oswald Rothaug (who had also served as a judge of the People’s Court);
4. Prosecutors of the Special Courts: Günther Joël;
5. Ministry of Justice: Josef Altstötter, Wilhelm von Ammon, Karl Engert, Günther Joël, Herbert Klemm,

---

169. *Id.* at 288.

170. *Id.*

171. *Id.*

172. *Id.* at 289.

173. JUSTICE TRANSCRIPT, *supra* note 14, at 31 (opening statement of Brigadier General Telford Taylor) (emphasis added).

Wolfgang Mettgenberg, Curt Rothenberger, Franz Schlegelberger, Carl Friedrich Otto Westphal.<sup>174</sup>

The People's Court and the Special Courts were established after the Nazi takeover of Germany in 1933 as courts parallel to the existing German judicial system.<sup>175</sup> The People's Court had concurrent jurisdiction over internal subversion and the Special Courts had jurisdiction over external threats.<sup>176</sup> Both courts were staffed by loyal Nazis and were primarily tools for maintaining party control.<sup>177</sup>

The Ministry of Justice, after a reorganization of the legal system after the Nazi takeover, was the central organization of the legal system. The Ministry included all the courts, all the prosecutors, and issued all laws and decrees relating to criminal justice.<sup>178</sup>

All the defendants were charged with war crimes, crimes against humanity, and conspiracy to commit war crimes and crimes against humanity.<sup>179</sup> Additionally, Altstötter, Cuhorst, Engert, Joël, Nebelung, Oeschey, and Rothaug were charged with membership in a criminal organization, that is, the leadership ranks of the Nazi Party or the SS.<sup>180</sup>

None of the defendants were charged with crimes against the peace or conspiracy to commit crimes against the peace.<sup>181</sup> The most prominent of the defendants, and the primary target of the prosecution was Franz Schlegelberger, who had been an internationally known legal scholar, and one of the pillars of the German legal establishment.<sup>182</sup> In 1941, after a long and illustrious career, he became the acting Minister of Justice, and in that capacity took part in some of the most notorious abuses of the German legal system under the Nazis.<sup>183</sup>

OMGUS 7 gave the defendants the right to counsel of their own choice.<sup>184</sup> By the time of the NMT trials, there were a group of fifty German lawyers with experience in the proceedings who were

---

174. HELLER, *supra* note 14, at app. A (listing each defendant, his role, the charges against him, the results of his trial, and disposition).

175. MÜLLER, *supra* note 7, at 51.

176. *See id.*

177. *See id.* at 140–41.

178. *See* JUSTICE TRANSCRIPT, *supra* note 14, at 212–17.

179. HELLER, *supra* note 14, at app. A.

180. *Id.*

181. *Id.*

182. *See* JUSTICE TRANSCRIPT, *supra* note 14, at 1081, 1087.

183. *Id.* at 1082–86.

184. TAYLOR II, *supra* note 14, at 30.

deemed acceptable to the tribunal and recommended to the defendants.<sup>185</sup> It was also determined that, although an attorney with a significant Nazi past would not be recommended to the defendants, such a lawyer might be acceptable to the tribunal if the defendant chose someone not on the recommended list.<sup>186</sup> Some of the counsel did in fact have a history of participation in Nazi activities.<sup>187</sup>

The German attorneys, however chosen, were paid by the U.S. Army and were provided housing in Nuremberg at no cost.<sup>188</sup> They were also provided cigarettes, low cost meals, office space, and staff.<sup>189</sup> In the conditions prevailing in immediate post-war Germany, the cigarettes, housing, and food provisions were likely as important as the actual monetary payments.<sup>190</sup>

In accordance with OMGUS 7, a panel of three judges and an alternate were chosen. Covington Marshall, chief justice of the Ohio Supreme Court, was intended to be the presiding judge in the Justice Trial, but withdrew from the tribunal for health reasons.<sup>191</sup> He was replaced by Justin W. Harding who had served as a JAG Officer during the war, but had also been a federal judge in the then-territory of Alaska from 1929 to 1933.<sup>192</sup> Harding was the only former or sitting federal judge to serve in any of the NMT trials. James T. Brand, an associate judge of the Supreme Court of Oregon, became the new presiding judge.<sup>193</sup> Mallory Blair, an associate justice of the Court of Civil Appeals of Texas, was the third judge.<sup>194</sup>

The prosecutors assigned to the case included former Republican Congressman Charles LaFollete (lead counsel), Robert King, Alfred Wooleyhan, Arnold Buchold, Rudolph Auerbach, and Sadie Arbuthnot, one of a number of women attorneys on the various

---

185. *Id.*

186. *Id.* at 46–47.

187. *Id.* at 47. Ultimately, over 200 attorneys represented defendants in the twelve NMT trials. *Id.*

188. *Id.* at 49 & n.156.

189. *Id.* at 46, 49.

190. *See id.* (explaining the full extent of services and goods rendered by the government to defense counsel during the trials).

191. HELLER, *supra* note 14, at 90.

192. *Id.*

193. *Id.*

194. *Id.*

prosecution teams.<sup>195</sup> However, Telford Taylor himself gave the initial portion of the opening statement.<sup>196</sup>

### B. *Preliminary Motions*

The defendants in the first three NMT trials, that is, the Medical Trial, the Milch Trial, and the Justice Trial, all moved to dismiss Count I of the indictment relating to conspiracy to commit crimes against humanity and war crimes.<sup>197</sup> The motion was argued by Egon Kuboshok, attorney for Schlegelberger and von Ammon in the Justice Trial, on behalf of all the defendants in all three trials. Telford Taylor argued for the prosecution.<sup>198</sup> The three tribunals heard the motion together and they issued three separate, essentially identical, opinions.<sup>199</sup>

As previously noted, the conspiracy count had been problematic throughout the entire Nuremberg war crime program. At the London Conference, the American and British representatives had argued for the inclusion of a conspiracy count and the French and Russian delegates had strongly opposed its inclusion in the charges.<sup>200</sup> The compromise solution was to include a count for conspiracy to commit crimes against the peace, but not as to war crimes or crimes against humanity.<sup>201</sup> Neither ACC 10 nor OMGUS 7 had clarified matters. Indeed, ACC 10 specifically included language related to conspiracy in Article 2, Section (a), describing crimes against the peace, but not in Article 2, Section (b) or Article 2, Section (c), relating to war crimes and crimes against humanity, whereas OMGUS 7 recognized conspiracy as applying to all counts.<sup>202</sup>

The decision in the IMT also was not helpful to the prosecution as the tribunal gave a narrow interpretation of the conspiracy charge and ultimately no defendant was found guilty of conspiracy unless he had also been found guilty of crimes against the peace. The defendants argued strenuously that conspiracy was uniquely a feature of Anglo-

---

195. JUSTICE TRANSCRIPT, *supra* note 14, at 14. Taylor made a point of recruiting women lawyers to the trial teams. Heller notes that ten of ninety-four prosecutors were women. See HELLER, *supra* note 14, at 34.

196. JUSTICE TRANSCRIPT, *supra* note 14, at 31.

197. HELLER, *supra* note 14, at 276.

198. See JUSTICE TRANSCRIPT, *supra* note 14, at 14.

199. See generally HELLER, *supra* note 14, at 275–80 (discussing the arguments made by both prosecution and defense at trial). See also 6 UNITED NATIONS WAR CRIMES COMM'N, LAW REPORTS OF TRIALS OF WAR CRIMINALS 109–10 (1948).

200. See *supra* Section II.A.2.

201. See London Charter, *supra* note 113, 59 Stat. at 1547, 82 U.N.T.S. at 288.

202. ACC 10, *supra* note 139, at 250; OMGUS 7, *supra* note 161, at 286.

American law and had no counterpart in the civil law system, and therefore none in international law.<sup>203</sup>

Taylor argued, on behalf of the prosecution, that although conspiracy was part of British and American practice, civil law systems all contain prohibitions on aiding and abetting or attempting to commit a crime.<sup>204</sup> Therefore, the issue was not whether persons could have participated in the commission of a crime without pulling the trigger, as all legal systems recognize closer and farther circles of accountability. The prosecution argued that the inclusion of the charge of conspiracy with respect to crimes against the peace resulted from the fact that crimes against the peace was a newer offense, which had not developed an analog in domestic law unlike the other offenses, so there was greater need to spell out that the offense was a collective one.<sup>205</sup>

Taylor also argued that the London Charter did not intend to limit the application of conspiracy law to the other crimes when it included it in the definition of a crime against the peace.<sup>206</sup> ACC 10, which was adopted before the IMT rendered its decision with its narrow interpretation of conspiracy law, was intended to give an expansive rather than restrictive application of the law.<sup>207</sup>

The importance of this issue lies in the use of the conspiracy count in the IMT. Justice Jackson had used the conspiracy count as the core of the entire prosecution. He viewed the conspiracy as having commenced in 1933, and he viewed all that followed as part of the overall conspiracy.<sup>208</sup> Thus, for him and for the American prosecutors in general, the conspiracy charge allowed the prosecution to explore all participants, events, and aspects of the Third Reich from its inception in 1933 to its end in 1945.<sup>209</sup>

This broad interpretation of conspiracy in the Justice Trial would have allowed the prosecution to build strong cases against defendants whose modest involvement in offenses might otherwise have resulted in acquittals or light sentences. It also would have recognized liability for each of the defendants for wrongful acts of other defendants.

---

203. UNITED NATIONS WAR CRIMES COMM'N, *supra* note 199, at 105–06.

204. *Id.* at 106–07.

205. *Id.* at 107–109.

206. *Id.* at 106–108.

207. *Id.* at 107–09; HELLER, *supra* note 14, at 278–79.

208. UNITED NATIONS WAR CRIMES COMM'N, *supra* note 199, at 2.

209. TAYLOR II, *supra* note 14, at 74.

The three tribunals ultimately ruled in favor of the defendants and dismissed the conspiracy counts on the basis that their jurisdiction had been established by ACC 10, which only referred to conspiracy with respect to crimes against the peace.<sup>210</sup>

One of the major implications of the ruling was that the defendants could not be found guilty of war crimes or crimes against humanity for any act committed before September 1, 1939. However, the prosecution could use acts committed before that date to prove motive, knowledge, or intent with respect to acts committed after September 1, 1939.<sup>211</sup>

### C. *Opening Statements*

The opening statement for the prosecution was delivered by Telford Taylor, Charles LaFollette, Alfred Wooleyhan, and Robert King. Taylor's eloquent opening statement established important principles in the trial of this particular group of defendants. Most notably, Taylor made clear that the judges were not being prosecuted for being bad judges; indeed, early in his argument, Taylor noted:

The "trials" they conducted became horrible farces, with vestigial remnants of legal procedure which only served to mock the hapless victims. . . . But the defendants are not now called to account for violating constitutional guaranties or withholding due process of law.<sup>212</sup>

On the contrary, the defendants are accused of participating in and being responsible for the killings, tortures, and other atrocities that resulted from—and which the defendants knew were the inevitable consequences of—the conduct of their offices as judges, prosecutors and ministry officials.<sup>213</sup>

Thus, the prosecution's theory was that the German legal system actually ceased to be a legal system, and the judges and prosecutors

---

210. *Id.* at 227–28.

211. As a result of this temporal restriction, several important allegations of crimes against humanity, such as euthanasia, compulsory sterilization, and persecution of the Catholic Church and the Confessing Church (protestant dissidents) could not be fully explored as most of the offenses took place prior to September 1, 1939. *See* Charles M. LaFollette, Speech Before the Interzonal Conference of Lawyers and Justice Officials 18–19 (June 3, 1948).

212. JUSTICE TRANSCRIPT, *supra* note 14, at 31–32.

213. *Id.* at 32.

committed crimes through the legal system. Taylor described in detail the degeneration of the German legal system during the Nazi era.<sup>214</sup> LaFollette then took over the opening and argued at length that the tribunal was authorized to make its own interpretation of the London Charter and ACC 10 and was free to interpret them more broadly than the IMT had.<sup>215</sup> In particular, he emphasized that the definition of crimes against humanity in ACC 10 was broader than in the London Charter, as it did not require that crimes against humanity be in association with other crimes.<sup>216</sup>

He then noted that the evidence would fall into three categories. First, there were offenses that clearly fell within traditional notions of war crimes, specifically violations of the Hague Convention of 1907 and of the Geneva Convention of 1929.<sup>217</sup> These offenses included two of the major categories in the trial, the Night and Fog Decree, the extension of German law to the Incorporated Eastern Territories,<sup>218</sup> and the deprivation of rights to Poles and Jews in that extension.<sup>219</sup> Second, was the extensive cooperation by the judiciary with the Gestapo and SS in persecution of Germans and non-Germans alike.<sup>220</sup> Third, was the systematic denial of fair trials to political and ethnic minorities so that trials would be tantamount to murder.<sup>221</sup>

King refined these categories to focus specifically on the Law Against Poles and Jews, and the Night and Fog program.<sup>222</sup> Wooleyhan laid out the facts in some detail that would be proven as to each individual defendant, including descriptions of the most notorious cases tried by the various judges.<sup>223</sup> Finally, LaFollette resumed the podium to discuss questions of evidence and provide additional argument concerning the perversion of the legal profession under Nazi rule.<sup>224</sup>

---

214. *See id.* at 33–40.

215. *Id.* at 62–63.

216. *Id.* at 65–66.

217. *Id.* at 70.

218. The Incorporated Eastern Territories were the portion of Poland directly adjacent to the German border. After the invasion of Poland, Germany annexed the territories into Germany. *Id.* at 119, 594.

219. *Id.* at 995, 997, 1003, 1063–64.

220. *Id.* at 70–71.

221. *Id.* at 71.

222. *Id.* at 71–78; *see infra* Section IV.D.

223. *See* JUSTICE TRANSCRIPT, *supra* note 14, at 78–89.

224. *Id.* at 89–100.



Kuboshok, Schlegelberger's attorney, assumed the role of lead counsel for all the defendants in the opening statement.<sup>225</sup> The other defense counsel presented additional arguments with respect to their specific clients.<sup>226</sup> Kuboshok made two points. First, in the German civil law system, unlike the American or British common law systems, judges essentially apply law codes adopted by competent authorities.<sup>227</sup> Before Hitler, law would have been adopted by the Reichstag.<sup>228</sup> However, after passage of the Enabling Act of 1933, legal authority to legislate passed to Hitler personally.<sup>229</sup> Thus, after 1933, Hitler was the duly constituted supreme legislative authority under the Weimar Constitution, which, it should be noted, was never abrogated.<sup>230</sup> As the German legal tradition dissociated morality and law, it was not the role of the judiciary to ignore valid law, no matter what the ethical implications were.<sup>231</sup>

Second, many of the specific provisions complained of had pre-Nazi antecedents or were legitimate exercises of power in wartime conditions. Thus, in 1936, law by analogy was intended to introduce the flexibility of the common law system into the civil law.<sup>232</sup>

There was precedent in Weimar Germany for use of Special Courts and People's Courts. Under the customs and usages of war, many acts, which might otherwise be viewed as war crimes, might be excused because of military necessity.<sup>233</sup> As an example, the offensive components of the Night and Fog Decree flowed out of military necessity of secrecy in judicial proceedings involving the Resistance. Kuboshok also noted that the judiciary was in a constant struggle with the SS, the Gestapo, and the Nazi party for control of the judicial process and the maintenance of judicial independence.<sup>234</sup>

---

225. *Id.* at 108.

226. *Id.* at 130, 142, 150, 154.

227. *Id.* at 108–09.

228. *Id.* at 986–87.

229. *Id.* at 109–10.

230. *Id.*

231. *Id.* As Professor Hermann Jahrreiss, who was called as an expert by the defense on the German legal system and constitutional law, testified:

On the continent of Europe, in the course of four centuries, a development has taken place by which law and morality in legislative thought are separated sharply; and so as the question of morality arises, the lawyer on the continent of Europe says as a lawyer, "That has nothing to do with me."

*Id.* at 257.

232. *Id.* at 108–09.

233. *Id.* at 120–21.

234. *See id.* at 108–26 (statement of Dr. Kubuschok).

In the remaining arguments, that of Erich Wandschneider, counsel for Rothenberg, is of the most interest. Wandschneider pointed out that his client was operating within the climate of a totalitarian state.<sup>235</sup> In a dictatorship, the average citizen tends to fall into a general attitude of passivity because, unlike in a democracy, any display of initiative requires a high degree of personal commitment and courage.<sup>236</sup> It is false, therefore, to look at a course of conduct retrospectively without taking into account the pressures and climate of a dictatorship.<sup>237</sup> Acts, which under normal circumstances might be culpable, might be readily excusable under the special circumstances of Nazism.<sup>238</sup> Thus, Rothenberger's notorious memorandum on the reorganization of the German judiciary on National Socialist lines<sup>239</sup> was actually an effort to preserve some remnants of judicial independence. The tribunal, therefore, had to view the evidence in the case in light of the circumstances with which the defendants were faced.<sup>240</sup>

#### D. *Testimony*

Arraignment took place on February 17, 1947.<sup>241</sup> The trial began on March 5, 1947, and ended on October 18, 1947.<sup>242</sup> There were 140 live witnesses, 2,093 exhibits, and 10,964 pages of trial transcript.<sup>243</sup>

The trial proceeded in the manner set forth in OMGUS 7. The prosecution presented its case first, the defense responded with its case, and the prosecution had opportunity for rebuttal.<sup>244</sup> The

---

235. *See id.* at 144–46.

236. *Id.* at 146–47.

237. *Id.* at 147–48.

238. *Id.* at 146–47.

239. Rothenberger was an idealistic believer in Nazi ideology. When he became a senior official in the Justice Ministry, he composed a lengthy memorandum urging the creation of a “Nazi Conception of Law,” which, among other things, called for the complete subordination of the judiciary to Hitler. *See generally* J. WALTER JONES, *The Nazi Conception of Law*, in 21 OXFORD PAMPHLETS ON WORLD AFFAIRS (1939) (explaining the Nazi emphasis on unity and strength of leadership, which compelled submission of any potentially conflicting political forces in Germany, such as the judiciary). Rothenberger would argue in his testimony that this was his effort to preserve judicial independence from the inroads of the Gestapo and SS. *See* Sfekas, *supra* note 32, at 215, for a fuller account of Rothenberger's role in the ultimate destruction of judicial independence.

240. JUSTICE TRANSCRIPT, *supra* note 14, at 146–47.

241. *Id.* at 5.

242. *Id.*

243. *Id.*

244. OMGUS 7, *supra* note 161, at 289.

prosecution had to prove its case beyond a reasonable doubt, and had to do so by the use of sworn testimony and documents, subject to defense cross-examination and confrontation.<sup>245</sup> The defense had a full opportunity to present its witnesses and documentation, and, in fact, the defense presented substantially more testimony and documents than did the prosecution.<sup>246</sup> All prosecution documents had to be provided to the defense prior to introduction and translated into German or English.<sup>247</sup>

Evidence could be presented by affidavit on either side, subject to the opposing side's requests that the witness be produced for cross-examination.<sup>248</sup> The bulk of testimony in the trial was, in fact, taken by affidavit.<sup>249</sup> Documents were introduced with an affidavit from the document center created by the U.S. Army, certifying the authenticity and place of origin of the document.<sup>250</sup>

As in the IMT, the prosecution chose to rely heavily on documentary proof of wrongdoing, so that the proof of guilt would be by the defendants' own words.<sup>251</sup> By contrast, the defense relied more heavily on oral testimony, and most of the defendants actually testified in the trial.<sup>252</sup> The prosecution did very little cross-examination of defense witnesses.<sup>253</sup>

Although there would be substantial evidence introduced with respect to a number of issues—such as the failure to prosecute civilians who had lynched Allied flyers that were shot down, the failure to prosecute members of the Gestapo or SS for abuse of POWs or political prisoners, and the persecution of a German Catholic priest for officiating at a Polish laborer's funeral—the heart of the case against all of the defendants was their participation in either or both the Night and Fog program or actions taken in accordance with the Law Against Poles and Jews and other anti-Semitic laws.<sup>254</sup>

---

245. *Id.* at 288.

246. JUSTICE TRANSCRIPT, *supra* note 14, at 5.

247. OMGUS 7, *supra* note 161, at 287.

248. TAYLOR II, *supra* note 14, at 88.

249. *Id.* at 88–89.

250. *See* JUSTICE TRANSCRIPT, *supra* note 14, at 5.

251. *See id.*

252. *See id.* at 115, 125–26, 1212–16.

253. *See id.* at 592–93, 731–33, 760–61, 898–902, 925–29.

254. *See id.* at 594, 913–14.

After the invasion of Poland on September 1, 1939, Poland was partitioned between the Germans and Soviets.<sup>255</sup> Part of German-occupied Poland was organized into the “Government General,” where military law would apply.<sup>256</sup> The parts of Poland contiguous to Germany were annexed to Germany and became known as the “Incorporated Eastern Territories.”<sup>257</sup> The Law Against Poles and Jews was issued to provide the legal framework for the administration of the Incorporated Eastern Territories.<sup>258</sup>

The law had two major themes. First, in the new regime, Poles would be reduced to a docile permanent underclass who would support the spread of German settlement in Eastern Europe and, over time, be eliminated.<sup>259</sup> Thus, the law as to Poles would be applied harshly to break the spirit and establish German domination, but would not seek to eliminate the Polish population in the short run.<sup>260</sup> Second, the goal was to eliminate the massive Jewish population of Poland.<sup>261</sup>

The law itself provided substantively that Poles and Jews would be subject to the death penalty for any of the following activities:

1. Any act of violence against a German;
2. Manifesting any anti-German sentiment by making anti-German comments or defacing or removing official notices or lowering the prestige of the German people.<sup>262</sup>

The sentence would be death or imprisonment for any of the following:

1. Any “act of violence against any member of the German armed forces,” police, or any agency of the Nazi Party whether the victim was German or not;
2. Causing damages to any installation of the German government or the Nazi Party;
3. Soliciting any person to disobey any decree or regulation;

---

255. Agnieszka Nosowska, *17 September 1939 – The Soviet Invasion of Poland*, EUR. NETWORK REMEMBRANCE & SOLIDARITY (Sept. 16, 2013, 4:11 PM), <http://enrs.eu/en/news/882-17-september-1939-the-soviet-invasion-of-poland>.

256. See JUSTICE TRANSCRIPT, *supra* note 14, at 119, 615–17.

257. *Id.* at 119.

258. HELLER, *supra* note 14, at 225.

259. See JUSTICE TRANSCRIPT, *supra* note 14, at 614–15, 1065.

260. *Id.*

261. *Id.* at 1065.

262. *Id.* at 616.

4. Conspiring with or aiding or abetting anyone in the violation of this decree;
5. Possession of any weapon;
6. Committing any other act contrary to “fundamental principles of German criminal law” or contrary to the interest of the German state.<sup>263</sup>

The death penalty was made mandatory for any act for which death was the only penalty.<sup>264</sup> A schedule of prison terms ranging from three months to ten years was prescribed when imprisonment was an option.<sup>265</sup> However, “in cases where the law does not provide for the death sentence, [it shall] be imposed, if the committed action testifies to an exceptionally vicious character or if for other reasons the crime is a very serious one.”<sup>266</sup> The minimum penalties could not be reduced unless the crimes were committed against a fellow Pole or Jew.<sup>267</sup> The law also changed the procedures available to a Polish or Jewish defendant:

1. The cases would be brought before the Special Courts in most cases.
2. All sentences, including the death penalty, would be carried out without delay.
3. The prosecutor could appeal a decision, but the defendant had no right to appeal.
4. Poles and Jews had no right to lodge a criminal complaint.
5. Poles and Jews had no right to ask for recusal for bias of a German judge.
6. Poles and Jews could not be sworn in as witnesses. However, even if unsworn, they could be prosecuted for perjury or false statements.<sup>268</sup>
7. Although proceedings would be conducted in accordance with the German Law of Civil Procedure, the court was free to depart from the established rules

---

263. *Id.* at 616, 633.

264. *Id.* at 617.

265. *Id.* at 633.

266. *Id.* at 617.

267. *Id.*

268. The provision of this law forbidding the swearing in of Poles or Jews as witnesses, while retaining penalties for perjury, would seem to be contradictory. However, the purpose of the provision was to discourage the calling of Poles or Jews in any case involving a German and to receive such testimony only with the utmost caution. *Id.* at 617–18, 668–69.

when appropriate for the rapid and efficient conduct of proceedings.<sup>269</sup>

The Law allowed the governor of the Incorporated Eastern Territories to impose martial law and to try Poles and Jews before civilian courts-martial or to defer trial indefinitely and to refer the case directly to the Gestapo.<sup>270</sup>

Finally, Poles and Jews were forbidden to file civil cases.<sup>271</sup> In January 1942, a subsequent decree was issued over Schlegelberger's signature making this law retroactive.<sup>272</sup>

On July 1, 1943, a new decree was issued which deprived Jews of any right to a trial at all and turned any Jew accused of a crime over to the police for processing.<sup>273</sup> The Jew's property would be confiscated upon his death. Thus, the Law Against Poles and Jews would no longer apply to Jews.<sup>274</sup> This change in the law reflected the official adoption of the so-called Final Solution, that is, the systematic murder of the entire Jewish population in the occupied territories of Europe.<sup>275</sup>

By 1941, resistance movements had sprung up in a number of occupied countries, and the German Army was struggling to find a solution to the growing problem of maintaining control of the occupied territories.<sup>276</sup> Hitler instructed the German Army to implement a program whereby suspected resistors would disappear into the "Night and Fog."<sup>277</sup>

The Night and Fog Decree was issued on December 7, 1941, at Hitler's direction by Field Marshal Wilhelm Keitel, who was the Chief of the Supreme Council of the Armed Forces.<sup>278</sup> Keitel himself would be tried by the IMT and found guilty of war crimes, crimes against humanity, crimes against the peace, and conspiring to commit crimes against the peace. He would be executed in 1946.<sup>279</sup>

The decree provided that in circumstances in which the trial of a member of the resistance could not be dealt with within one week of

---

269. *Id.* at 618.

270. *Id.* at 619.

271. *Id.* at 635.

272. *Id.* at 642.

273. *Id.* at 685.

274. *Id.* at 685–86.

275. *See id.* at 648–50.

276. *See id.* at 75, 833.

277. *See id.* at 21, 1031–32.

278. *Id.* at 774–81.

279. TAYLOR I, *supra* note 13, at 608–10.

arrest, the resistor would be transferred to Germany for trial.<sup>280</sup> The defendant's family and acquaintances would not be informed of his or her fate, would not be allowed contact or correspondence with the person, and would not be informed of his or her location.<sup>281</sup> If the person died, either of natural causes or execution, the family members would not be informed.<sup>282</sup> If the defendant wrote a will or a farewell letter, the document would not be delivered until the war's end.<sup>283</sup> As no foreign witnesses would be allowed to testify in court in order to preserve secrecy, the defendant essentially had no ability to call witnesses on his own behalf.<sup>284</sup> The defendant would have the right to counsel in capital cases (the great majority of cases), but the choice of counsel would be made by the court with permission of the prosecutor.<sup>285</sup> The proceedings would be conducted in German with restrictions on the availability of interpreters.<sup>286</sup> The decree was made applicable in all cases involving:

1. Assault with intent to kill[;]
2. Espionage[;]
3. Sabotage[;]
4. Communist activity[;]
5. Crimes liable to create disorder[;]
6. Favoring of the enemy [by] the following means:
  - a. Smuggling people into a country[;]
  - b. The attempt to enlist in an enemy army[;]
  - c. Support of members of an enemy army (parachutist; etc.)[;] [or]
7. Illegal possession of arms.<sup>287</sup>

Although the decree was applicable to all the occupied territories, it in fact was primarily directed at the west European occupied countries (i.e., France, Belgium, the Netherlands, Luxemburg, and Norway) except for Denmark.<sup>288</sup>

The case against Schlegelberger focused on his role in drafting the Law Against Poles and Jews and on his role in implementing the

---

280. JUSTICE TRANSCRIPT, *supra* note 14, at 779.

281. *Id.* at 75.

282. *Id.*

283. *Id.* at 77–78.

284. *See id.*

285. *Id.* at 78, 785.

286. *See id.* at 640.

287. *Id.* at 778–79.

288. *See id.* at 785.

Night and Fog Decree and keeping it in the judiciary rather than leaving it with the Wehrmacht (the German Army), where it more likely should have been kept.<sup>289</sup> The testimony indicated that the Wehrmacht was reluctant to participate in the program because of doubts as to its legality.<sup>290</sup>

The prosecution introduced Schlegelberger's draft of the Law Against Poles and Jews, which showed him to have played a pivotal role in producing that policy and overseeing its implementation.<sup>291</sup> The prosecution produced many documents signed by Schlegelberger indicating his complicity in the overall degradation of German justice in the Nazi period.<sup>292</sup> Two particularly damaging pieces of evidence were a memo removing two notaries from office for having bought postcards from a Jewish street vendor,<sup>293</sup> and his proposal that Jews who were in mixed marriages not be deported to the East if they agreed to be sterilized.<sup>294</sup> The defense, for its part, produced Schlegelberger in his own defense. He noted that during the entire period of Nazi rule, the Ministry of Justice and the judiciary were in a constant struggle against the SS, Gestapo, and the Nazi Party for control of the judicial process.<sup>295</sup> Schlegelberger argued that much of what he did therefore actually served to protect judicial independence and protect defendants.<sup>296</sup> He argued that even the Law Against Poles and Jews offered some limited procedural rights to the victims and was therefore better than the laws which might have been proposed by the SS, Gestapo, or the Nazi Party.<sup>297</sup>

He also testified that he agreed to take on the Night and Fog program because the alternative, given the Wehrmacht's reluctance, would have been to have turned over the defendants to the Gestapo or SS for immediate disposition without trial.<sup>298</sup> Schlegelberger also noted that many of the harsh measures adopted in the Law Against Poles and Jews were intended to stave off harsher measures.<sup>299</sup> He also pointed out that he was in fact replaced by Thierack, a Nazi zealot, as Minister of Justice after his resignation in 1942, and that all

---

289. *See id.* at 811–15.

290. *See id.* at 806–07.

291. *Id.* at 615–20.

292. *See id.* at 598–606, 611–20.

293. *Id.* at 363–65.

294. *Id.* at 648–49.

295. *See id.* at 292–93.

296. *See id.* at 808–09.

297. *See id.* at 809–10.

298. *See id.* at 808–09.

299. *See id.* at 811–13.



semblance of judicial independence and adherence to legal norms disappeared after his departure.<sup>300</sup>

The prosecution introduced testimony that, in addition to Schlegelberger, Klemm, Rothenberger, Lautz, Mettgenberg, von Ammon and Joël were all involved in the Night and Fog program.<sup>301</sup> Additionally, there was substantial evidence against Rothaug, Lautz, and Joël for actions under the Law Against Poles and Jews.<sup>302</sup>

Of the greatest interest was the testimony against Rothaug and Oeschey, two People's Court judges, which consisted of case reports and testimony of multiple trials in which Poles and Jews had been deprived of all semblance of a fair trial, and had ultimately been found guilty and executed.<sup>303</sup> Many of the best-known incidents of the trials occurred in their courtrooms,<sup>304</sup> most notably with evidence of the *Katzenberger-Seiler* case.<sup>305</sup>

### 1. The *Katzenberger-Seiler* Case

Leo Katzenberger was a 68-year-old Jewish man, a leader in the Jewish community, who had befriended Irene Seiler, the daughter of a tenant of his.<sup>306</sup> They had maintained a friendly relationship for years and on one occasion she was seen to have sat on his lap.<sup>307</sup> Katzenberger was charged with violating the Nuremberg race laws, which prohibited sexual relations between Jews and non-Jewish Germans.<sup>308</sup> The evidence showed that Rothaug prejudged the case and privately disclosed before the trial that Katzenberger would be found guilty and would receive the death penalty, even though there was no evidence that he had in fact had sexual relations with Seiler.<sup>309</sup>

Because Seiler denied any sexual contact with Katzenberger, Rothaug decided that she would be tried for perjury in the same trial

---

300. *Id.* at 300.

301. *See id.* at 1086, 1107, 1118, 1128, 1134, 1138.

302. *Id.* at 1128, 1142, 1156.

303. *Id.* at 1145–55, 1159–61.

304. *Id.* at 1159.

305. *See id.* at 1150–56. This case was recounted in the film *Judgment at Nuremberg* as the “Feldenstein case.” *See* DAVID FRASER, CENTRE FOR THE STUDY OF POST-CONFLICT CULTURES, *JUDGING JUDGMENT AT NUREMBERG: LAW, JUSTICE, AND MEMORY IN HOLLYWOOD* 13 (2007), [http://www.academia.edu/5991394/Judging\\_Judgment\\_at\\_Nuremberg\\_Law\\_Justice\\_and\\_Memory\\_in\\_Hollywood\\_CIDESC\\_Centre\\_for\\_the\\_Study\\_of\\_Post-Conflict\\_Cultures](http://www.academia.edu/5991394/Judging_Judgment_at_Nuremberg_Law_Justice_and_Memory_in_Hollywood_CIDESC_Centre_for_the_Study_of_Post-Conflict_Cultures).

306. *See* JUSTICE TRANSCRIPT, *supra* note 14, at 1150–51.

307. *Id.* at 1151–52.

308. *Id.* at 1153–54.

309. *Id.* at 1152.

as Katzenberger.<sup>310</sup> Thus, her denial was discredited. The minimum penalty for violation of the Nuremberg laws was imprisonment for up to one year or a fine or both.<sup>311</sup> Rothaug noted, however, that the alleged offenses occurred at night.<sup>312</sup> Using law by analogy, he concluded that the sexual relationship was analogous to a violation of the wartime blackout restrictions, for which the death penalty was available.<sup>313</sup> Rothaug sentenced Katzenberger to death and Seiler to two years' imprisonment.<sup>314</sup>

## 2. The *Kaminska-Wdowen* Case<sup>315</sup>

Oeschey presided over the *Kaminska-Wdowen* Case.<sup>316</sup> Sophie Kaminska was a 36-year-old Polish woman who was the mother of three children.<sup>317</sup> Her husband was killed in the German attack on Poland in September 1939.<sup>318</sup> Thereafter she came to Germany to work on a German farm.<sup>319</sup> Wasyl Wdowen was a 20-year-old Ukrainian farm worker who resided in Poland at the time of the German invasion.<sup>320</sup> Kaminska and Wdowen developed a romantic attachment and had a child together while working on the farm.<sup>321</sup> At some point a dispute broke out between Kaminska and the German farmer over compensation.<sup>322</sup> Wdowen joined the dispute in support of Kaminska and reportedly shoved the farmer.<sup>323</sup> A German soldier on leave heard the commotion and joined the dispute.<sup>324</sup> He later gave a statement that Kaminska slapped him and he slapped her back.<sup>325</sup> She was also alleged to have picked up a hoe and threatened him.<sup>326</sup> The soldier then pulled out a bayonet and ordered Kaminska

---

310. *Id.* at 1151–52.

311. *See id.* at 180–81.

312. *Id.* at 1153–54.

313. *See id.*

314. *Id.* at 654. The verdict of both defendants is at the beginning of Rothaug's full opinion. *See id.* at 653–64.

315. *Id.* at 1159–61.

316. *Id.* at 706.

317. *Id.* at 706–07.

318. *Id.* at 707, 998.

319. *Id.* at 707.

320. *Id.* at 706–07.

321. *Id.* at 707.

322. *Id.*

323. *Id.*

324. *Id.*

325. *Id.*

326. *Id.*

and Wdowen to leave.<sup>327</sup> As the soldier left on his bicycle to call the police, Kaminska threw a stone at him.<sup>328</sup>

Kaminska's account differed in that she testified that the soldier slapped her first.<sup>329</sup> The soldier's account came in a statement he gave at the police station.<sup>330</sup> As he was missing in action in North Africa, he did not testify.<sup>331</sup> Kaminska gave unsworn testimony, in accordance with the law.<sup>332</sup> The court credited the soldier's testimony and discredited hers.<sup>333</sup> When the police came to arrest her, she resisted arrest.<sup>334</sup> Wdowen tried to help her, but was ordered to stay away.<sup>335</sup> He followed her to the jail and took her hands as she was being put into jail.<sup>336</sup>

Kaminska was convicted of using a knife or a thrusting weapon against a German soldier (based on her throwing a stone at him as he rode off).<sup>337</sup> Using the doctrine of decision by analogy, Oeschey concluded that the purpose of throwing the stone was to injure the soldier.<sup>338</sup> If he had been hit by the stone he might have died.<sup>339</sup> As a soldier he was essential to the German war effort.<sup>340</sup> Therefore the stone must be considered to be the equivalent of a knife, and she was therefore guilty of a serious violent crime.<sup>341</sup> By invoking the Law Against Poles and Jews, Oeschey imposed a death sentence on Kaminska.<sup>342</sup>

Oeschey found Wdowen guilty of insulting German honor by pushing the German farmer.<sup>343</sup> In addition, by holding Kaminska's hands while a police official tried to put her in jail, he offered forceful resistance to an official in performance of his official duty.<sup>344</sup> As these crimes were only possible because the war called most able-bodied men to the army, he was also found to be taking advantage of

---

327. *Id.*

328. *Id.*

329. *Id.* at 708.

330. *See id.* at 708–09.

331. *See id.* at 708.

332. *Id.* at 1002–03.

333. *Id.* at 708–09.

334. *Id.* at 708.

335. *Id.*

336. *Id.* at 711.

337. *Id.* at 709.

338. *Id.* at 709–10.

339. *Id.* at 710.

340. *Id.*

341. *Id.*

342. *Id.* at 706, 712.

343. *Id.* at 711.

344. *Id.*

wartime conditions to commit his crimes.<sup>345</sup> As a result, Oeschey also sentenced him to death.<sup>346</sup>

### 3. The Stefanowicz-Lenczewski Case

In another case, typical of many cited in the opinion, two Polish laborers, Paul Stefanowicz, age twenty, and Franz Lenczewski, age eighteen, left their workplaces to which they were committed and attempted to cross the border into Switzerland.<sup>347</sup> They were caught by border control.<sup>348</sup> The court noted that although it could not be proven that they intended to join the Polish army (indeed the court noted that both men appeared to be “effeminate”): “Nevertheless, as Poles, both of them have harmed the interests of the German Reich by their conduct. For they were assigned to work in the Reich, and in total warfare any loss in this regard harms the interests of the Reich.”<sup>349</sup> Under the Law Against Poles and Jews, Stefanowicz was sentenced to death and Lenczewski to eight years’ imprisonment.<sup>350</sup> It should be noted that although neither had ever been a German citizen, they were both charged with treason, thereby vesting the People’s Court with jurisdiction.<sup>351</sup> The prosecutor in this case was defendant Lautz.<sup>352</sup>

### 4. The *Durka* and *Struss* Cases

An additional case concerned seventeen and eighteen-year-old Polish girls who worked in a munitions factory.<sup>353</sup> Both were accused of setting a fire at the factory, and both were alleged to have confessed.<sup>354</sup> Their trial was held the same day as the arrest and the fire.<sup>355</sup> Their attorney was given two hours’ notice of the trial, and his request for postponement was denied.<sup>356</sup> One of the girls, who reportedly confessed, recanted her confession at the trial.<sup>357</sup> Both were found guilty and were sentenced to death by the presiding

---

345. *Id.* at 711–12.

346. *Id.* at 712.

347. *Id.* at 702–03.

348. *Id.* at 703.

349. *Id.* at 704.

350. *Id.*

351. *Id.* at 1123.

352. *Id.* at 702–03.

353. *Id.* at 1146.

354. *Id.*

355. *Id.*

356. *Id.*

357. *Id.*

judge, defendant Rothaug.<sup>358</sup> They were executed four days after the trial.<sup>359</sup> In each of these cases, the trappings of a trial were present, but the reality of a fair trial was not.

E. *Opinion*

*Woe to those who make unjust laws, to those who issue oppressive decrees, to deprive the poor of their rights and withhold justice from the oppressed of my people.*<sup>360</sup>

On December 3–4, 1947, the tribunal issued a thorough and comprehensive opinion, running to 223 pages.<sup>361</sup> The opinion began with a review of its jurisdiction and authority to proceed under the London Charter, ACC 10 and OMGUS 7.<sup>362</sup> The tribunal then went on to a detailed analysis of the crimes charged in the indictment, particularly focusing on Count III, crimes against humanity.<sup>363</sup>

As has been noted, the charge of crimes against humanity was first specifically identified in the London Charter and was modified by the requirement that such an offense be in association with some of the other crimes identified in the London Charter, to wit, crimes against the peace and war crimes.<sup>364</sup> Despite the opinion of the IMT, which found a number of defendants guilty of crimes against humanity, the difference in text between the definition of crimes against humanity in the London Charter and ACC 10 left many questions about the application of the charges. The tribunal set about to answer these questions.

First, the tribunal clearly distinguished between a war crime and a crime against humanity and, in doing so, established a definition used in subsequent cases of international law. The tribunal noted that a war crime was an offense committed during war time against the population of a belligerent enemy power.<sup>365</sup> The specific type of offense constituting a war crime was set forth in treaties, such as the Hague and Geneva Conventions, as well as by the traditional customs and usages of war.<sup>366</sup> A war crime could be committed against a single person.<sup>367</sup>

---

358. *Id.* at 1147.

359. *Id.*

360. *Isaiah* 10:1–2 (emphasis added).

361. JUSTICE TRANSCRIPT, *supra* note 14, 954–1177.

362. *Id.* at 956–59.

363. *Id.* at 959–1010.

364. *Id.* at XIII–XIV, XVIII–XIX.

365. *Id.* at 972.

366. *Id.* at 960.

367. *See id.* at 972.

The defendants had argued that an offense committed against civilians in the Incorporated Eastern Territories could not be a war crime because they were now part of Germany.<sup>368</sup> The tribunal concluded that because there were Polish armies still in the field fighting,<sup>369</sup> and a Polish government in exile had existed throughout the war, the administrative decision to incorporate Polish land into the German Reich did not change any part of pre-war Poland into German territory.<sup>370</sup>

Crimes against humanity, particularly as defined in ACC 10, served as a complement to war crimes. Under ACC 10, Section 2(b) a crime against humanity was an offense against any civilian population, not only that of a belligerent power.<sup>371</sup> Thus, German officials could be guilty of a crime against humanity even if the offense were against German civilians or on German soil.

The tribunal recognized that not all offenses against German civilians would constitute crimes against humanity or a crime under international law.<sup>372</sup> For example, the court concluded that the imposition of what appeared to be excessively harsh penalties on certain categories of offenders such as habitual criminals or violators of laws concerning hoarding or black markets were not crimes against humanity, as long as the prosecution or penalty was not based on racial, religious, or prohibited discrimination.<sup>373</sup> Similarly, the references in ACC 10 to offenses “against any civilian population” had to be interpreted to mean that an offense against an individual, no matter how serious, would not be a crime against humanity.<sup>374</sup> The tribunal therefore came to the following interpretation:

---

368. *Id.* at 961.

369. Subsequent to the conquest of Poland, substantial numbers of Polish soldiers were released by the Soviet Union to fight for the Western Allies. Polish army units had a distinguished combat record during the war, including the capture of Monte Cassino in the Italian campaign, and played a major role in the breakout from the Normandy bridgehead. A Polish parachute brigade fought at Arnhem. There were two armed revolts in Warsaw during the war, including the revolt of the Warsaw ghetto and the revolt of the Polish Home Army. Polish flyers had also served in the RAF during the Battle of Britain. *See* RICK ATKINSON, *THE DAY OF BATTLE: THE WAR IN SICILY AND ITALY, 1943-1944*, at 511, 531–33 (2007); JOHN KEEGAN, *SIX ARMIES IN NORMANDY: FROM D-DAY TO THE LIBERATION OF PARIS, JUNE 6TH–AUGUST 25TH, 1944*, at 262–82 (1982).

370. JUSTICE TRANSCRIPT, *supra* note 14, at 1027–28, 1076.

371. ACC 10, *supra* note 139, at 250.

372. JUSTICE TRANSCRIPT, *supra* note 14, at 1026.

373. *Id.* at 1025–27.

374. *Id.* at 973.

We hold that crimes against humanity as defined in C.C. Law 10 must be strictly construed to exclude isolated cases of atrocity or persecution whether committed by private individuals or by governmental authority. As we construe it, that section provides for punishment of crimes committed against German nationals only where there is proof of conscious participation in systematic government organized or approved procedures amounting to atrocities and offenses of the kind specified in the act and committed against populations or amounting to persecutions on political, racial or religious grounds.<sup>375</sup>

Although the opinion, in deciding the fate of individual defendants—particularly the judges on trial—relied heavily on clear incidents of miscarriages of justice, the opinion made clear that the specific cases were being cited to demonstrate a pattern of wrongdoing against populations, rather than constituting offenses in their own right.<sup>376</sup>

The defendants in all of the NMT cases argued that the charge of crimes against humanity was an ex-post facto law since the crime was first officially identified in the London Charter.<sup>377</sup> All the tribunals concluded that, as their jurisdiction was established by the London Charter and ACC 10, they accepted the inclusion of crimes against humanity as binding.<sup>378</sup>

This tribunal, however, was the only one to consider whether the offenses also violated fundamental justice as an ex-post facto law.<sup>379</sup>

The tribunal first noted that, unlike legislation in the United States or other constitutional countries, there was no constitutional limit or superior law by which to challenge the London Charter or ACC 10.<sup>380</sup> Thus, there was no basis for a legal challenge to the offense.

However, the tribunal concluded that the ex-post facto rule was based on notions of justice and that there was no injustice in the application of ACC 10.<sup>381</sup> First, the ex-post facto principle is primarily applied to statutory provisions, but is generally not applied in decisions under the common law, that is, decisions which typically deal with novel situations.<sup>382</sup> International law is comparable to the

---

375. *Id.* at 982.

376. *Id.* at 984–85.

377. *Id.* at 974; HELLER, *supra* note 14, at 123–29.

378. HELLER, *supra* note 14, at 123.

379. *See id.* at 125.

380. JUSTICE TRANSCRIPT, *supra* note 14, at 974–75.

381. *See id.* at 977.

382. *Id.* at 974–75.

common law in that it grows by accretion.<sup>383</sup> Thus, a rigid application of the ex-post facto principle would “strangle . . . [common international] law at birth.”<sup>384</sup>

More to the point, the tribunal noted that:

As a principle of justice and fair play, the rule in question will be given full effect. As applied in the field of international law that principle requires proof before conviction that the accused knew or should have known that in matters of international concern he was guilty of participation in a nationally organized system of injustice and persecution shocking to the moral sense of mankind, and that he knew or should have known that he would be subject to punishment if caught.<sup>385</sup>

The opinion then noted that, as part of the Versailles Peace Conference, the Commission on Responsibility of Authors of the War had specifically stated that persons who had violated “the laws and customs of war or the laws of humanity, are liable to criminal prosecution.”<sup>386</sup>

The opinion also recounted a number of prior incidents in which countries had intervened with Ottoman Turkey to protect its Christian minorities, with Russia and Romania on behalf of their Jewish minorities, and with Spain on behalf of the Cuban population.<sup>387</sup> Finally, and ironically, Hitler himself had justified his intervention in Czechoslovakian internal affairs on behalf of the allegedly persecuted Sudeten Germans, which was the incident triggering the notorious Munich agreement dismembering Czechoslovakia.<sup>388</sup>

Thus, the defendants had to have known that if they had engaged in massive acts of injustice, even against their own people in wartime, they might very well be found criminally liable. There was no unfairness or injustice in trying the defendants for crimes against humanity.<sup>389</sup>

The tribunal disposed of several other defenses of the defendants. First, the tribunal concluded that the defendants were charged with using German law as an instrument for the commission of war crimes

---

383. *Id.* at 975.

384. *Id.*

385. *Id.* at 977–78.

386. *Id.* at 978.

387. *Id.* at 981–82.

388. *Id.* at 982.

389. *Id.* at 983.



and crimes against humanity, and as ACC 10 specifically rejected compliance with domestic law as a defense, the defendants could not use compliance with German law in defense.<sup>390</sup>

Additionally, the tribunal noted that the doctrine of judicial immunity, applicable in American courts, would not be available to the German judges as the immunity was only available to judicial officials who were acting independently.<sup>391</sup> Judicial independence had ceased to exist in Germany.<sup>392</sup>

Although there was a great deal of testimony on a number of issues, the opinion focused on two general categories of offense: (1) acts associated with the Night and Fog Decree and (2) acts of racial persecution, particularly with the Law Against Poles and Jews.<sup>393</sup>

The tribunal's task with respect to the Night and Fog Decree was simplified by the decision in the IMT, which found field marshals Keitel and Jodl guilty of war crimes and crimes against humanity for their role in the Night and Fog program.<sup>394</sup> There was, therefore, binding precedent for finding that the Night and Fog program could not be justified on the basis of military necessity. Indeed, the tribunal noted that, in a number of cases, the victims in the Night and Fog cases were acquitted or given light sentences as posing little threat, yet they were sent to concentration camps anyway, rather than being sent home where they could reveal the nature of the program.<sup>395</sup>

The tribunal noted that the program violated the laws of war, in particular, Article 5 of the Hague Convention pertaining to the treatment of prisoners of war; Article 23 pertaining to maintaining the civilian courts of the occupied countries; Article 43 pertaining to maintaining order and enforcing the law; and most importantly, Article 46 pertaining to protection of family honor and rights and protecting the lives and property rights, religious practices, and convictions of persons in occupied territories.<sup>396</sup>

An important part of the decision was the tribunal's conclusion that the secrecy of the Night and Fog program was intended to terrorize and intimidate families of the victims as well as members of the occupied population—whether they were engaged in resistance activities or not—thereby violating international law.<sup>397</sup> Thus,

---

390. *Id.* at 984.

391. *Id.* at 1024–25.

392. *Id.*

393. *See id.* at 1031–81.

394. *Id.* at 1060.

395. *Id.* at 1058.

396. *Id.* at 1061.

397. *Id.* at 1058.

intentional infliction of emotional harm to third parties could constitute a crime.<sup>398</sup>

The tribunal also addressed the nature of the Night and Fog court proceedings as well. Had the trials provided under the Night and Fog program been conducted fairly, the programs likely still would have been viewed as a war crime or a crime against humanity, but the crimes would have been highly mitigated. However, as the tribunal noted:

The trials of the accused NN persons did not approach even a semblance of fair trial or justice. The accused NN persons were arrested and secretly transported to Germany and other countries for trial. They were held incommunicado. In many instances they were denied the right to introduce evidence, to be confronted by witnesses against them, or to present witnesses in their own behalf. They were tried secretly and denied the right of counsel of their own choice, and occasionally denied the aid of any counsel. No indictment was served in many instances and the accused learned only a few moments before the trial of the nature of the alleged crime for which he was to be tried. The entire proceedings from beginning to end were secret and no public record was allowed to be made of them.<sup>399</sup>

It is clear that the systematic denial of these rudiments of a fair trial, whether under common law, civil law, or courts martial to persons in occupied countries could itself constitute a war crime and a crime against humanity.<sup>400</sup> Each of the defendants indicted for participation in the Night and Fog program, whether as drafters of the decree, as judges or as prosecutors, was found guilty of war crimes and crimes against humanity.<sup>401</sup>

The second broad category of offense discussed in the opinion was racial persecution, particularly of Poles and Jews. A majority of the specific cases cited were of Poles, rather than Jews, because Jews were effectively barred from the court system in early 1943, as the Final Solution was implemented.<sup>402</sup>

---

398. *Id.*

399. *Id.* at 1046–47.

400. *Id.* at 1046.

401. *See id.* at 1031–33, 1087, 1107, 1118, 1128, 1132, 1134, 1142, 1156, 1170.

402. *See id.* at 81.

This portion of the opinion focused on the impact of the Law Against Poles and Jews and on the trials of Polish citizens for high treason against Germany. Schlegelberger and others drafted the Law Against Poles and Jews to extend German law, including its racial laws, to the newly annexed Polish land.<sup>403</sup> As was previously noted, this law dramatically reduced the rights of Poles and Jews in the legal system and, coupled with provisions of German law, such as law by analogy, made it impossible for a Pole or Jew even to know what conduct of his or hers might constitute a crime under the new German laws.<sup>404</sup>

Schlegelberger, as primary draftsman, and Oeschey and Rothaug, as judges applying the law, were the principal targets of this portion of the case. Although the tribunal reviewed individual acts of cruelty and injustice committed by the various defendants in great detail, the defendants were not found guilty because of the conduct of any particular trial.<sup>405</sup> Rather, the tribunal found that the overall policy of the government was the extermination of Jews and Poles from Germany and throughout Europe. The defendants took part in this policy of extermination by various actions, including the enactment of laws for the persecution and extermination of Poles and Jews, for attempting to enforce those laws, and for presiding over the adjudication of alleged violations of such laws, by means of sham trials.<sup>406</sup>

The policy of extermination constituted a war crime despite the purported annexation of portions of Poland because, as previously noted, a Polish government in exile was still operating and a Polish army was still in the field resisting Germany.<sup>407</sup> The tribunal concluded that the annexation should not be recognized, and that it would be improper to allow a country to evade responsibility for war crimes by the simple expedient of annexing occupied territories.<sup>408</sup> Therefore, the Law Against Poles and Jews and actions taken under it could constitute war crimes. Additionally, because German policy consisted of atrocities and persecutions by the German government against racial and religious minorities, the law would in any event constitute a crime against humanity.<sup>409</sup>

---

403. *Id.* at 1066.

404. *See id.* at 1083.

405. *Id.* at 1177.

406. *Id.* at 1063.

407. *Id.* at 1027–28, 1076.

408. *See id.* at 1076.

409. *Id.* at 1081.

The opinion's discussion of the charges against the defendants Oeschey and Rothaug are of particular interest. The tribunal concluded that the trials conducted by Oeschey and Rothaug were conducted in a manner so failing to meet even minimal levels of due process or fairness so as not to be trials at all.<sup>410</sup> The tribunal recognized the recently coined term, "genocide," which is the deliberate murder of members of a defined group in order to eliminate the group's existence.<sup>411</sup> As the only purpose of these trials was the judicial murder of Jews and Poles in accordance with the overall government policy, Rothaug was one of the first persons in history found guilty of genocide, a subset of crimes against humanity.<sup>412</sup>

The tribunal also considered a bizarre feature of German law during the war. Polish laborers from the annexed areas were brought into Germany, whether voluntarily or involuntarily to work on German farms.<sup>413</sup> On a number of occasions, workers fled their farms to escape to Switzerland.<sup>414</sup> These escaped farm hands were captured, tried for high treason against Germany, and sentenced to death even though they had no allegiance to Germany.<sup>415</sup> Between 150–200 Polish workers were prosecuted under this theory.<sup>416</sup> The tribunal found this program to be a crime against humanity and a war crime because the finding of guilt for treason required that the death penalty be imposed.<sup>417</sup>

As with the Night and Fog portion of the opinion, the opinion describes the manner in which Oeschey and Rothaug failed to meet minimum standards of justice in their courts. Specifically, they refused to permit the Poles and Jews who were tried before them to present witnesses on their own behalf.<sup>418</sup> They denied defense counsel time to prepare a defense or even to be present.<sup>419</sup> They were

---

410. *See id.* at 1155–56, 1161, 1167.

411. *Id.* at 983. The term genocide was coined by Raphael Lemkin, a Jewish refugee lawyer, who lobbied successfully for this U.N. resolution and for the subsequent genocide convention. *See* SAMANTHA POWER, *A PROBLEM FROM HELL: AMERICA IN THE AGE OF GENOCIDE* 42, 53–54 (2002).

412. *See* JUSTICE TRANSCRIPT, *supra* note 14, at 1156. Lautz, the prosecutor who brought the high treason cases against the Polish farmworkers, also was found to have participated in genocide. *Id.* at 1128.

413. *See id.* at 858.

414. *Id.* at 1120–24.

415. *Id.* at 1123.

416. *Id.* at 1120–21.

417. *Id.* at 1028.

418. *Id.* at 1046.

419. *See, e.g., id.* at 1047, 1146.

neither fair nor impartial.<sup>420</sup> Indeed, in a number of cases, these judges met with prosecutors to advise them on how to present their cases or to come to agreement on the punishment before the trial was even held.<sup>421</sup> Both indicated from the bench that they would not believe the testimony of a Jewish or Polish witness.<sup>422</sup> One conclusion of this opinion is that the systematic denial of a fair trial could constitute a war crime or a crime against humanity.

#### F. *Verdict and Sentences*

Schlegelberger was found guilty of crimes against humanity and war crimes arising out of his involvement with the Night and Fog Decree and the Law Against Poles and Jews.<sup>423</sup> The tribunal took seriously Schlegelberger's argument that the judiciary was under constant challenge from the SS, the Nazi Party, and the Gestapo, and that his actions were intended to ward off even harsher actions, and that anyone who would have followed him would have been worse.<sup>424</sup> The tribunal acknowledged that his actual successor, Thierack, was in fact worse,<sup>425</sup> and that Schlegelberger may have mitigated some measures.<sup>426</sup> Even so, the tribunal noted that in attempting to hold off the SS and Gestapo, Schlegelberger and the other defendants had created a system of which more extreme successors would take advantage.<sup>427</sup> The Court concluded that:

Schlegelberger is a tragic character. He loved the life of an intellect, the work of the scholar. We believe that he loathed the evil that he did, but he sold that intellect and that scholarship to Hitler for a mess of political pottage and for the vain hope of personal security.<sup>428</sup>

Schlegelberger was sentenced to life imprisonment.<sup>429</sup>

---

420. *See id.* at 1046–47 (“The trials of the accused . . . persons did not approach even a semblance of fair trial or justice.”).

421. *See id.*

422. *See id.* at 1166.

423. *Id.* at 1084–85.

424. *Id.* at 1086.

425. *Id.*

426. *Id.* at 1083–84. The tribunal noted one such “mitigation.” When German authorities issued an order that all remaining German Jews be evacuated to the East and certain death, Schlegelberger suggested that half-Jews be given the alternative of sterilization, rather than evacuation. The tribunal noted that this alternative itself was hardly humane. *Id.*

427. *Id.* at 1086.

428. *Id.* at 1087.

429. *Id.* at 1200.

In addition to Schlegelberger, von Ammon, Klemm, Lautz, Mettgenberg, and Rothenberger were convicted of crimes against humanity and war crimes.<sup>430</sup> Joël and Oeschey were convicted of crimes against humanity, war crimes, and membership in a criminal organization.<sup>431</sup> Rothaug was convicted of crimes against humanity, but was acquitted of war crimes.<sup>432</sup> Altstötter was convicted of membership in a criminal organization, but was acquitted of war crimes and crimes against humanity.<sup>433</sup> Barnickel, Cuhorst, Nebelung, and Petersen were acquitted.<sup>434</sup> Westphal died before trial, and Engert was granted a mistrial due to illness.<sup>435</sup> In addition to Schlegelberger, Klemm, Oeschey, and Rothaug received life sentences, the rest received sentences from five to ten years in length.<sup>436</sup>

One group of verdicts is of particular interest. Seven of the defendants were tried for offenses committed in their capacity as judges.<sup>437</sup> A mistrial was declared in Engert's case, and the tribunal acquitted Nebelung and Petersen with no explanation or review of evidence.<sup>438</sup>

The opinion described at great length its conclusion with respect to Oeschey, Rothaug and Cuhorst. In each case the tribunal described the actions of the defendants in harsh terms. As an example, Cuhorst is described as: "a fanatical Nazi and a ruthless judge. There is also much evidence as to the arbitrary, unfair, and unjudicial manner in which he conducted his trials."<sup>439</sup> However, the tribunal also noted that some of the records of his cases had been destroyed in an air raid, with the result that:

[T]his Tribunal does not consider that it can say beyond a reasonable doubt that the defendant was guilty of inflicting the punishments which he imposed on racial grounds or that it can say beyond a reasonable doubt that he used the

---

430. HELLER, *supra* note 14, at app. A.

431. *Id.*

432. *Id.*

433. *Id.*

434. *Id.*

435. *Id.*

436. *Id.* (providing a list of the defendants, the results of their cases, and their sentences).

437. *Id.*

438. JUSTICE TRANSCRIPT, *supra* note 14, at 1156–57.

439. *Id.* at 1158.

discriminatory provisions of the decree against Poles and Jews to the prejudice of the Poles whom he tried.<sup>440</sup>

Thus, although Cuhorst may have been an agent of injustice, it had not been proved that he committed a crime against humanity, one element of which was atrocity or persecution based on racial, religious, or political grounds.<sup>441</sup> There was no such problem of proof with respect to Oeschey and Rothaug. Their convictions were based on many examples of sham trials and harsh sentences given to defendants specifically because they were Jews or Poles.<sup>442</sup>

### G. *Aftermath*

The story does not end with the imposition of sentence. Both during and after the twelve Nuremberg Military Tribunals, pressure to stop the trials or mitigate the sentences developed in Germany and in the United States. The opposition in the United States was led by a group of conservative Republican Senators, notably Senators Joseph McCarthy and Robert Taft.<sup>443</sup>

In Germany, a number of groups sought the release of the NMT defendants, including church groups and the Adenauer government of the newly formed Federal Republic of Germany.<sup>444</sup> While the United States was negotiating for German accession to the NATO alliance, and for German support in the Cold War, the High Commissioner for Germany, John McCloy, set in motion processes which resulted in the release of all the NMT defendants, including all of the Justice Trial defendants.<sup>445</sup> Schlegelberger received a medical release in 1951.<sup>446</sup> The last Justice Trial defendants to be released were Oeschey in 1955 and Rothaug in 1956.<sup>447</sup>

---

440. *Id.*

441. JUSTICE TRANSCRIPT, *supra* note 14, at 1157–59.

442. *Id.* at 1166; *see supra* notes 303–04 and accompanying text.

443. *Chapter Summaries on Robert A. Taft and Daniel Webster*, JOHN F. KENNEDY: PRESIDENTIAL LIBR. & MUSEUM, <https://www.jfklibrary.org/Education/Profile-in-Courage-Essay-Contest/Curriculum-Ideas/Curriculum-Appendix-3.aspx/> (last visited Apr. 1, 2017); *see TAYLOR I*, *supra* note 13, at 490.

444. *See Donald Bloxham, The Nuremberg Trials and the Occupation of Germany*, 27 CARDOZO L. REV. 1599, 1606 (2006).

445. *See HELLER*, *supra* note 14, at 350–51.

446. *Id.* at 352.

447. *See generally id.* at 331–67 (giving an excellent account of the process in which the Justice Trial defendants were released).

## V. CONCLUSION

*I myself was a criminal judge. One single murder . . . occupied our time for 2 to 3 weeks, and it was a terrible thing. Two murders by one person—that was horrifying. If someone had eight to ten murders on his conscience, then he was described as a mass murderer in the press of Europe, and people asked themselves whether this was something that could be handled by means of the penal code at all.*

*When, last year, in the courtroom of the big trial I listened to the witness, Hoess, of Auschwitz, when he answered the question of the prosecutor as to how many people he had killed . . . he answered he didn't remember exactly whether two and a half or three million. At that time it was quite obvious to me that . . . this had anything to do anymore with legal considerations because, Mr. Prosecutor, no matter what a state regulates concerning the question of review of a law the state has to think of normal conditions. These occurrences and matters cannot be measured by any order of the world at all.<sup>448</sup>*

*[T]he arc of the moral universe is long, but it bends toward justice.<sup>449</sup>*

In the introduction to this article, three questions were posed. Was the trial procedurally fair? Was it substantively fair? Was justice done?

A. *Was the Trial Procedurally Fair?*

The opinion in the trial provides the appropriate measure of its fairness. In discussing the Night and Fog program in particular, the tribunal set forth a number of criteria defining a fair trial under international law.

A fair trial would have to be public, with a record of proceedings. The defendants could not be held incommunicado. They would be entitled to counsel of their own choice. They would receive adequate notice of the charges against them with sufficient time to prepare for

---

448. JUSTICE TRANSCRIPT, *supra* note 14, at 281–82 (statement of Professor Hermann Jahrreiss) (emphasis added).

449. Martin Luther King, Jr., Speech at the Annual S. Leadership Conference: Where Do We Go from Here? (Aug. 16, 1967) (emphasis added).



their case. They must have an opportunity to confront witnesses against them and to present witnesses and documents on their own behalf. There must be interpreters available for those who cannot understand the language or the proceedings. The finder of fact and law had to be fair and impartial.<sup>450</sup>

The Nuremberg Trials, in general, and the Justice Trial, in particular, met this international standard well. The defendants not only had counsel of their own choosing, but unlike American practice, pre-*Gideon*, the United States government paid for their counsel.<sup>451</sup> They received copies of the indictments long before the trial and were given copies of all documents the prosecution intended to introduce before their introduction.<sup>452</sup> The defendants were allowed to present witnesses on their own behalf and to present exhibits.<sup>453</sup> Indeed, the defense submitted more witnesses and exhibits than did the prosecution.<sup>454</sup> Guilt had to be established beyond a reasonable doubt.<sup>455</sup>

Given the hybrid nature and logistical problems of the proceedings, much of the evidence was presented by affidavit, rather than by live witnesses.<sup>456</sup> However, the defense had the ability to require the prosecution to call any person whose affidavit the prosecution had produced for purposes of cross-examination.<sup>457</sup> The defense also benefitted from the availability of simultaneous interpreters.<sup>458</sup> As noted above, Justice Jackson offered as a rule of thumb for determining the fairness of a proceeding that the result could be the acquittal of defendants.<sup>459</sup> In the Justice Trial, the tribunal granted the defense motion striking the conspiracy count.<sup>460</sup> It also acquitted four of the defendants.<sup>461</sup> Most significantly, it acquitted Cuhorst.<sup>462</sup> Although it found that he was a terrible judge, it could not find him

---

450. See JUSTICE TRANSCRIPT, *supra* note 14, at 106–07; UNITED NATIONS WAR CRIMES COMM’N, *supra* note 199, at 103–04.

451. Joseph A. Ross, *Göring’s Trial, Stahmer’s Duty: A Lawyer’s Defense Strategy at the Nuremberg War Crimes Trial, 1945-46*, 5 MADISON HIST. REV. 1, 3 (2004).

452. See *supra* note 166 and accompanying text. Sixteen years later, the U.S. Supreme Court held that defendants in a criminal case have an absolute right to all exculpatory evidence. *Brady v. Maryland*, 373 U.S. 83, 87 (1963).

453. JUSTICE TRANSCRIPT, *supra* note 14, at 5.

454. *Id.*

455. TAYLOR II, *supra* note 14, at 90.

456. *Id.* at 89.

457. See *supra* notes 166–71 and accompanying text.

458. TAYLOR II, *supra* note 14, at 143–44.

459. Jackson, *supra* note 64.

460. JUSTICE TRANSCRIPT, *supra* note 14, at 3–4.

461. *Id.* at 4.

462. *Id.* at 1157–59.

guilty beyond a reasonable doubt of the charge of war crimes because it had not been proved that he had discriminated against Poles and Jews on the basis of race.<sup>463</sup>

If this trial is said to have established a universal standard of procedural fairness, it is of note that many of the protections afforded the defendants, such as provision of counsel at public expense, or full discovery, would not be constitutionally mandated under American law for years to come. Additionally, although the American legal system was well-regarded at this time, the standard of justice for African Americans, particularly in the South, did not meet the standard set forth by the Justice Trial tribunal.<sup>464</sup>

On the other hand, other elements of American and British practice were not recognized as universally binding. For example, the trials made no use of a lay jury.<sup>465</sup> Hearsay in the form of affidavits was easily admitted, and concomitantly the confrontation of witnesses was not required.<sup>466</sup> However, the defendants were allowed to challenge affidavits and to require that the preparer of the affidavit make the witness available for cross-examination and confrontation.<sup>467</sup> On balance, it appears that the trial was conducted fairly.

#### B. *Was the Trial Substantively Fair?*

This is a more difficult question than procedural fairness. The entire Nuremberg project has been criticized from its inception for being “victors’ justice” and for trying the defendants *ex-post facto*.<sup>468</sup>

In a sense, most international criminal trials could be viewed as victors’ justice. The trials generally can only take place when the suspect is in custody, and witnesses and documentation are available. In the case of high government officials or warlords, these conditions will only occur after military defeat or the overthrow of a

---

463. *Id.*

464. *See, e.g.,* *Powell v. Alabama*, 287 U.S. 45, 52–53 (1932); *Patterson v. Alabama*, 294 U.S. 600, 601 (1935); *Norris v. Alabama*, 294 U.S. 587, 588 (1935). It appears also that the trial and execution of Japanese General Yamashita did not meet the international standard recognized in the Justice Trial. *See In re Yamashita*, 327 U.S. 1, 26–27 (1946) (Murphy, J., dissenting); *In re Yamashita*, 327 U.S. 1, 41–89 (1946) (Rutledge, J., dissenting).

465. *See HELLER, supra* note 14, at 39.

466. *Id.* at 140–42.

467. *Id.* at 141–42.

468. Charles E. Wyzanski, *Nuremberg: A Fair Trial? A Dangerous Precedent*, ATLANTIC (Apr. 1946), <https://www.theatlantic.com/magazine/archive/1946/04/neuremberg-a-fair-trial-a-dangerous-precedent/306492>.

government.<sup>469</sup> Thus, there was no prospect for trial of Nazi leaders until the Allies had defeated Germany, captured its leaders and seized German archives. To this extent, the charge of victors' justice is of no weight. The Nuremberg project could have constituted victors' justice if the trials had been show trials or if, as the British suggested at the London Conference,<sup>470</sup> the Allies had simply shot the Nazi leaders. It should be noted that in some circumstances in post-war Europe, victors' justice in fact occurred. Mussolini and other Fascist leaders were summarily executed by resistance forces.<sup>471</sup> Female collaborators in France and Italy were publicly humiliated.<sup>472</sup> German populations were summarily expelled from Czechoslovakia for collaboration.<sup>473</sup>

Some critics have suggested that the trial should have included at least one German judge or perhaps a judge from a neutral country.<sup>474</sup> Given the failure of the Leipzig trials after World War I<sup>475</sup> and the very discrediting of the German judiciary which led to the convening of the Justice Trial, it would have been profoundly inappropriate to have had German judges. Similarly, there were few neutrals in World War II. The only European neutrals were Spain and Portugal, both with authoritarian governments;<sup>476</sup> Sweden, which had cooperated with the Germans in the military occupation of Norway and sold iron and weapons to Germany;<sup>477</sup> Ireland, whose intense anti-British feelings led it to refuse all cooperation with the Allies;<sup>478</sup> and Switzerland, which despite Allied pressure sold war materials to the Germans until late in the war.<sup>479</sup>

More importantly, none of these countries, by their failure to have entered the struggle against Nazism and by their frequent

---

469. The experience of the International Criminal Court with respect to Darfur and Kenya demonstrates this problem. Mark Kersten, *In Withdrawal? Africa and the International Criminal Court*, JUST. IN CONFLICT (Dec. 21, 2016), <https://justiceinconflict.org/2016/12/21/in-withdrawal-africa-and-the-international-criminal-court/>.

470. See *supra* notes 71–74 and accompanying text.

471. LOWE, *supra* note 149, at 146.

472. See *id.* at 163.

473. *Id.* at 233.

474. See Wyzanski, *supra* note 468.

475. The Treaty of Versailles, which ended World War I, called for war crimes trials of alleged German war criminals to be held in German courts. The trials were a sham. TAYLOR I, *supra* note 13, at 16–18.

476. Additionally, Franco's Spain, while neutral, favored the Nazis. See GERHARD L. WEINBERG, *A WORLD AT ARMS: A GLOBAL HISTORY OF WORLD WAR II* 72, 396–97 (1994).

477. *Id.* at 174–75, 394–95.

478. *Id.* at 146, 372–73.

479. *Id.* at 399–400.

collaboration with the German war effort, had earned the moral stature to participate in the trials.<sup>480</sup> It is not clear that participation by neutral governments would have been acceptable to any of the belligerent powers or that their participation would in any way have contributed to the real or perceived justice of the proceedings.

The ex-post facto charge is of greater moment. None of the defendants in the Justice Trial were charged with crimes against the peace, and the charge of conspiracy to commit war crimes and conspiracy to commit crimes against humanity were dismissed as those charges were not recognized in international law.<sup>481</sup>

The charge of belonging to a criminal organization was an offense recognized in the International Military Tribunal, but was viewed as problematic even in that proceeding. The charge required proof that voluntary participation in a criminal organization (e.g., the SS, at a sufficiently high level with knowledge) would constitute a crime.<sup>482</sup> Only Altstötter was found guilty on that count alone.<sup>483</sup> This count, while not technically one of conspiracy, certainly is its first cousin. There was little or no precedent for this charge other than the IMT trial itself, and the charge essentially was a residue of the Bernays' Memorandum.<sup>484</sup> This count is the most doubtful of the counts in the case and Altstötter's conviction the only questionable conviction in the trial.

By contrast, the war crimes count was based on centuries of customary law and, since General Order 100 and the subsequent Hague and Geneva Conventions, codified law. All of the defendants, with the exception of Altstötter, Rothaug, and those acquitted, were convicted of war crimes.<sup>485</sup>

The charge of crimes against humanity was the great substantive innovation of the Nuremberg Trials. In each of the NMT trials, the defendants moved to dismiss this count, but in eleven of the twelve trials, the tribunals declined to dismiss the count on the basis that ACC 10 had defined the tribunals' jurisdiction to include crimes against humanity.<sup>486</sup> The tribunal in the Justice Trial went further and addressed the fairness of the charges. In the London Charter, the crime was defined as a crime in association with one of the other

---

480. See WILLIAM C. HEFFERNAN, DIMENSIONS OF JUSTICE: ETHICAL ISSUES IN THE ADMINISTRATION OF CRIMINAL LAW 147–49 (2015).

481. See JUSTICE TRANSCRIPT, *supra* note 14, at 3–4.

482. *Id.* at 1129–31.

483. *Id.* at 1776–77.

484. See *id.* at 1186–90.

485. See *id.* at 1199–1201.

486. See *id.* at 58–62.

offenses such as crimes against peace or war crimes.<sup>487</sup> In fact, many crimes against humanity also constituted war crimes. ACC 10 of course eliminated the “in association with” language, and thus seemed to show greater confidence in the charge.<sup>488</sup>

In the IMT and in the NMT trials, the argument was made that crimes against humanity should be recognized as a natural extension of existing offenses, such as war crimes.<sup>489</sup> As international criminal law should grow, like the common law, by application of existing principles to new situations, there was no ex-post facto application. Furthermore, and fundamentally, the defendants knew or should have known that what they were doing was wrong and that should Germany lose the war, there would be liability. Interestingly, Telford Taylor seemed to agree that at least the offense of crimes against the peace was ex-post facto, but argued that the injustice would have been greater had the charge not been brought.<sup>490</sup> The tribunal made a strong showing that whether the charge was ex-post facto or not, there was no injustice in applying the charge to these defendants.

The defendants all argued in their defense that they were acting in accordance with German domestic law and that they did not have the option of disobedience or of holding the law invalid.<sup>491</sup> This defense of dealing with the unjust Nazi laws has generated a veritable cottage industry among legal philosophers debating the nature of law.<sup>492</sup> Professor Hart, arguing from a positivist position, discussed a case in which a German court tried a German woman for the offense of having informed on her husband for having violated Nazi law, knowing that he would likely be convicted and executed.<sup>493</sup> Hart argued that the German law in the Nazi era, although unjust and violating moral norms, was nevertheless law, and therefore it was unjust to convict her for making use of it.<sup>494</sup> He acknowledged that, although the unjust law might have a claim of obedience over her, she would have had a moral imperative to disobey.<sup>495</sup>

---

487. *Id.* at 972.

488. *See* TAYLOR II, *supra* note 14, at 8.

489. *See* JUSTICE TRANSCRIPT, *supra* note 14, at 972.

490. TAYLOR I, *supra* note 13, at 629.

491. TAYLOR II, *supra* note 14, at 109–10.

492. *See generally* Richard Primus, *A Brooding Omnipresence: Totalitarianism in Postwar Constitutional Thought*, 106 YALE L.J. 423 (1996) (providing a good description of the impact of the Nazi experience on legal theory).

493. H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 618–19 (1958).

494. *Id.* at 619.

495. *Id.* at 619–20.

Professor Lon Fuller, a modern natural law philosopher, responded to Hart's article and made the argument that German law under the Nazis violated basic norms for the recognition of the validity of the law (e.g., the ad hoc application of rules).<sup>496</sup> Thus, at a certain point Germany ceased to have a legal system at all.<sup>497</sup> Therefore, the wife should not have been able to claim the protection of the law.<sup>498</sup>

Ronald Dworkin, the leading interpretivist philosopher, criticizes Hart and the positivists for their semantic focus on the word law. It certainly is correct that Nazi Germany had laws, which the government expected its subjects to obey and which most Germans obeyed.<sup>499</sup> Hart was wrong, however, in rejecting the notion based on a deeper understanding of German law that it lacked fundamental characteristics of a flourishing legal system, and therefore, lacked the moral basis to command obedience.

Fuller and Dworkin seemed to have the better of the argument. Certainly, the enactment of law by analogy in 1936 eliminated all certainty from the law. Henceforth, judicial decisions would be whatever a judge, motivated by national socialist ideology, wanted it to be. Among the defendants, the Ministry of Justice officials such as Schlegelberger, could not claim Hart's approach as defense, as the Ministry of Justice officials were the drafters of the unjust laws. Prosecutors and judges, to the extent that their trials were shams, intended only to give a legal pretext to discriminatory and lethal conduct, and therefore, were departing from any reasonable concept of the law.

One of the ironies about the development of the law under Nazism was that the fundamental positivist basis of German jurisprudence was negated by law by analogy. This law, relying as it does on the "sound sentiments of the people,"<sup>500</sup> in effect established a perverse form of natural law. Traditional natural law theories assumed a fundamental transcendent structure of law found in nature and ordained by God (although Fuller's version of natural law does not have a theological basis).<sup>501</sup> National Socialist ideology, however, posited that the fundamental law of nature was a struggle for existence on the basis of race in which the fittest race would

---

496. Lon L. Fuller, *Positivism and the Fidelity to Law – A Reply to Professor Hart*, 71 HARV. L. REV. 630, 648 (1958).

497. *See id.* at 652.

498. *See* Hart, *supra* note 493, at 619.

499. RONALD DWORKIN, *LAW'S EMPIRE* 35 (1986).

500. *See supra* notes 35–63 and accompanying text.

501. *See* Fuller, *supra* note 496, at 660.

survive.<sup>502</sup> The “sound sentiment of the people,” in effect was an appeal to a higher legal or moral authority than positive law.<sup>503</sup> Thus, the judges felt comfortable departing from existing written law relating to punishment, as an example, when they felt there to be a racial imperative to impose a higher sentence, such as with Leo Katzenberger, or the Polish farmworkers. It is striking that although several of the defendants in the IMT, notably Speer, experienced remorse for their deeds, not one of the defendants in the Justice Trial did so.

C. *Was Justice Done?*

*They defiled the German temple of justice . . . . The temple must be reconsecrated. This cannot be done in the twinkling of an eye or by any mere ritual. It cannot be done in any single proceeding or at any one place. It certainly cannot be done at Nuernberg alone.*<sup>504</sup>

The defendants in this case, with the arguable exception of Altstötter, were fairly convicted.<sup>505</sup> However, there were a number of interesting arguments offered in mitigation which must be considered in evaluating the overall fairness of the proceeding.

In his opening statements, counsel for Rothenberger argued that the members of the tribunal had to recognize the difficulty of life in a dictatorship.<sup>506</sup> Under circumstances in which arbitrary arrest or dismissal were possible, only the unusually courageous would go against the system. Most people, including apparently most of the defendants, lost all initiative and acquiesced in the system despite personal objections.

This argument would have greater strength were it not apparent that many of the defendants were members of the Nazi Party, and all had been willing to draft unjust laws or to willingly rule by analogy.<sup>507</sup> It is striking that there was resistance to the Nazis in other areas of German society such as the Confessing Church, the White Rose, and the Kreisau Circle, among Christian groups, and the July 20, 1944

---

502. See Dorothy Thompson, *National Socialism: Theory and Practice*, 13 FOREIGN AFF. 557, 561–62 (1934).

503. See *supra* notes 52–53 and accompanying text.

504. JUSTICE TRANSCRIPT, *supra* note 14, at 33 (opening statement of Brigadier General Telford Taylor) (emphasis added).

505. See *infra* note 507 and accompanying text.

506. JUSTICE TRANSCRIPT, *supra* note 14, at 146–47.

507. See, e.g., *id.* at 25–26; Sfekas, *supra* note 32, at 220, 227.

conspiracy in the Army, and the aristocracy.<sup>508</sup> There was no equivalent resistance among the judiciary.<sup>509</sup>

Schlegelberger argued that what he did was a strategy designed to mitigate the worst parts of Nazi rule.<sup>510</sup> He was in constant conflict with the SS, the Gestapo, and the Nazi Party to maintain judicial independence. Thus, by accepting civil jurisdiction over the Night and Fog cases, he kept the victims from being turned over to the Gestapo for summary execution or immediate confinement in a concentration camp.<sup>511</sup> His draft of the Law Against Poles and Jews was designed to maintain at least some semblance of legal process for Poles and Jews.<sup>512</sup> He argued that his suggestion that half-Jews be given the option of sterilization rather than be deported to the East (to what he knew would be certain death) was the commission of a small evil to avoid the greater.<sup>513</sup> In his final statement, he argued that he knew that his successors would be far worse than he and that he had a clear conscience.<sup>514</sup>

Rothenberg made a similar argument. He testified as an example that a lengthy memorandum he had written concerning a Nazi conception of law was ultimately intended to increase Hitler's comfort level with the judiciary so that he would not feel it necessary to end judicial independence.<sup>515</sup>

The tribunal took this argument seriously, particular with respect to Schlegelberger.<sup>516</sup> However, the tribunal also noted that this strategy rather than tempering the demands of the regime instead facilitated them.<sup>517</sup> The opinion notes that: "If the judiciary could slay their thousands, why couldn't the police slay their tens of thousands?"<sup>518</sup> Thus, the tribunal nevertheless felt compelled to hand down severe sentences. In the aftermath of the trials, as has been noted, every single defendant regardless of the severity of the offense or degree of

---

508. Sfekas, *supra* note 32, at 189–90.

509. MÜLLER, *supra* note 7, at 193–95 (identifying only one judge of all the German judges who in fact had the courage to resist unjust laws, and his only penalty was an early retirement at full pension).

510. JUSTICE TRANSCRIPT, *supra* note 14, at 127.

511. *Id.* at 808–10.

512. *See id.* at 611–15.

513. *Id.* at 721–22.

514. *Id.* at 941, 1086.

515. *Id.* at 498–99. See Sfekas, *supra* note 32, at 215–16, for a more in-depth discussion of the Rothenberg memorandum.

516. *See* JUSTICE TRANSCRIPT, *supra* note 14, at 1086–87.

517. *See id.* at 1086.

518. *Id.*



moral culpability was released early—most notably Schlegelberger in 1951, only four years after the end of the trial.<sup>519</sup>

Although justice was done in the trial itself, the disproportionately short sentences served constituted an injustice, particularly as the commutations of sentence were driven by political expediency rather than by legal or moral considerations. Whether justice was done as to the individual defendants in this case, or for that matter their victims, who received no restitution and perhaps retribution for their suffering, this trial and the NMT trial in general served larger interests of justice.

The Justice Trial and the other NMT trials exposed to the world and to the German public the crimes of the Nazis and of German society in a way that was credible and fair.<sup>520</sup> It was precisely because the defendants had a full opportunity afforded by a trial to challenge the prosecution's case, to present their own witnesses and introduce documents, that we have a full record of the Nazi era. Every book and article on the German legal system relies on the record of the Justice Trial. The NMT trials also were an important part of post-war efforts to define more clearly the laws of war and crimes against humanity. In fact, the trials preceded the 1949 Geneva Conventions,<sup>521</sup> which further defined the laws of war and crimes against humanity, as well as the Genocide Convention.

The cycle of Nuremberg trials should perhaps best be understood as part of a general effort to create a new and just world order. Nuremberg was part of an effort internationally, including the Four Freedoms, the Atlantic Charter, the formation of the United Nations, and the series of post-war treaties defining the laws of war and international humanitarian law, including, most notably, the Geneva Convention of 1949, the Genocide Convention, and the Universal Declaration of Human Rights to establish new norms of international conduct and to create a rule-based system to govern international conflict. Indeed, the trials created the precedent of personal criminal responsibility, which would ultimately give these treaties greater bite. The Justice Trial, in particular, established the precedent that judges,

---

519. HELLER, *supra* note 14, at 352.

520. The Office of the Military Government (OMGUS) did intensive public opinion surveys of the German public from 1945 to 1949 on a variety of issues. In polls taken between 1945 and 1946, 79% of the German public thought that the IMT was fair; 55% thought the sentences handed down were just; 21% thought the sentences were too lenient; and 84% stated that they had learned something new from the trial. PUBLIC OPINION IN OCCUPIED GERMANY: THE OMGUS SURVEYS, 1945-1949, at 34-35 (Anna J. Merritt & Richard L. Merritt eds., 1970).

521. The NMT trials commenced in October of 1947. JUSTICE TRANSCRIPT, *supra* note 14, at III.

prosecutors, and legal officials would enjoy no immunities for sham legal proceedings or for the misuse of the law for purposes of justifying war crimes or crimes against humanity.<sup>522</sup> Telford Taylor, in the opening of the Justice Trial, stated that: “The temple [of justice] must be reconsecrated,” in reference to the German legal system.<sup>523</sup> By the mid-1960s, Germany in fact was conducting its own war crimes trials.<sup>524</sup>

In the third play of the *Oresteia Trilogy*, the Furies, ancient goddesses of vengeance, pursue Orestes, son of Agamemnon, to avenge his murder of his mother.<sup>525</sup> The goddess Athena convenes a trial which acquits Orestes and the Furies accept the result.<sup>526</sup> Athena states that a new civilization will result from the replacement of revenge by law.<sup>527</sup>

The postwar treatment of the German leadership could have taken many forms—from exile to summary execution to inaction. The trials that did take place documented Nazi atrocities in a manner convincing to all but the Holocaust deniers, vindicated the suffering of the victims, and established both international standards for fair trials and useful precedent for future international criminal trials. Most importantly, the trials helped to end the cycle of retribution and violence which threatened to destroy postwar Europe. Although the Justice Trial and NMT trials in general achieved only partial success with respect to individual defendants, they were a material advance in the civilization of the world.

---

522. This precedent has obvious implications if and when the United States ever comes to grips with the use of torture and prisoner abuse by the CIA and military interrogators. These abuses were perpetrated under the purported authority of a series of poorly reasoned legal opinions by a small group of lawyers in the Department of Justice. These opinions were all subsequently withdrawn by the Justice Department. See SENATE SELECT COMM. ON INTELLIGENCE, COMMITTEE STUDY OF THE CENTRAL INTELLIGENCE AGENCY’S DETENTION AND INTERROGATION PROGRAM 7–8 (2014).

523. JUSTICE TRANSCRIPT, *supra* note 14, at 31–33.

524. JUDT, *supra* note 149, at 810.

525. AESCHYLUS, *supra* note 1, at 120–22.

526. *Id.* at 141.

527. *Id.* at 148–49.

