In October 1945, as he awaited trial as a major war criminal, Robert Ley wrote a long and cogent repudiation of the right of the recently victorious Allies to try German leaders for war crimes. The Indictment served on Ley, and others, on 19 October 1945 claimed that ‘[a]ll the defendants … formulated and executed a common plan or conspiracy to commit Crimes against Humanity as defined’. Ley continued: ‘Where is this plan? Show it to me. Where is the protocol or the fact that only those here accused met and said a single word about what the indictment refers to so monstrously? Not a thing of it is true.’ A few days later, Ley committed suicide in his cell rather than face the shame of a public trial.

The unease about the legal basis of the trial was not confined to those who were to stand before it. Legal
opinion in Britain and the United States was divided on the right of the victors to bring German leaders before a court for war crimes. The Nuremberg Military Tribunal was, as Ley realised, an experiment, almost an improvisation. For the first time the leaders of a major state were to be arraigned by the international community for conspiring to perpetrate, or causing to be perpetrated, a whole series of crimes against peace and against humanity. For all its evident drawbacks, the trial proved to be the foundation of what has now become a permanent feature of modern international justice.

The idea of an international tribunal to try enemy leaders for war crimes arrived very late on the scene. During the war, the Allied powers expected to prosecute conventional war crimes, from the machine-gunning of the survivors of sunken ships to the torture of prisoners-of-war. For this there already existed legal provision and agreed conventions. Yet these did not cover the prosecution of military and civilian leaders for causing war and encouraging atrocity in the first place. Axis elites came to be regarded by the Allies as the chief culprits, men, in Churchill's words, 'whose notorious offences have no special geographical location'.

2 Public Record Office (=PRO), Kew, London, PREM 4/100/10, note by the Prime Minister, 1 November 1943, p. 2.
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greatest difficulty arose over the issue of the treatment of civilians. Enemy generals and admirals might be prosecuted as simple war criminals if the case could be proved that they ordered crimes to be committed. But civilian leaders were different. There was no precedent for judicial proceedings against them (the campaign to ‘hang the Kaiser’ in 1919 came to naught, and was in any event directed at the supreme military commander, not a civilian head of state).

When the British government began to think about the issue in 1942, the only realistic solution seemed to be to avoid a trial altogether and to subject enemy leaders to a quick despatch before a firing-squad. ‘The guilt of such individuals’, wrote the Foreign Secretary, Anthony Eden, in 1942, ‘is so black that they fall outside and go beyond the scope of any judicial process.’ It was Winston Churchill, Britain’s wartime prime minister, who arrived at a solution. He revived the old-fashioned idea of the ‘outlaw’, and proposed that enemy leaders should simply be executed when they were caught. The idea of summary execution (at six hours’ notice, following identification of the prisoner by a senior military officer) became the policy of the British government from 1943.

3 PRO, PREM 4/100/10, minute by the Foreign Secretary, ‘Treatment of War Criminals’, 22 June 1942, pp. 2–3.
until the very end of the war. Until 1938, outlawry had finally been abolished as a concept in English law by the Administration of Justice Act. British preference for summary execution was based partly on the genuine, but almost certainly mistaken, belief that public opinion would expect nothing less, and partly on the fear that a Hitler trial would give the dictator the opportunity to use the court case as a rallying point for German nationalism. American lawyers rehearsed a possible Hitler trial, and found to their discomfiture that he would have endless opportunity for making legal mischief, and, at worst, might argue himself out of a conviction. This would make the trial a mockery, and earn the incredulous hostility of public opinion. In America, Churchill won the support of the President, Franklin Roosevelt, and his hardline Treasury Secretary, Henry Morgenthau. But opinion in Washington was divided. The veteran Secretary of War, Henry Stimson, was opposed to summary justice. He favoured a tribunal that reflected Western notions of justice: notification to the accused of the charge, the right to be heard, and to

4 PRO, PREM 4/100/10, note by the Prime Minister, 1 November 1943, pp. 1–4.
5 NA II, RG 107, McCloy papers, Box 1, Chanler memorandum, ‘Can Hitler and the Nazi Leadership be Punished for Their Acts of Lawless Aggression?’, n.d. (but November 1944).
call witnesses in his defence. The War Department believed that it was important for the Allied war effort to demonstrate that democratic notions of justice would be dispensed even for men like Hitler.

The tide was turned from an unusual quarter. In the Soviet Union, jurists insisted that the full penalty could only be imposed on German leaders after there had been a trial. Their experience of the show trials of the 1930s persuaded them that justice had to be popular, visible justice. Soviet spokesmen universally expected German war criminals to be found guilty and executed, as they had expected purge victims to confess their guilt and be shot in the Great Terror. American officials who were keen to avoid the Churchill line latched on to Soviet insistence on the need for a trial, and an unlikely alliance of Communist lawyers and American liberals was mobilised to protest summary justice and to insist on a judicial tribunal. The argument was clinched only by the death of Roosevelt. His successor, Harry Truman, a former small-town judge, was adamant that a trial was both necessary and feasible. When the major powers met in San Francisco in May 1945 to set up the United Nations, the issue was an urgent agenda item. The British

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6 NA II, RG 107, Stimson papers, Box 15, Stimson to the President, 9 September 1944, p. 2.
were outmanoeuvred by the American–Soviet alliance and agreement was reached that Axis leaders should be tried by a military tribunal for crimes as yet unspecified. The idea that the trial should be conducted before a military court reflected the prevailing convention that war crimes were a military affair, but in practice the larger part of the subsequent trial was organised and prosecuted by civilian lawyers and judges.

Truman proceeded at once to appoint an American prosecution team under the leadership of the New Deal lawyer Robert H. Jackson, who had cut his teeth on fighting America’s powerful industrial corporations in the 1930s under Roosevelt’s antitrust legislation. Jackson was the principal architect of the trial and the decisive figure in holding together an unhappy alliance of Soviet, British and French jurists, who represented the only other United Nations states to be allowed to participate in the tribunal. The Soviet prosecution team favoured a trial but treated the proceedings as if the outcome were a foregone conclusion, a show-trial. French lawyers were unhappy with a tribunal whose main basis was to be Anglo-Saxon common law instead of Roman law, and whose procedures were foreign to French legal practice. Above all, the British accepted the
idea of a trial with great reluctance. They remained sceptical that a proper legal foundation could be found in existing international law, and doubted the capacity of the Allied prosecution teams to provide solid forensic evidence that Axis leaders had indeed committed identifiable war crimes. British leaders were much more squeamish than the Americans about sitting side-by-side with representatives of a Soviet Union whose own responsibility for aggression and human rights violations was popular knowledge. The driving force behind the tribunal was the American prosecution team under Jackson. Without them, an international war crimes tribunal might never have been assembled.

The preparation of the tribunal exposed the extent to which the trial was in effect a 'political act' rather than an exercise in law. When the American prosecution team was appointed in May 1945, there was no clear idea about who the principal war criminals would be, nor a precise idea of what charges they might face. A list of defendants and a list of indictable charges emerged only after months of argument, and in violation of the traditions of justice in all the major Allied powers. The choice of defendants was the product of a great many different strands of political argument, and was not, as had been expected, self-evident. Some of those eventually charged at Nuremberg, like Hitler's former Economics Minister,
Hjalmar Schacht, were given no indication for six months that they might find themselves in the dock. Schacht himself had been taken into Allied custody straight from a Nazi concentration camp.\(^8\)

Quite how arbitrary the choice eventually was can be demonstrated by a remark made by Britain’s attorney-general at a meeting in June 1945 to draw up yet another list of defendants: ‘The test should be: Do we want the man for making a success of our trial? If yes, we must have him.’\(^9\)

The task of assigning responsibility was made more difficult by the death or suicide of the key figures. Hitler killed himself on 30 April 1945; Heinrich Himmler, head of the SS and the managing-director of genocide, killed himself in British custody in May; Joseph Goebbels died with Hitler in the bunker; Benito Mussolini was executed by partisans shortly before the end of the war. This last death accelerated the decision to abandon altogether the idea of putting Axis leaders in the dock. Italian names had been included on the early lists of defendants, but by June they had been removed. Italian war criminals were turned over to the Italian government for trial. Italy was now a potential

\(^8\) Imperial War Museum, London, FO 645 Box 154, Foreign Office Research Department, Schacht personality file; PRO, WO 208/3155, Schacht personality file.

\(^9\) PRO, LCO 2/2980, minutes of second meeting of British War Crimes Executive, 21 June 1945, p. 2.
ally of the West. Other Axis allies, like Admiral Horthy of Hungary, were also quietly dropped from the list. By mid-summer all the prosecuting powers had come to accept that they would try only a selection of German political and military leaders.

This decision still begged many questions. In 1945, the international community faced for the very first time the issue of bringing to trial the government of one of its renegade members. In theory the entire governmental and military apparatus could be arraigned: if some were guilty, then, as Robert Ley complained in his tirade against the legal basis of the trial, all were guilty. The early American lists did include a hundred names or more. The British prosecution team, under Sir David Maxwell Fyfe, favoured a smaller and more manageable group, and for much of the summer expected to try only half-a-dozen principal Nazis, including Hermann Göring, the self-styled ‘second man in the Reich’. At one point, the British team argued for a single, quick trial using the portly Göring as symbol for the dictatorship. The chief difficulty in drawing up an agreed list of defendants derived from different interpretations of the power-structure of the Third Reich. In 1945, the view was widely held that Hitlerism had been a malign

10 PRO, LCO 2/2980, minutes of third meeting of British War Crimes Executive, 25 June 1945, pp. 1–4.
extension of the old Prussia of militarism and economic power. The real villains, on this account, were to be found among the Junker aristocracy and the industrial bosses, who were Nazism’s alleged paymasters. Clement Attlee, Churchill’s deputy prime minister, and then premier himself following Labour’s election victory in July 1945, argued forcefully that generals and business leaders should be dragged into the net. ‘Officers who behave like gangsters’, wrote an uncharacteristically intemperate Attlee, ‘should be shot.’ He called for a cull of German businessmen ‘as an example to the others’.11

These views did not go uncontested. The indictment of large numbers of senior officers was regarded as a dangerous precedent, which might allow even the defeated enemy the opportunity to argue that Allied military leaders were just as culpable. The decision to include German bombing as part of the indictment was quietly dropped for just such reasons. The issue of economic criminals was equally tendentious. While Soviet lawyers, British socialists and Jackson’s team of New Dealer lawyers saw nothing unjust about including industrial magnates at Nuremberg, they were opposed by those who saw business activity as independent of

11 PRO, PREM 4/100/10, Deputy Prime Minister, ‘Treatment of Major Enemy War Criminals’, 26 June 1944.