From Nuremberg to The Hague

The Future of International Criminal Justice

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The Nuremberg trials: international law in the making

RICHARD OVERY

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.'[1] 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

[1] National Archives II, College Park, Maryland, Jackson main files, RG 238, Box 3, letter from Robert Ley to Dr Pflücker, 24 October 1945, p. 9.

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] The

[2] Public Record Office (=PRO), Kew, London, PREM 4/100/10, note by the Prime Minister, 1 November 1943, p. 2.

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.'[3] 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.[4] Five years before, in 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.[5] 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.'[6] 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

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.[7] 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

[7] NA II, RG 107, McCloy papers, President Truman, Executive Order 9547, 2 May 1945.

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.[10] 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.

politics and war-making. Even Albert Speer, Hitler's armaments minister and overlord of the war economy, was argued about. He was, one British official suggested, 'essentially an administrator', not a war criminal.[12] This tendency to see economic leaders as functionaries rather than perpetrators probably saved Speer from hanging when the trial ended in 1946.

The many arguments over whom to indict betrayed a great deal of ignorance and confusion on the Allied side about the nature of the system they were to put on trial. Only gradually over the summer, and thanks to a wealth of intelligence gathering and interrogation, did a clearer picture emerge. But there still remained significant gaps. Knowledge of the extent and character of the Holocaust was limited to information supplied by Jewish organisations. The chief managers of genocide, the Gestapo chief, Heinrich Müller, and his deputy, Adolf Eichmann, were missing from most lists of potential defendants. Because he made more noise than the other party fanatics, the prosecution chose Julius Streicher, editor of the scurrilous anti-semitic journal *Der Stürmer*, as the representative of Nazi racism. Yet Streicher had held no office in the SS racist apparatus, knew nothing of the details of the Holocaust, and had

[12] PRO, LCO 2/2980, British War Crimes Executive meeting, 15 June 1945, p. 2.

lived in disgrace since 1940 after Hitler had sacked him as Gauleiter of Franconia on corruption charges. Full interrogation testimony on the Holocaust and its perpetrators was received only days before the start of the trial in November 1945, when it at last became clear that the men the Allies should have been hunting were still at large.

The final agreed list of twenty-two defendants represented a series of compromises. The original six British names were never in question: Göring, the foreign minister Joachim von Ribbentrop, interior minister Wilhelm Frick, labour front leader Robert Ley, Ernst Kaltenbrunner, head of the security apparatus, and the party's chief ideologue, Alfred Rosenberg. Other names were added as representative of important aspects of the dictatorship. The idea of representation was without question legally dubious, but it resolved many of the disputes between the Allies over how large the eventual trial should be. Streicher stood for anti-semitism; Hitler's military *chef de cabinet*, Wilhelm Keitel, and his deputy for operations, Alfred Jodl, stood for German militarism; the unfortunate Schacht and his successor as economics minister, Walther Funk, were made to represent German capitalism. Jackson insisted that Gustav Krupp, the one industrial name well-known everywhere outside Germany, should also be included,

despite his age and his debilitated condition. But he was too ill to attend, and Jackson's efforts to extend the principle of representation by simply requiring Krupp's son, Alfried, to attend in his place was too much for the other prosecution teams, and the trial went ahead with no Prussian 'iron baron' in the courtroom.[13]

Others were included for a variety of reasons. Karl Dönitz, head of the German navy and Hitler's brief successor as chancellor, had his name added at the Potsdam conference, when it was brought up by the Soviet Foreign Minister. Only days before, the British prosecution had warned that the Dönitz case was so weak that he would probably be acquitted, an outcome regarded candidly as 'disastrous to the whole purpose of the trial'.[14] The Soviet Union did not want to be alone in presenting none of its Nazi prisoners at Nuremberg, and in August insisted that Admiral Erich Raeder and an official of Goebbels' propaganda ministry, Hans Fritsche, should also be included. The remaining group of Nazi ministers and officials were deemed to have done

[13] On Krupp, see Imperial War Museum, FO 645, Box 152, minutes of meeting of chief prosecutors, 12 November 1945, p. 1. Jackson's views on Krupp are in NA II, RG 238, Box 26, draft of press release.

[14] PRO, WO 311/576, British War Crimes Executive to War Office, 20 June 1945; War Office to Supreme Headquarters, Allied Expeditionary Force (Paris), 27 June 1945.

enough to merit their inclusion, but the final list left out men like Otto Thierack, the SS minister of the interior and former head of the Nazi People's Court, and the SS general, Kurt Daluege, head of the Order Police and an important figure in the apparatus of repression and genocide. Both were in Allied captivity. To ensure that even these men would eventually stand trial in a series of subsequent tribunals, the Allied prosecutors, at Jackson's prompting, agreed to arraign a number of organisation as well as individuals. It was hoped that, by declaring the organisations criminal, further trials of individuals now classified as *prima facie* criminals could be speeded up. This was a device of doubtful legality, since it placed much of the basis of war crimes trials on retrospective justice, but nonetheless alongside the twenty-two defendants at Nuremberg stood metaphorically the SS, the SA, the Gestapo and the rest of the German cabinet and military high command.[15]

The framing of the charges was a little less arbitrary. Here there was no precedent at all. The war crimes defined at the end of the First World War and subject to common agreement included crimes that had evidently been perpetrated by the Nazi system: 'systematic terrorism', 'torture of civilians', 'usurpation of sovereignty'

[15] NA II, RG 238, Box 34, Indictment first draft, p. 1.

and so on.[16] The difficulty in this case was to define crimes in terms that could be applied to the men in the dock, few of whom could be shown beyond any reasonable doubt to have directly ordered or perpetrated particular crimes, even if they served a criminal regime. The main charge was deemed to be the waging of aggressive war as such, but this had never been defined as a crime in international law, even if its prosecution might give rise to specific criminal acts. War was regarded as legally neutral, in which both sides enjoyed the same rights, even in cases of naked aggression. To define the war-making acts of the Nazi government as crimes required international law to be written backwards. Even more problematic was the hope that the crimes perpetrated against the German people by the dictatorship, and the persecution and extermination of peoples on grounds of race, could also be included in any final indictment. This violated the principle in international law that the internal affairs of a sovereign state were its own business, however unjustly they might be conducted. Here, too, legal innovation was a pre-condition for trial.

The radical solution proposed by Jackson and the American prosecution team was to include all the

[16] NA II, RG 107, McCloy papers, Box 1, United Nations War Crimes Commission memorandum, 6 October 1944, Annex A.

actions deemed to be criminal under the single heading of a conspiracy to wage aggressive and criminal war. This tautological device was first thought up in November 1944 by an American military lawyer, Murray Bernays. It had obvious merits beyond that of simplicity. Bernays concluded that a conspiracy to wage aggressive war could rightfully include everything the regime had done since coming to power on 30 January 1933. It could include the deliberate repression of the German people, the plans for rearmament, the persecution of religious and racial minorities, as well as the numerous crimes committed as a consequence of the launching of aggressive war in 1939. Moreover, conspiracy removed the central legal problem that defendants could claim obedience to higher orders in their defence, or that Hitler (who at that point was still alive, and expected to be the chief defendant) could claim immunity as sovereign head of state. Conspiracy caught everyone in the net, regardless of their actual responsibility for specific acts.[17]

The idea of conspiracy remained the essence of the American prosecution case right through to the trial

[17] NA II, RG 107, Stimson papers, memorandum on war crimes, 9 October 1944; letter from Stimson to Stettinius (Secretary of State), 27 October 1944, enclosing 'Trial of European War Criminals: The General Problem', pp. 1–5.

itself. In May 1945, the American War Department drew up a memorandum for Jackson setting out the case that the major war criminals collectively 'entered into a common plan or enterprise aimed at the establishment of complete domination of Europe and eventually the world'.[18] In June, Jackson reported to President Truman his belief that the German leadership had indeed operated with a 'master plan', in which everything from the indoctrination of German youth to the muzzling of the trade unions had served the central grotesque ambition to wage criminal war on the world.[19] The conspiracy charge neatly removed the need to define new categories of crime for the other policies pursued by the regime, since they could, Jackson believed, all be subsumed under the heading of the master plan.

The conspiracy thesis provoked both scepticism and unease among the other prosecution teams. The first problem was simply one of evidence. The central document in the American case was Hitler's *Mein Kampf*, which was naively considered to be an outline of the future foreign policy of Hitler's Germany. A British Foreign Office analysis of the content of the book, writ-

[18] NA II, RG 107, McCloy papers, Box 3, draft Planning Memorandum, 13 May 1945, p. 2.

[19] NA II, RG 107, Stimson papers, Box 5, Bernays to Stimson, report to the President, 7 June 1945.

ten in June 1945, was forced to conclude that the book 'does not reveal the Nazi aims of conquest and domination fully and explicitly'.[20] The British argued that the Nazis were 'supreme opportunists', and thought it highly unlikely that the prosecution could make a conspiracy theory work, not only in law, but in terms of the available evidence. The second problem was the absence of any legal foundation for the charge of conspiring to wage aggressive war. Jackson insisted that such a foundation existed in the Kellogg–Briand Pact signed in Paris in 1928 by sixty-five signatory powers. The Pact was a statement of intent rather than a binding international convention, but the intent was clear enough: to renounce war as a means of settling disputes, except in the case of self-defence. It was signed by Germany, Japan, Italy and the Soviet Union, all of whom undertook wars of aggression at some point in the decade that followed. Its American sponsors declared that signature of the Pact heralded 'the outlawry of war'; this interpretation sustained Jackson's later argument that, under its terms, 'aggressive war-making is illegal and criminal'.[21]

[20] PRO, LCO 2/2900, Foreign Office memorandum, 'Nazism as a Conspiracy for the Domination of Europe', 22 June 1945, pp. 1–2.

[21] NA II, RG 107, report to the President, 7 June 1945, pp. 6–7. See also J. P. Kenny, *Moral Aspects of Nuremberg* (Washington DC, 1949), p. 6.

There were problems too with the French and Soviet approach to the trials. In neither state did the legal tradition support the idea of conspiracy. Whereas in Anglo-Saxon law it was possible to declare all those complicit with a conspiracy as equally responsible in law, in French and Soviet (and German) law the defendant had to be charged with a specific crime in which he had directly participated. The French preferred a trial based on particular atrocities and acts of terrorism, but this would have prevented the prosecution of most of those who ended up in the dock at Nuremberg. The Soviet legal experts, who had first invented the term 'crimes against peace', used later in the Indictment, were very concerned that 'conspiracy to wage aggressive war' should be confined only to the Axis states, and only to specific instances of violation: Poland in 1939, the Soviet Union in 1941, and so on. This anxiety masked more than legal niceties. If Jackson succeeded in making the waging of aggressive war into a substantive crime in international law, then the Soviet Union was equally guilty in its attacks on Poland in September 1939 and on Finland three months later. Jackson knew this. In his personal file on 'Aggression' were the terms of the German–Soviet agreement of 1939, dividing Poland. It was kept in the file and never presented at Nuremberg. The Soviet authorities

ordered any discussion of aggression against Poland removed from the opening address of the Soviet prosecutor, and the Soviet courtroom team was under specific instructions to shout down any attempt by the defendants to raise awkward issues of Soviet–German collaboration.[22]

The result of these many objections was a compromise. Jackson agreed that the charge of conspiracy should only apply to specific acts of Axis aggression, and that other charges should be brought separately, not simply placed under the umbrella of a general conspiracy. But this still left the difficulty of how to include the terror and racism of the regime in any indictment. None of the prosecution teams wanted to focus only on the waging of war, and the crimes that resulted directly from it. In particular, the American and British prosecutors wanted to include Nazi anti-semitism as an indictable offence. The difficulty in doing so was highlighted when an academic judgment was sought on how to define Nazi racial and national persecution in law. Rafael Lemkin coined a new term 'genocide' to describe the intention to 'cripple in their

[22] NA II, RG 238, Box 32, aggression file. See also S. Mironenko, 'La collection des documents sur le procès de Nuremberg dans les archives d'état de la fédération russe', in A. Wiewiorka (ed.), *Les procès de Nuremberg et de Tokyo* (Paris, 1996), pp. 65–6.