

Nuremburg International Military Tribunal and Universal Crimes

The synopsis is divided into five parts:

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Nuremberg International Military Tribunal and Universal Crimes

1 The decision to establish an International Military Tribunal (IMT) for the trial of leading members of the German Reich who had committed universal crimes was made by Allies in 1943 during World War II.¹ The IMT at Nuremberg² began on 20 November 1945 and included prosecutors from four nations- the United States, Great Britain, the Provisional Government of France and the Union of Soviet Socialist Republics.³

The concept of universal jurisdiction was set in stone, as soon as Justice Robert H. Jackson⁴ began his address before the Tribunal on 21 November 1945, stating that the Tribunal while novel and experimental had four of the mightiest nations and the support of seventeen more to utilize international law to fight the menace of aggressive war.⁵

2 The law established at Nuremberg, the Charter of the Nuremberg International Military Tribunal, was signed on 8 August 1945 pursuant to the Agreement of London.⁶ The Charter described the constitution, jurisdiction and functions of the International Military Tribunal.⁷ It contained 30 articles under seven major headings: i) constitution of the international military tribunal, ii) jurisdiction and general principles, iii) committee for the investigation and prosecution of major war criminals, iv) fair trial for defendants, v) powers of the tribunal and conduct of the trial, vi) judgment and sentence, vii) expenses, and a concluding section on protocol.⁸

¹ Ann Tusa and John Tusa, *The Nuremberg Trial* (1983) 24.

² John Shattuck, 'The Legacy of Nuremberg: Confronting Genocide and Terrorism through the Rule of Law' 10 *Gonzaga Journal of International Law* 6. 'Who would have thought that the city most often associated with Nazi Germany would later become the birthplace of the modern human rights movement?'

³ David Matas, 'From Nuremberg to Rome: Tracing the Legacy of the Nuremberg Trials' (2006/07) 10 *Gonzaga Journal of International Law* 17. The United Kingdom was a reluctant participant in the Nuremberg effort from the very beginning. 'As Michael Bazzyler notes... the initial reaction of Winston Churchill to the suggestion that Nazi war criminals should be brought to justice was that they should just be shot, instead. The British were eventually brought on board, but their reluctance continued.' At the Tehran Conference, in the presence of Allies, Joseph Stalin toasted to 50,000 German deaths by firing squad in 1943.

⁴ Robert H. Jackson, *Opening Statement Before the International Military Tribunal* (1945) Robert H. Jackson Center <<http://www.roberthjackson.org/Man/theman2-7-8-1/>> at 30 March 2007.

⁵ Office of United States Chief of Counsel for Prosecution of Axis Criminality, *Nazi Conspiracy and Aggression*, Vol I. (1946) 114.

⁶ Office of United States Chief of Counsel for Prosecution of Axis Criminality, above 7, 14. See, Leslie Scheuermann, 'Victor's Justice? The Lessons of Nuremberg Applied to the Trial of Saddam Hussein' (2006) 15 *Tulane Journal of International and Comparative Law* 291. 'On this basis, Justice Jackson worked with the representatives of the other Allied powers at the London Conference of June 26, 1945, to develop the substantive law and methods of procedure and prosecution for the trial of the European war criminals.' See also, Robert K. Woetzel, 'The Nuremberg Trials' (1962) *International Law* 6, and Stephen Stratford, *The London Agreement* (2007) <http://www.stephen-stratford.co.uk/london_agreement.htm> 30 March 2007 and Telford Taylor, *International Conference on Military Trials* (1945) The Avalon Project at Yale Law School <<http://www.yale.edu/lawweb/avalon/imt/jackson/jack54.htm>> 30 March 2007.

⁷ Ibid 1.

⁸ Ibid Ch. 2.

The three main criminal acts that were outlined as coming under the jurisdiction of the IMT were outlined in Article 6 and included: (a) crimes against peace, (b) war crimes, and (c) crimes against humanity.⁹ However these main criminal acts were translated into four counts (i.e. statements of offence). Part 6(a) 'crimes against peace' was divided into Count One 'the common plan or conspiracy', and Count Two 'crimes against peace'.¹⁰ Statements of offence for Counts One and Four were detailed. For instance Count One included sections (A) on the 'Nazi Party as the central core of the common plan or conspiracy', (B) 'common objectives and methods of conspiracy', (C) 'doctrinal techniques of the common plan or conspiracy', (D) 'the acquiring of totalitarian control of Germany: political', (E) 'the acquiring of totalitarian control in Germany: economic; and the economic planning and mobilization for aggressive war', (F) 'utilization of Nazi control for foreign aggression, (G) 'war crimes against humanity committed in the course of executing the conspiracy for which the conspirators are responsible', and (H) 'individual, group and organization responsibility for the offense stated in Count One'.¹¹

3 At the Nuremberg IMT, 22 major Nazi war criminals were tried, although 24 were originally accused in the Indictment signed in Berlin on 6 October 1945.¹² It should be noted, that there were no exact precedents for the charges made by prosecutors.¹³ The cases were based on statements of individual responsibility for crimes set out in Counts One, Two, Three and Four, and statements of criminality of groups and organizations.¹⁴ Documentary evidence providing proof for the accusations made by the prosecutors was mainly to be found on enemy territory. At the conclusion of the nine month trial,¹⁵ nineteen people had been convicted of at least one crime, and twelve were

⁹ Ibid 5.

¹⁰ Ibid 15, 29. See, Anonymous, *International Military Tribunal at Nuremberg* (2007) Holocaust Encyclopaedia <<http://www.ushmm.org/wlc/article.php?lang=en&ModuleId=10007069>> at 26 March 2007

¹¹ Ibid.

¹² Office of United States Chief of Counsel for Prosecution of Axis Criminality, above 7, 14, 84. The war criminals included: Hermann Wilhelm Goering, Rudolf Hess, Joachim von Ribbentrop, Robert Ley, Wilhelm Keitel, Ernst Kaltenbrunner, Alfred Rosenberg, Hans Frank, Wilhelm Frick, Julius Streicher, Walter Funk, Hjalmar Schacht, Gustav Krupp von Bohlen und Halbach, Karl Doenitz, Erich Raeder, Baldur von Schirach, Fritz Sauckel, Alfred Jodl, Martin Bormann, Frank von Papen, Artur Seyss-Inquart, Albert Speer, Constantin von Neurach, and Hans Fritzsche. However it should be noted that only 20 appeared in the prisoner's dock when the court began. For a summary of their individual indictments see, Justiz, *The 24 Nazi Leaders Indicted and Tried as War Criminals* (n.d.) International Military Tribunal <http://www4.justiz.bayern.de/olgn/imt/int/imte_inh.htm> at 2 April 2007, and Anonymous. *The Nuremberg Trials: IMT Charter, Indictments, Verdicts and Sentencing of Major War Figures* (n.d.) University of Missouri-Kansas City School of Law <<http://www.law.umkc.edu/faculty/projects/ftrials/nuremberg/NurembergIndictments.html>> at 30 March 2007.

¹³ Ibid 165.

¹⁴ The six criminal organizations included- the leadership of the Nazi party, the Schutzstaffel (SS) and Sicherheitsdienst (SD), the Gestapo, the Sturmabteilung (SA) and the High Command of the German army (OKW).

¹⁵ Andreas R. Wesseler, *Allied War Crimes Trials* (1981) Institute of Historical Review- Journal of Historical Review <http://www.ihr.org/jhr/v02/v02p11_Wesseler.html> at 4 April 2007.

put to death. The most infamous defendant was Field Marshal Hermann Wilhelm Goering, who was indicted and found guilty on all four counts.¹⁶

One of the most controversial selections of a defendant to stand at the Tribunal was that of Karl Doenitz. Doenitz became a Grand Admiral and succeeded Raeder as Supreme Commander of the German Navy in 1943. He fought the Battle of the Atlantic and destroyed up to 21.5 million tons of Allied shipping as U-boat Fleet Commander.¹⁷ Adolf Hitler designated Doenitz as his successor in his will. Doenitz was indicted for Counts One, Two and Three but was only found guilty of Counts Two and Three and sentenced to 10 years imprisonment.¹⁸ Before his selection as an accused, British Admiralty had recommended against his indictment, stating that Doenitz was simply doing his duty for his country, as all military men are sworn to do.¹⁹ Nuremberg had also failed to deal with the problem of aerial bombardment, and instead, Doenitz's submarine service was singled out, 'as if there were any substantial difference between a torpedo from below and a bomb from above'.²⁰ Of course, if the Tribunal had recognized bombs from above, it would have meant that the Allies themselves had committed war crimes through the unleashing of the atomic bomb upon Hiroshima and Nagasaki.

4 The IMT at Nuremberg was far from perfect. Justice Jackson himself proclaimed that a major weakness in the Charter was that it failed to define a 'war of aggression'.²¹ And yet, this struck at the heart of the debate- why it was that only members of Axis countries were eligible to stand trial at the Tribunal and Allies were not. This led to accusations of 'victor's justice' and a 'kangaroo court'.²² Freda Uitley wrote that instead of teaching the Germans that "crime does not pay," the Allies 'enunciated the

¹⁶ Scheuermann, above 8. See, Tusa, above 3, 279-292.

¹⁷ Tusa, above 3, 494-5.

¹⁸ Justiz, above 14.

¹⁹ Robert E. Conot, *Justice at Nuremberg* (1983) 412. See, Thompson Jr and Henry Strutz, *Doenitz at Nuremberg: A Reappraisal- War Crimes and the Military Professional* (1976) xxii.

²⁰ Thompson, above 21, xi.

²¹ Office of United States Chief of Counsel for Prosecution of Axis Criminality, above 7, 166. At the Tribunal Jackson went on to define that an aggressor is 'generally held to be that state which is the first to commit (1) Declaration of war upon another State; (2) Invasion by its armed forces, with or without a declaration of war, (3) Attack by its land, naval, or air forces, with or without a declaration of war, on the territory, vessels, or aircraft of another State; and (4) Provision of support to armed bands formed in the territory of another State...'

²² Eun Young Choi, 'Veritas, Not Vengeance: An Examination of the Evidentiary Rules for Military Commissions in the War Against Terrorism' (2007) 42 *Harvard Civil Rights-Civil Liberties Law Review* 139. 'Both the Nuremberg and Tokyo trials "were conducted after the termination of hostilities by, essentially, the unconditional surrender of the defendants to the prosecutors."' They have been described as ad hoc and "predicated upon the right of the victors to try the vanquished." The prosecuting allied powers had evidence, witnesses, and defendants "all firmly within their control." Scheuermann, above 8. 'However, not all Americans gave their approval to the Nuremberg trials. Small segments of the population called the trials a mere display of "Victors' Vengeance" and a "kangaroo court" meting out predetermined punishments. Some did not accept what appeared to be the creation of new laws to try these particularly heinous defendants and the imposition of ex post facto laws. In addition, some of the defendants refused to play the part of contrite sinner and submit to the role that their Allied prosecutors wished them to play. Nonetheless, the overall success of the trials completely overshadowed these flaws; Nuremberg is now remembered as an ultimate display of justice and the preeminent international tribunal.'

theory that the victors are entitled to do anything they please to the vanquished once the war is over'.²³ To many observers the trials were conducted under their own rules and the indictments were ex post facto and not based on any nation's law.²⁴ Attempts by defense counsel to introduce unlawful conduct of the victors' side were rigorously blocked by the judges. Thus, the deliberate air attacks directed against the civilian population in German cities like Hamburg and Dresden could not be raised.²⁵

It is true that the horrors of the atrocities committed by the Nazi authorities, many times with the active involvement of the German Wehrmacht, surpassed by far the charges that could be leveled against the Allied Powers. However, such charges were by no means marginal or negligible. In any event, the one-sidedness of the prosecution did not contribute to strengthening the legitimacy of the trials. Even many Germans who, as a matter of principle, welcomed the trials felt uncomfortable on account of their unbalanced character.²⁶

Much of the defense was mounted on the fact that Axis powers were not signatories to the Tribunal and that because of that, charges were non-binding. The defendants were unable to appeal or affect the selection of judges.²⁷

Another controversial action was the decision to institute a Count of 'Crimes Against Peace' in the Charter.

While drafting the charter of the IMT, the Allied representatives argued over the definition of such a term. The tribunal never defined the term "aggressive war" as a crime against peace, yet it accepted the notion that an aggressive war was illegal, based on documents such as the Kellogg-Briand Pact.²⁸

Today, crimes against peace have all but vanished from modern international criminal tribunals.

²³ Freda Utley, *The Nuremberg Judgments: Chapter 6 from The High Cost of Vengeance* (1949) Utley.com <<http://www.fredautley.com/nuremberg.htm>> at 30 March 2007. At Nuremberg, Utley believed that it was the 'law of men' that prevailed, and not a 'democratic government of laws'. In her interpretation of Nuremberg, only the defeated were liable to punishment for breaches in international law. See, Scheuermann, above 8. 'Nevertheless, the trials had their detractors. Some periodicals described the trials as "Victors' Vengeance" and "self righteous hypocrisy," claiming that "administration officials were using the trials to divert the public's attention from the wartime failures of the United States political leadership." Some even remarked that the trials were simply "the conquerors' kangaroo court' butchering the losers." Critics derided the public for exhibiting a very naïve and simplistic view of international events, seeing the trials as "stark alternatives: black-white, good-bad, right-wrong," and unquestioningly "accept[ing] a simple 'devil' or 'conspiracy' theory.'"

²⁴ Thompson, above 21. See, Anonymous, *Charter of the Nuremberg International Military Tribunal* (1945) <<http://www.derechos.org/nizkor/nuremberg/ncharter.html>> at 30 March 2007.

²⁵ See, Walter J. Rockler, *War Crimes Law Applies to U.S. Too* (1999) <<http://www.zmag.org/crisescurevts/nurletter.htm>> at 2 April 2007.

²⁶ Christian Tomuschat, 'The Legacy of Nuremberg' (2006) 4 *Journal of International Criminal Justice* 830.

²⁷ A. L. Goodheart, 'The Legality of the Nuremberg Trials,' (1946) *Juridical Review* 8. See also, Christian Tomuschat, 'The Legacy of Nuremberg' (2006) 4 *Journal of International Criminal Justice* 830. 'In Germany, the reaction to the Nuremberg trial was rather ambivalent or even outright negative, as described by Christoph Burchard in his article. First of all, it was felt that the trial had been imposed upon Germany and that the fact alone of justice being dispensed by prosecutors and judges from the four main victorious Powers discredited the proceedings as a 'diktat'.'

²⁸ Scheuermann, above 8. See also, Christian Tomuschat, 'The Legacy of Nuremberg' (2006) 4 *Journal of International Criminal Justice* 830. 'The list of offences under the jurisdiction of the IMT was also denounced as having no solid foundation in international law. The Statute of the IMT provided, in the first place, for crimes against peace and, in particular, criminalized war of aggression (Article 6(a)).'

Some of the articles in the Charter have also been considered unlawful. For example, Article 19 states that the Tribunal ‘shall not be bound by the technical rules of evidence. It shall adopt and apply to the greatest possible extent expeditious and non-technical procedure, and shall admit any evidence which it deems to have probative value.’²⁹ In contrast, Robert H. Jackson speaks of providing ‘undeniable proofs of incredible events’.³⁰ Elsewhere, Article 12 of the Charter authorized trials *in absentia*. Defendant Martin Bormann was found guilty of universal crimes even though he never appeared in court.³¹

Even Americans like US Supreme Court Chief Justice Harlan Fiske Stone call the Nuremberg trials a fraud.³² ‘The prosecuting allied powers had evidence, witnesses, and defendants "all firmly within their control."’³³ They also relied heavily on the copious records kept by the Reich government, framing the prosecution heavily around the existence of documentation instead of witnesses.³⁴ From the outset the tone presented at Nuremberg by the United States was moralistic (i.e. in sync with natural law), about good and evil, supposedly devoid of political motivations.³⁵ Other inconsistencies included the lack of language translation available to defendants and other members of the court.

5 ‘Nuremberg is not a tale of glory and shining justice; historic occurrences are never free from at least some objectionable aspects. And yet, Nuremberg opened up a new page of universal history...’³⁶ And yet one must question whether Nuremberg was a success or failure?³⁷

There are a variety of responses to this question. There are those who maintain the legality of the trial proceedings, those who believe the trials were illegal but had to happen, and yet another group who felt the trials were an attempt to establish a body of international law but were not comfortable with the way the law was applied *ex post facto*. Thus Defendant Hess was not the only one who maintained that the Tribunal was not ‘legally competent’.³⁸ The German public held a similar perception of the Nuremberg

²⁹ Office of United States Chief of Counsel for Prosecution of Axis Criminality, above 7, 9.

³⁰ Ibid 115.

³¹ Ibid 95. The Tribunal’s rule of procedure had been strictly carried out in the notices which had been given.

³² Harlan Fiske Stone, *Pillar of the Law* (1956).

³³ Choi, above 24.

³⁴ Ibid.

³⁵ Scheuermann, above 8.

³⁶ Christian Tomuschat, ‘The Legacy of Nuremberg’ (2006) 4 *Journal of International Criminal Justice* 830.

³⁷ Shattuck, above 4. ‘As the Allies’ interest in Nuremberg faded, so did the Nuremberg promise of "never again." A 1948 article in *The New Yorker* captured what was happening: "On the barbed wire fence surrounding the crematorium and the mass grave at Dachau, there is a sign that reads, "This Really Happened." Now that sign appears to be in danger of being replaced by one that reads, "So What?"' But it would be wrong to look at Nuremberg as a failure. After all, the tribunal marked the first time that genocide and crimes against humanity had been singled out in international law, and the first time the perpetrators of those crimes had ever been prosecuted. Nuremberg was a success, but it also demonstrated the limits of the law, and its weakness in the hands of sovereign governments.’

³⁸ Office of United States Chief of Counsel for Prosecution of Axis Criminality, above 7, 112.

trials. From the beginning of the trials, 'an influential segment of the German population rejected Nuremberg's legal validity.'³⁹

Some consider Nuremberg to be an exceptional, once-off proceeding that should not be used to set precedence.⁴⁰ But the reality is that similar challenges have been faced by other military tribunals between 1948 and 1998, for instance, in Tokyo, Rwanda, and Yugoslavia. Still others believe that the International Military Tribunal at Nuremberg was truly a revolutionary step.⁴¹ The lessons that can be gained from Nuremberg as described by Tomuschat are: the demise of absolute sovereign power, the emergence of the international community, and individual criminal responsibility becomes one of the cornerstones of the international community.⁴² The outcome of Nuremberg was that 'aggression' could be considered an international crime. And that 'crimes against humanity' could be prosecuted in a free standing and universal jurisdiction.⁴³

Today, there is a great deal that can be said for the Allies that took part in the Tribunal. The United States, a once pro-international law nation is today against the spirit of a universal system.⁴⁴ This in itself is a stark contradiction. In fact, originally it was the United Kingdom who fought the establishment but was convinced by the Americans.⁴⁵ It

³⁹ Scheuermann, above 8. Christian Tomuschat, 'The Legacy of Nuremberg' (2006) 4 *Journal of International Criminal Justice* 830. 'This reasoning was far from convincing. It is one thing to declare war unlawful with regard to inter-state relationships, but a totally different thing to acknowledge it as an offence entailing individual criminal responsibility. Most of the rules of international law, which are binding on states produce no direct effects on individual human beings. The IMT made a dramatic leap, deriving the criminality of aggression from its character as an internationally wrongful act according to the classic scheme of international law as a system of rights and obligations among states. To this very date, doubts have been voiced as to the viability of this legal deduction... From the German side, it was further argued that the trial was flawed by its fundamental discriminatory nature... Lastly... [e]ach one of the four Allied Powers appointed a judge (together with an alternate) and a chief prosecutor, including the Soviet Union. The Soviet jurists came from a country that had suffered enormously from the war, but where, in the twenties and the thirties, under the Stalinist terror regime, millions of political opponents had been murdered. Thus, they lacked any moral legitimacy. Yet, they could not be challenged as accomplices of a regime that had no better moral standing than Nazi Germany itself.'

⁴⁰ Eun Young Choi, 'Veritas, Not Vengeance: An Examination of the Evidentiary Rules for Military Commissions in the War Against Terrorism' (2007) 42 *Harvard Civil Rights-Civil Liberties Law Review* 139.

⁴¹ Christian Tomuschat, 'The Legacy of Nuremberg' (2006) 4 *Journal of International Criminal Justice* 830.

⁴² *Ibid* 830.

⁴³ Geoffrey Robertson, *Crimes Against Humanity: the Struggle for Global Justice* (2006) ix.

⁴⁴ Shattuck, above 4. 'After World War II the U.S. was in the forefront of an effort to build an international rule of law, symbolized by its leadership at Nuremberg, its role in organizing the conference that framed the UN Charter and its participation in drafting some of the early human rights conventions. Today, the U.S. is at the forefront of an effort to undermine that very system of international law, as demonstrated by its attacks on the United Nations, its resistance to the Geneva Conventions and human rights treaties like the Torture Convention, and its open hostility to new institutions of international justice like the International Criminal Court. How did it come to this?'

⁴⁵ *Ibid*. See, Matas, above 5. 'It was the United Kingdom which led the opposition to the creation of an international criminal court. The U.K.'s argument was that there was no point in setting up a permanent tribunal for war crimes since war itself is not permanent. Ad hoc methods of adjudication used in the past were reasonably adequate. A permanent court might not be set up by victors in a war; but it would be activated by them. The charge of one sidedness, if there were a permanent court, would remain.'

is ironic, that it was Justice Jackson himself, an American, who looked into the future and maintained that the Allies must never forget that the record on which they judged the defendants would be the record that history would use to judge the Allies in the future.⁴⁶ He followed on by affirming: ‘And let me make clear that while this law is first applied against German aggressors the law includes, and if is to serve a useful purpose it must condemn aggression by any other nations, including those which sit here now in judgment.’⁴⁷

⁴⁶ Office of United States Chief of Counsel for Prosecution of Axis Criminality, above 7, 116.

⁴⁷ Ibid 172.