

“WAR CRIMES”: THE NUREMBERG TRIAL AND THE TRIBUNAL FOR THE FORMER YUGOSLAVIA

The Seegers Lecture*

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I was delighted by the invitation to deliver this Seegers lecture. It provides me with a pleasant association with this law school, and an opportunity to get to know more of its faculty and its students. Naturally, I consider it a great honor to be included in the distinguished company of prior Seegers lecturers. Finally, in this fiftieth year after the Nuremberg trial, your faculty's suggestion that I talk about it was welcome indeed.

That trial, before the International Military Tribunal, because of the horrors it addressed and the purposes it sought to accomplish, has been viewed as the greatest in this century, if not in history.¹ The road back to Nuremberg—which means both a trial and a place—is, of course, well-travelled. Nonetheless, there are reasons, in addition to this fiftieth anniversary, for another trip. “Nuremberg,” on the surface, seems relevant—alas, too relevant—to the atrocities reflected in the grim clichés of our own time, such as so-called ethnic cleansing in the former Yugoslavia and Rwanda, as well as mass rape as an instrument of terror and territorial expansion. Furthermore, the memory of Nuremberg is also evoked by the rise of explicit neo-Nazism in Germany and the United States, as well as by the preachers of bigotry everywhere.

This afternoon, I intend first to deal primarily with the Nuremberg trial's purposes, limitations, and the principal criticisms surrounding it. I will not be breaking any new ground. For me, this is an occasion for remembering rather than discovering. I also propose to add some concreteness by saying a word

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1. See JON R. WALTZ, REVIEW OF TELFORD TAYLOR, *THE ANATOMY OF THE NUREMBERG TRIALS* (1992) [hereinafter TAYLOR].

about my own work at Nuremberg. Finally, I will briefly identify significant differences between the context for the Nuremberg Tribunal and the one established to deal with recent international crimes in the former Yugoslavia.

The way for the Nuremberg trial was paved by the Germans' unconditional surrender on May 7, 1945, and by the Allies' capture of the major surviving leaders of the Nazi regime. On November 20, a little over six months after the surrender, the trial before the International Military Tribunal of those formally called the "Major War Criminals of the European Axis" opened at the Palace of Justice in Nuremberg with the reading of the 100 page indictment.² The next day Justice Robert Jackson, on leave from our Supreme Court, delivered his magnificent opening statement.³ In the courtroom were twenty-one defendants—surviving major leaders of the Nazi regime, such as Goering, Ribbentrop, and Hess. All of the defendants pleaded not guilty explicitly or in effect. Seeing them in the dock, stripped of their medals and insignia of power, one could scarcely believe that, as Jackson put it, these men had dominated much of the world and had terrified most of it.⁴

The International Military Tribunal had been established under the so-called London Charter⁵ agreed to by the major Allies, that is, the United States, England, France, and the Soviet Union. Two of the principal authors of the Charter, representing the United Kingdom and the United States, respectively, later served as chief prosecutors for their governments. The Soviet draftsman later served as a member of the Tribunal. The French, however, brought new people into those posts. Obviously, the drafting of the Charter and the selection of the judges did not reflect excessive zeal for separation of powers—an attitude consistent with the time pressures involved. In any event, the Charter set forth the law that was to govern the trial before the International Tribunal.

Each of the major Allies had appointed one judge and an alternate to the International Military Tribunal. The judges were, however, civilians, except for the U.S.S.R. judges. The judges elected the British judge, Sir Geoffrey Lawrence, as the Tribunal's President; he announced its decisions on procedural matters. His election was apparently designed to play down the numerical dominance of the Americans. Our legal staff of 200⁶ was, I believe, bigger

2. The indictment appears in OFFICE OF THE UNITED STATES CHIEF OF COUNSEL FOR PROSECUTION OF AXIS CRIMINALITY, (Roger W. Barrett & William E. Jackson eds., 1947), NAZI CONSPIRACY AND AGGRESSION 13 et seq. (G.P.O. 1946).

3. His statement appears in ROBERT H. JACKSON, THE NUREMBERG CASE 30 (1947).

4. *Id.* at 49.

5. The Charter is reproduced *id.* at 21 et seq. Its evolution is traced by TAYLOR, *supra* note 1, chs. 2-4; the Charter also appears in TAYLOR, *supra* note 1, at app. A.

6. See PETER CALVOCORESSI, THREADING MY WAY 135 (1994).

than the three other prosecution staffs combined.⁷

In describing the indictment, which in general tracked the Charter, I will oversimplify a bit. The first count charged a common plan or conspiracy to commit (i) crimes against peace and (ii) war crimes and crimes against humanity.⁸ The second count charged the actual commission of crimes against peace, namely, preparation and waging of aggressive wars, which were also in violation of international treaties.⁹ The third count alleged certain war crimes, namely, violations of the laws or customs of war, including murder or ill-treatment of civilian populations or of prisoners of war.¹⁰ The fourth count alleged crimes against humanity, namely, extermination, enslavement, or other inhumane treatment of any civilian population either *before* or during the war or persecution on political, racial, or religious grounds.¹¹

The Charter rejected certain defenses, such as acts of state and superior orders,¹² which in combination might have immunized all the defendants. However, it permitted superior orders to be considered in mitigation.¹³ Furthermore, in the trial of any individual member of an organization, the Charter authorized the Tribunal to declare organizations, such as the SS, illegal.¹⁴ I am going to say only that those organizational provisions created overwhelming practical and moral problems and were of little use.¹⁵

The most creative and criticized provisions of the Charter were those making aggressive war an international crime and providing for individual punishment of those guilty of that crime. Critics challenged that approach as

7. The trial before the International Military Tribunal is to be distinguished from so-called "Subsequent Proceedings," that is, later trials held at Nuremberg by only our own government, as well as other trials held elsewhere before other international or national tribunals. See generally Telford Taylor, *The Nuremberg War Crimes Trials*, 450 INT'L CONCILIATION 243, 277 (1949); Telford Taylor, *Final Report to the Secretary of the Army on the Nuremberg War Crimes Trials Under Control Council Law No. 10* (G.P.O. Aug. 15, 1949).

Regarding the post World-War II Tokyo Trials, see REPORT OF SPECIAL TASK FORCE OF THE ABA SECTION OF INTERNATIONAL LAW AND PRACTICE ON THE INTERNATIONAL TRIBUNAL TO ADJUDICATE WAR CRIMES COMMITTED IN THE FORMER YUGOSLAVIA, 5 n.11 (1993) (hereinafter ABA SUBSTANTIVE REP.).

8. See NAZI CONSPIRACY AND AGGRESSION, *supra* note 2, at 15.

9. *Id.* at 29.

10. *Id.* at 30.

11. *Id.* at 53.

12. See CHARTER OF THE INTERNATIONAL MILITARY TRIBUNAL, *supra* note 5, arts. 7-8.

13. *Id.*

14. *Id.* art. 9.

15. See Office of United States Chief of Counsel for Prosecution of Axis Criminality, *Nazi Conspiracy and Aggression*, Opinion and Judgment [hereinafter IMT JUDGMENT], at 84 (G.P.O. 1947).

incompatible with the principle that punishment should not be imposed on the basis of standards or penalties retroactively defined.¹⁶

Before examining that criticism, among others, it is useful to recall the context out of which the Charter arose. Before Germany's surrender, reliable evidence had shown: First, ruthless pre-war Nazi assaults on the Jews, the churches, independent labor unions and dissidents in Germany, as the Nazis achieved and consolidated their power; second, the deliberate and indisputable aggression against Czechoslovakia, Poland, most of the rest of Europe, and then against the U.S.S.R. and the United States; third, as a result of those wars, the systematic and massive pillaging, plundering and devastation of a continent, and the deportation of millions of slave laborers, all centrally organized; and fourth, the deliberate mistreatment and execution of POW's, the murder of millions of Jews, Slavs, gypsies, and dissidents.

The murder of the Jews was the defining element of the Nazi regime and the most terrible event in modern European history.¹⁷ Their murder had occurred on so large a scale that it was uncertain how many millions had been destroyed. However, the vast scope and general consequences of the Nazi's Final Solution, i.e., the Holocaust, and the unspeakable horrors that had attended it, were known before the war ended.¹⁸

World War II has understandably been called by John Keegan "the largest single event in human history."¹⁹ He estimated that the war killed nearly fifty million and, for millions more, destroyed their homes, towns, cities, and culture, and left them wounded in mind and body.

Many of those horrors had, of course, been war crimes. "In the eyes of the law," as Peter Calvocoressi observed, "not all is fair in war whatever the

16. See, e.g., VISCOUNT MAUGHAM, U.N.O. AND WAR CRIMES chs. 4-5 (1951); JOHN F. KENNEDY, PROFILES IN COURAGE 190, 292 (Memorial edition, 1964) (referring to criticism by Justice Douglas and by Senator Taft which earned the Senator Chapter IX in Kennedy's book). *But cf.* TAYLOR, *supra* note 1, at 629, 581; STANLEY HOFFMAN, REACHING FOR THE MOST DIFFICULT: HUMAN RIGHTS AS A POLICY GOAL 112, 19, 21-22 (1983).

17. See, e.g., Arthur Spiegelman, *Head of Austrian Parliament Meets Jewish Leaders*, THE REUTER LIBR. REP., Sept. 28, 1987, available in LEXIS, News Library, Arcnws File (quoting Leopold Gratz, President of the Austrian Parliament, describing the Holocaust "as the greatest crime in history"); HANNAH ARENDT, EICHMAN IN JERUSALEM 19 (1963). Eichman viewed the annihilation of the Jews as "one of the greatest crimes in the history of Humanity." *Id.*

18. See generally MARTIN GILBERT, FINAL SOLUTION, OXFORD COMPANION TO WORLD WAR II 364, 371 (I.C.B. Dear ed., 1995) (stating that six million Jews were murdered); *cf.* J.A.S. GRENVILLE, A HISTORY OF THE WORLD IN THE TWENTIETH CENTURY 284 (1994) (noting that historians cannot tell for certain to the nearest million the huge number of Jews murdered); DAVID S. WYMAN, THE ABANDONMENT OF THE JEWS chs. 2-4 (1984).

19. See JOHN KEEGAN, *Foreword* to THE SECOND WORLD WAR (1990).

case in love."²⁰ For a long time, war crimes had been subject to individual punishment.²¹ However, given the human misery resulting from Nazi aggressions, Jackson, among others, found charges of war crimes, based only on how the war had been conducted, insufficiently. It was necessary also to impose individual punishment for aggressive war, the supreme evil and the generating cause of most of the other offenses, and their attendant agonies.²² Jackson urged, moreover, that the principle against retroactive punishment, properly understood, did not preclude punishment in the circumstances involved.²³

That principle is, as you know, designed to avoid punishing one who, when he acted, had no reasonable warning that his conduct was culpable. That rule was manifestly inapplicable to the Nazis. They knew of the Kellogg-Briand Pact, among other formulations, which had renounced, explicitly or by implication, war except in self-defense, and which had been signed by an earlier German government.²⁴ They were aware of other international formulations explicitly or implicitly condemning aggressive war as an international crime.²⁵ They knew that, given modern technology, the launching of such a war was a terrible act. Not even Hitler had been prepared publicly to claim the right to do so. Thus, after the attack on Poland, Hitler, in a speech to the Reichstag, indicated that the Poles had launched a war of aggression and that the Nazis had acted only in self-defense.²⁶

As Justice Jackson urged,²⁷ the character of international law precluded the strict and automatic application of the rule against retroactivity. That rule has flourished in comparatively well-developed legal systems but not in primitive or immature ones. Thus, during the early development of our common law, offenses, like killing and robbery, that shocked the moral sense of the community, had been retrospectively transformed into crimes for which individual punishment was exacted.²⁸ Similarly, individual punishment for war crimes had become an established feature of international law without any express provisions for individual punishment in organic documents, such as the

20. See *id.*; CALVOCORESSI, *supra* note 6, at 132.

21. CALVOCORESSI, *supra* note 6, at 18-19.

22. JACKSON, *supra* note 3, at 82-84; TAYLOR, *supra* note 1, at 42.

23. JACKSON, *supra* note 3, at 85.

24. *Id.* at 83.

25. *Id.* at 84. See also SHELDON GLUECK, THE NUREMBERG TRIAL AND AGGRESSIVE WAR 25-34 (1946); Max Rheinstein, *The Nuremberg Trial and Aggressive War*, 14 U. CHI. L. REV. 319 (1947) (book review). But see Bernard Meltzer, *A Note on Some Aspects of the Nuremberg Debate*, 14 U. CHI. L. REV. 455 (1947).

26. See ADOLPH HITLER, MY NEW ORDER 687, 689 (Raoul de Roussey de Sales trans., 1941).

27. See JACKSON, *supra* note 3, at 84-86.

28. *Id.* at 14; Max Radin, *International Crimes*, 32 IOWA L. REV. 33, 41-42 (1946).

Geneva Convention.²⁹ International law was at best a primitive system, lacking a legislative body, and, like the early common law, dependent on case-by-case development. The strict and automatic application of the principle against retroactivity in such a system would have created too large a gap between the law and the developing moral sense of the world community. In short, the principle against retroactivity was a principle of justice and the reasons behind it were totally inapplicable to the Nazi leadership.

I was once convinced³⁰ that the foregoing considerations trumped the *ex post facto* objection, but I am now more doubtful about that conclusion. It is weakened by the fact that the debate on U.S. ratification of the Kellogg-Briand Pact³¹ emphasized that the pact was an appeal to public opinion and that breaches were not to trigger any punitive measures.³² Furthermore, individual punishment for aggression ran against the pre-1945 practices of nations.³³ The most troubling events included the Soviet aggressions against Poland, the Baltic States, and Finland. In any event, such considerations lay behind the initial resistance of the French to the inclusion of crimes against the peace.³⁴ Like most continental lawyers, they relied on a tradition of a code, which tended to be less open-ended than the common law tradition.

To be sure, the idea of crimes against peace had met the emotional needs of the times.³⁵ Thus, Rebecca West observed: "It is the virtue of the Nuremberg trial that it was convened in hatred of war and was nurtured by those starved for peace."³⁶ Nonetheless, that idea left a shadow on the trail.

The Charter and the Indictment had raised another independent question of retroactivity by appearing to include within "crimes against humanity," governmental persecution and extermination of civilian populations in Germany *before* the outbreak of the war. The Tribunal ducked that question by folding crimes against humanity into war crimes or into crimes against the peace,

29. See Meltzer, *supra* note 25, at 456 and authorities cited therein.

30. *Id.*

31. 46 STAT. 2343 (1929).

32. See statements on Senate floor by Senator Borah, Chmn. of the House Committee for Foreign Relations of the U.S. Senate, on Jan. 3, 1929, 70 CONG. REC., Part 1, 1063 (treaty an appeal to public opinion); *id.* at 1064 (no coercive or punitive measures for violators envisaged). See also Report of the U.S. Senate House Committee for Foreign Relations, Jan. 15, 1929, *id.* at 1730 (disclaiming any coercive aspect to the treaty). For a fuller discussion of the history and significance of the pact, see MAUGHAM, *supra* note 16, at ch. 5 (1951).

33. See GEORGE A. FINCH, *THE NUREMBERG TRIAL AND INTERNATIONAL LAW*, 41 AM. J. INT'L L. 20 (1947); ROBERT K. WOETZEL, *THE NUREMBERG TRIALS IN INTERNATIONAL LAW* 166-69 (1960).

34. See TAYLOR, *supra* note 1, at 65-67.

35. *Id.* at 629.

36. See Rebecca West, *Foreword* in AIREY NEAVE, *ON TRIAL AT NUREMBERG* 7 (1978).

thereby eroding any independent legal significance for crimes against humanity, for the purpose of the Tribunal's judgment.³⁷

Concerns about retroactivity seemed to sharpen the question of whether judicial procedures should have been used to determine guilt and impose punishment. For a time, the United States and the Soviets had flirted with the idea of executive punishment, which had been pressed by the British. The British had proposed that the Allies would identify, let us say, twenty-five or one hundred leading Germans whose offenses had been serious and obvious and shoot them, out of hand. Stalin, who was said to have been pulling Churchill's leg, had raised that ante to 50,000 Germans.³⁸ The Allies ultimately decided to grant the defendants a hearing—a step that Jackson had urged.

Nonetheless, some critics condemned the use of judicial procedures to determine guilt and impose punishment, urging that to do so would be to turn a court into a political instrument by which the victors exercised their power to punish the defeated. Thus, then Chief Justice Stone privately labeled the trial as a "high grade lynching party."³⁹ These critics urged that avowedly political means—that is summary executions by executive fiat—rather than ostensibly judicial means—should be used for political punishments.⁴⁰

However, that position ignored or dismissed the risk of error involved in summary action whether it is based on "principles of law" or executive fiat. That position was in essence an argument against due process. Had it prevailed, it would no doubt have triggered an outcry against the risks of prosecutorial error aggravated by denial of the right to make a defense. The acquittal of three Nuremberg defendants is a powerful reminder of such risks.⁴¹ Indeed, it would not be pleasant today to defend summary execution of the defendants.

A trial, moreover, would respect the needs of history and provide a record of the Nazi affronts to civilization—a record that might serve an educative and reformatory role for the generation of 1945 and beyond, inside and outside of

37. See IMT JUDGMENT, *supra* note 15, at 84. This restrictive interpretation of crimes against humanity was renounced in CONTROL COUNCIL LAW NO. 10, which governed "Subsequent Proceedings" at Nuremberg. See Taylor, *supra* note 7, at 8.

38. See TAYLOR, *supra* note 1, at 29-32.

39. See Alpheus T. Mason, *Extra-Judicial Work for Judges: The Views of Chief Justice Stone*, 67 HARV. L. REV. 193, 212 (1953). For a fuller exposition of the Chief Justice's disapproval of the trial and Jackson's role, see *id.* at 209-14.

40. *Id.*

41. The charges against, the findings regarding, and the sentences of the defendants found guilty are set forth in JACKSON, *supra* note 3, at xii-xiii; see also Harold Leventhal et al., *The Nuremberg Verdict*, 60 HARV. L. REV. 857, 907 (1947).

Germany.⁴² Such a record might also, as Jackson urged, both foreclose responsible denial and avert martyrdom for the major leaders of the Nazi regime.⁴³ The evidence of the Holocaust was so strong in 1945 that I doubt that anyone then foresaw the so-called Auschwitz lie—the recent denials that the Holocaust actually happened. The trial record surely serves as a corrective of such fantastic revisionism.

What I have said so far does not, of course, deal with what was the central difficulty of the trial. The governing law was not applied equally. The standards of guilt were applied only to the losers. For example, the Soviets, who sat on the Tribunal, were not forced to answer for Soviet aggression against Poland, the Baltic States, or Finland. Nor were the United Kingdom and the United States required to face the questions raised, for example, by the bombing of Dresden and Hiroshima. To some, the unequal application of the law, compounded by the Soviet presence on the Tribunal, fatally compromised the morality of the trial. To others, the Nazis' uniquely monstrous barbarities and the fact that it was their aggression that precipitated the ensuing horrors, warranted the apparently unequal application of the law.

Furthermore, Nuremberg merely reflected the troubling inequality, it did not produce it. It has been the product of an undeveloped and fragile international system. Long before Nuremberg, the victor had applied an unequal standard, for example, in dealing with traditional war crimes. The victor had punished the misconduct of the enemy; similar conduct by his own forces had largely gone unpunished. Unless we had been prepared to comb our own ranks for violators of the rules of war, the logic of the inequality argument would have required us to give the Nazis complete immunity for all their crimes, war crimes as well as crimes against the peace. Even the critics shrank from that position.⁴⁴ We were, I believe, justified in rejecting it, because of what was the overwhelmingly greater depravity of the Nazis and because they had launched wars of aggression.

I want now to turn from those large legal questions to narrower problems regarding the content of the Charter, the indictment and the conduct of the trial. One set of problems arose from the need to mesh different legal and political

42. See JACKSON, *supra* note 3, at xvi, xvii; see also statement of the French Chief Prosecutor M. Francois de Menthon, *quoted in* NUREMBERG: GERMAN VIEWS OF THE WAR TRIALS 76-77 (Wilbourn E. Benton and George Grimm eds., 1955) [hereinafter WAR TRIALS]. On the effect of the trial on German opinion, see RICHARD L. MERRITT, *DEMOCRACY IMPOSED* 150-57 *passim* (1995). See also JUDITH N. SHKLAR, *LEGALISM* 164-65 (1964); cf. WERNER F. EBKE & DETLEV F. VAGTS, *DEMOCRACY, MARKET ECONOMY AND THE LAW* 7-8 (1995).

43. JACKSON, *supra* note 3, at xvi.

44. See, e.g., MASON *supra* note 39, at 209-214.

cultures.⁴⁵ For example, the French were puzzled by the concept of a common plan or conspiracy but reluctantly acquiesced in its inclusion in the Charter.⁴⁶ The Soviet negotiator at first insisted that aggressive war should be made a crime only when committed in the past by the Nazis.⁴⁷ Jackson held out for and secured a more expansive prohibition—one addressed to all peoples in the future as well as the past.⁴⁸ There were also inter-allied differences in the role of the indictment,⁴⁹ the role of the lawyers, and the importance of cross examination. The Soviets were used to much more specificity in an indictment; in crimes against the state at least, the evidence set forth in the indictment was not expected to be challenged but to be received as the truth, by the tribunal, and, as you know, accepted often by the accused as well. The French and Germans were used to an active judge who did much of the investigating and questioning of witnesses. Perhaps as a result, the French and German lawyers were not skillful in cross-examination; nor were the Russians. These, and other differences that I will bypass, were bridged by workable compromises and by recognizing within broad limits the discretion of each prosecuting team to follow its own style.⁵⁰

There were also lively disagreements among the U.S. prosecutors on issues of trial policy. The most important issue was whether to rely primarily on documents without much live testimony. Some urged that live witnesses in the prosecution's case-in-chief would spice up the proceedings. Jackson, however, decided to rely primarily on documentary evidence. Documents, although drabber, would be free from the problems that live witnesses would entail—flawed perception or memory, susceptibility to pressure, currying favor, or turning the tables and making Nazi propaganda. Because of Jackson's policy, the case against the defendants was proved by documents of their own making, the authenticity of which was challenged only once or twice.

The defendants were afforded adequate opportunity to challenge and to meet the evidence offered against them. They were allowed to pick their lawyers from the German bar, or they could have German counsel appointed for them. After some logistical difficulties were solved, their lawyers received a copy in German of all the documents put into evidence and could and did have witnesses and documents subpoenaed. The defendants could and did in most cases take

45. JACKSON, *supra* note 3, at vi-vii.

46. See William M. Jackson, *Telford Taylor - Critical Perspectives on the Nuremberg Trial*, 12 N.Y.L. SCH. J. HUM. RTS. (forthcoming June 1996); TAYLOR, *supra* note 1, at 629.

47. TAYLOR, *supra* note 1, at 64-65.

48. See *id.* at 65-74.

49. See JACKSON, *supra* note 3, at vi-vii.

50. *Id.*

the stand after being sworn. Even critics of the idea of a trial or of some provisions of the Charter generally applauded the fairness of the trial.⁵¹

In the end, the Tribunal acquitted three defendants, sentenced twelve to die by hanging, and seven to prison terms ranging from ten years to life.⁵² Only one defendant, Hess, was convicted of only crimes against peace. The others convicted of those crimes were also convicted of war crimes or crimes against humanity. The U.S.S.R. dissented from all the acquittals but dissented from only one sentence, life imprisonment, rather than death, for Hess.

Nuremberg, especially in its condemnation of aggressive war, focused not only on the offenses of these defendants but also on establishing a precedent designed to punish and to deter aggression in the future. But at the time, so far as I know, the prospects for such deterrence had not been closely analyzed. No one, of course, had been so extravagant as to expect aggressive war to be exorcised by a trial. The hope seemed to be that the condemnation of aggression would bite into the culture, affect public opinion, and constrain aggression by governments because of concern for domestic and foreign criticism or sanctions against an offending nation, as well as individual punishment. But the significance of those considerations for shaping official decisions about aggression—especially by totalitarian governments—was far from clear. In any event, after Nuremberg, there were aggressive wars, for example, in Korea, Afghanistan, and the Persian Gulf—wars for which no individual punishment was even sought to be imposed. Nuremberg may, of course, have helped keep the number down and was invoked to justify and organize resistance to the Korean and Gulf aggressions. The incidence of aggression has been high enough to raise questions about Nuremberg's deterrent effect—questions that are sharpened by the difficulties of enforcing its proscriptions. Furthermore, it is arguable that once an aggressive war breaks out, an aggressor's fear of punishment might encourage its leaders to make a gambler's throw and to prolong the war even when the probability of their winning is low. If punishment seemed inescapable, it might incite more atrocities. After all, one can be hanged only once.

I am going to leave those questions and turn to my work in Nuremberg, in order to give you some sense of particular items of evidence and particular defendants. Before, I do so, let me explain the general order of proof. First, the prosecution introduced evidence of the crimes alleged in the indictment. The responsibility for introducing such evidence was divided among the four Allied prosecutors, not without some overlap. After introducing proof of general

51. See, e.g., WAR TRIALS, *supra* note 42, at 201; ABA SUBSTANTIVE REP., *supra* note 7, at 8; *supra* notes 26-27. See also SHKLAR, *supra* note 42, at 168.

52. See *supra* note 41.

criminality, the prosecution focused on proof connecting each defendant with the substantive crimes involved. Then the defendants put in their evidence.

My own work dealt with what was called "the economic case," which included first, crimes against peace by defendants who had financed the building of, or had built, the German war machine, with knowledge of the Nazis' aggressive purposes; and second, war crimes and crimes against humanity resulting from the systematic plundering and pillaging of occupied territories, and the deportation and exploitation of millions of slave laborers.

I coordinated and reviewed the work of a group of lawyers, who assembled the evidence and prepared trial briefs on various aspects of the economic case. Some of our briefs related to pillaging and plundering in Eastern Europe. After those subjects had been allocated to the Soviets, we gave them our briefs. Disclosure was, however, a one-way street.

The Soviet's disinclination to share information reminds me of a story about Justice Jackson. At a birthday party for him, he was given a Swiss watch, the best of our PX's meager supply. After graciously conveying his thanks, he asked: "Where did it come from?" Before giving you the answer, I want to remind you that Soviet soldiers loved a watch with Mickey Mouse on its face even more than vodka. So a wag's answer to the Justice was "from the Russians." The Justice quickly replied: "That's fine, that's fine. Up to now I haven't been able to get even the time of day from them."

I also was responsible for preparing and presenting to the Tribunal the case against Defendant Walter Funk, who had been charged under all four counts of the indictment. Funk's principal offices had been Minister of Economics and Plenipotentiary General for the War, beginning in 1938, and as head of the Reichsbank, beginning in January of 1939, three jobs crucial to war finance. In both of those posts Funk had succeeded a much more formidable figure, defendant Hjalmar Greeley Schacht. Funk had also been involved with, although he did not play a major role in, agencies that had determined the number of slave laborers required for German industry and had called on other agencies to produce them. He had headed the Reichsbank when it had become the storehouse of the gold fillings, jewelry, eyeglass frames, and other valuables stripped from the corpses of concentration camp victims. Funk wept when confronted with this evidence pre-trial, but claimed that he knew nothing about that ghoulish traffic. The Tribunal concluded that he had known or had not wanted to know. It convicted him on three counts and sentenced him to life imprisonment.

In connection with my work on Funk and on the economic case, I interrogated Goering and lesser figures pretrial. Of those I met face to face, I

found Goering the most interesting and most diabolical. As another British author, Hilary Gaskin, recently put it, he had the "charisma of evil." He was intellectually quick, verbally nimble, and always wily. He often sensed the ultimate purpose of a question as soon as it was put. Incidentally, he did very well in an IQ test, which all the defendants took, ranking just below Schacht. Goering was completely unrepentant, and gloried in his role as second to Hitler and the first of the named defendants. He assumed the responsibility for defending the Nazi regime while attacking the laws of war as obsolete. During the trial, he outpointed Jackson during the latter's cross-examination of him—a notorious defeat for Jackson. In the end, he also managed a small triumph. He cheated the hangman by swallowing cyanide.

In addition to the economic case, I was quite unexpectedly given another assignment that highlighted the unique horrors of the concentration camps as well as the Teutonic obsession with recording such horrors. About ten days before the concentration camp case was to be presented to the Tribunal, I was asked to work on that presentation, which had been the responsibility of an Army team, whose evidentiary circuits had apparently been overloaded. I could not read German, so I got help from two lawyers who could. We had only seven days to prepare the principal part of the case that for many had been the unique mark of Nazism. Other evidence of the pervasive role of the camps had emerged or would do so in separate presentations concerning the Nazi attacks on, for example, the Jews, labor unions, churches, and gypsies. Indeed, the movies taken by Allied troops showing the horrors of the camps when they had been liberated had been presented to the Tribunal earlier—out of order—as a change from the tedium of an essentially documentary case.

The concentration camp evidence was a lawyer's dream and a humanist's nightmare. It included two *totenbuchs*—deathbooks—that had recorded approximately 300 deaths at the Mauthausen camp, deaths recorded as having occurred in alphabetical order, at brief intervals of time, and in each case because of heart disease. The hush in the courtroom when those books were put into evidence is unforgettable.

Let me turn from such evidentiary details to a brief assessment of Nuremberg:

First, the law of the London Charter has been absorbed into international law.⁵³ Nuremberg has also helped to promote the development of what is now

53. See *Affirmation of the Principles of International Law Recognized by the Charter of Nuremberg Tribunal*, G.A. Res. 95(1), U.N. Doc. A/236 at 1144 (1946). This resolution appears in LOUIS HENKIN ET AL., *BASIC DOCUMENTS SUPPLEMENT TO INTERNATIONAL LAW CASES AND MATERIALS* 332 (1993). Subsequently, the General Assembly adopted a "Definition of Aggression,"

called humanitarian law, embodied in such instruments as the Genocide Convention. Enforcement is, of course, a different matter.

Second, the trial was an important part of the closure of World War II: It justified the casualties and devastation that the Allies had both suffered and had inflicted.⁵⁴ It satisfied, in part at least, the demand of the peoples of the occupied countries for a judgment concerning, and individual punishment for, the crimes they had suffered. It probably helped reduce the extent of vigilante justice in those areas. It also appears to have helped reintegrate Germany into European civilization. Despite the general impact of the trial, it has remained essentially a product of its special time and circumstances.

The trials relating to the former Yugoslavia, although on the surface having some similarities with Nuremberg, are vastly different from it. The Tribunal for the former Yugoslavia, established on May 25, 1993, by the UN Security Council,⁵⁵ (which is known as "ICTY"), is the first international tribunal with jurisdiction over war crimes that has been created since the Nuremberg and Tokyo tribunals. Its creation rested on Article VII of the UN Charter,⁵⁶ which authorizes the Security Council to deal with threats to, and breaches of, peace. Reflecting its international origin and its neutrality, the Tribunal sits at the Hague. Its jurisdiction encompasses not aggressive war, but serious and recent violations of international humanitarian law, in the former Yugoslavia. More specifically, the Tribunal's jurisdiction encompasses first, grave breaches of the Geneva Convention of 1949 (Art. 2), which is designed to protect civilians and prisoners of war; second, violations of the laws or customs of war (Art. 3); third, genocide (Art. 4); and, finally, crimes against humanity (Art. 5), which

Resolution Annex, G.A. Res. 3314 (xxix) (1974), without a vote by the General Assembly on December 14, 1974. See HENKIN ET AL., *supra*, at 333.

54. Nuremberg achieved core purposes of the trial set forth by Telford Taylor before the trial began. See TAYLOR, *supra* note 1, at 50. It is doubtful, however, that one of his aspirations—harmonious collaboration by the Allies—was achieved with respect to the USSR.

55. See S.C. Res. 827, U.N. SCOR, 48th year, 3217th mtg. at 1, U.N. Doc. S/RES/827 (1993), reprinted in Symposium, 5 CRIM. L.F. 223, at app. A (1994).

56. Legal experts in Serbia asserted that Article VII was not a valid basis for establishing the Tribunal. See Dusan Cotic, *A Critical Study of the International Tribunal for the Former Yugoslavia*, 5 CRIM. L.F. 223, 233 (1994). Other scholars reject the Serbs' position. See Christian Tomuschat, *International Criminal Prosecution; The Precedent of Nuremberg Confirmed*, 5 CRIM. L.F. 237, 241 (1994). On October 2, 1995, in the case of *Duško Tadić, a/k/a DULE*, the five-member Appeals Chamber of the ICTY upheld the validity of the Tribunal and the primacy of its jurisdiction over that of national courts but divided on the rationale. See *Prosecutor v. D. Tradić*, Case IT-944-1-AR72 (Oct. 2, 1995). These and other significant elements of that decision are discussed by George H. Aldrich, *Jurisdiction of the International Tribunal for the Former Yugoslavia*, 90 AM. J. INT'L L. 64 (1996).

are further specified. I cannot today add to this broad-brush treatment of the Tribunal's substantive law.⁵⁷

I want now to turn to significant differences in the context for Nuremberg and the ICTY—differences in power, politics, logistics, and access to evidence, all of which are obviously intertwined. Key members of the UN and NATO have had different relationships with the countries carved out of the former Yugoslavia. Those UN members appear, moreover, to have been subject to different degrees of pressure from their own people “to do something” in response to the outrages flashing across their TV screens. These nations have also differed over the potential risks and benefits from vigorous and prompt prosecution.

Those differences appear to have been a factor in what appears to be serious underfunding and understaffing of the Tribunal.⁵⁸ Unlike the Nuremberg prosecutors, ICTY does not, of course, have the vast resources of the mighty armies, helping to collect evidence and taking care of logistics. Nor does the ICTY have Nuremberg's paper trail. On the contrary, the principal suspects, I have been told, have shown a certain awareness of the uses of a shredder. Hence, the ICTY must rely heavily on oral testimony from witnesses in remote and sometimes unfriendly areas—testimony that is expensive to get and check. As we have recently read, it must rely on painstaking and grisly searches of suspected mass graves. For, given the new science—forensics of war crimes—dead men do tell tales, as *Newsweek* put it.⁵⁹ Furthermore, the ICTY has custody of only a few relatively small fry, augmented by one supply corp Serb general, who made a wrong turn into the uncaressing arms of Bosnian

57. For fuller treatment, see M. CHERIF BASSIOUNI & PETER MANIKAS, *THE LAW OF THE INTERNATIONAL TRIBUNAL FOR THE FORMER YUGOSLAVIA* 487 (1996); see also *supra* note 56 and sources cited therein.

58. On the differences among some NATO nations regarding the usefulness of war crimes prosecution and the United States, the leading proponent of such prosecution, see David P. Forsythe, *Politics and the International Tribunal for the Former Yugoslavia*, 5 *CRIM. L.F.* 401, 403-09 (1994). On underfunding, see Antonio Cassese, in *An Address to the General Assembly of the United Nations*, Nov. 7, 1995. See also Christopher C. Joyner, *Strengthening of Enforcement of Humanitarian Law: Reflections on the International Tribunal for the Former Yugoslavia*, 6 *DUKE J. COMP. & INT'L L.* 79, 99 (1996).

The commission, which did the preparatory work for the establishment of the ICTY, was also underfunded. See M. Cherif Bassiouni, *The Commission of Experts Established Pursuant to Security Council Resolution 780: Investigating Violations of International Humanitarian Law in the Former Yugoslavia*, 5 *CRIM. L.F.* 279, 287-89 (1994).

59. Sharon Begley, *The Dead Tell Tales: The Science of Investigating War Crimes*, *NEWSWEEK*, Apr. 15, 1996, at 55; see also Kit R. Roane, *Bosnians are on Trail of Missing Kin's Graves*, *N.Y. TIMES*, Apr. 2, 1996, at A4.

troops,⁶⁰ and by one Croat general who "voluntarily," it is said, turned himself in.⁶¹ Finally, the Tribunal, although in existence for almost three years, is not scheduled to begin its first trial until May 1996. This delay, may I emphasize, is not due to any lack of energy or competence of the Tribunal.

The foregoing difficulties result largely from the obvious, if underappreciated fact that the ICTY first operated during an ongoing conflict and is now operating when there is a shaky peace. Under the circumstances of that conflict, the UN's creation of the Tribunal was free from concern about "victors' justice." On the contrary, Radovan Karadzic and General Ratko Mladic, the political and military leaders of the Bosnian Serbs, who have succeeded in carving out an ethnically "pure" area, have been indicted by the Tribunal. They are, however, not in custody, but in power. Furthermore, there has been concern that pursuit of powerful indictees or suspects in order to put them on trial would frustrate or destabilize efforts to make or maintain peace.⁶²

If peace and individual accountability were irreconcilable, a powerful argument could be made that the price of accountability would be the continuation of war and accordingly, excessive. However, Justice Goldstone, the Chief Prosecutor, and Antonio Cassese, the President of the Tribunal, reject that argument. Indeed, they turn it on its head, urging that genuine peace is not possible unless the key suspects are handed over for trial. Otherwise, they urge, all the members of the warring groups will be considered collectively guilty, and that there will be no end to the cycle of violence.⁶³

Nonetheless, peace might be a long time coming if it had to wait on the Tribunal's getting custody of suspected leaders. Perhaps, it would be enough

60. Chris Hedges, *Bosnia Limits War-Crimes Arrests After NATO Delivers 2 Suspects*, N.Y. TIMES, Feb. 13, 1996, at A1, A6.

61. See Chris Hedges, *Balkan War Crimes: Bosnia is First to Turn in Its Own*, N.Y. TIMES, May 3, 1996, at A3.

62. See Anthony D'Amato, *Peace vs. Accountability in Bosnia*, 88 AM. J. INT'L L. 500, 502-04 (1994). For similar concerns with reference to transitions to democratic regimes, see DETLEV F. VAGTS, LEGAL, ECONOMIC, AND POLITICAL PROBLEMS OF TRANSITION TO DEMOCRACY, reprinted in DEMOCRACY MARKET ECONOMY AND THE LAW 3, 15 (Werner F. Ebke & Detlev F. Vagts eds., 1995). See also the contrasting positions expressed by Diane F. Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 YALE L.J. 2537 (1991) and Carlos S. Nino, *The Duty to Punish Past Abuses of Human Rights Put into Context: The Case of Argentina*, 100 YALE L.J. 2619 (1991).

63. Joint Statement in Bulletin of the International Criminal Tribunal for the Former Yugoslavia, Dec. 15., 1995, at 5, col.1. See also Richard Goldstone, *Exposing Human Rights Abuses—A Help or Hindrance to Reconciliation*, 22 HASTINGS CONST. L.Q. 607, 620 (1995); Forsythe, *supra* note 58, at 401, 405-06, 410, 415-16. But cf. the view attributed to former President Carter (said to be the principal advocate of compromise and even amnesty) by Neil A. Lewis, *The Nation: Nuremberg Isn't Repeating Itself*, N.Y. TIMES, Nov. 19, 1995, at E5.

to advance peace if relatively junior defendants were tried while a variety of pressures are maintained on important but absent suspects. In any event, prosecutors, even distinguished and sincere ones, are, of course, not the most objective appraisers of the value of prosecution.

Other informed and experienced champions of civil rights have, however, endorsed the Justice's argument.⁶⁴ Although I am underinformed about the forces at work, vigorous prosecution seems desirable to me. Furthermore, the recent Dayton peace accord and its aftermath supports that course. That accord was reached even though it contained provisions bolstering the Tribunal's position. Thus, it reaffirmed the obligation of the parties to cooperate with the Tribunal and to comply with its requests⁶⁵ and to turn over those charged with war crimes. The peace pact also provided that both those convicted by the Tribunal and indictees evading its authority should be barred from public office in Bosnia.⁶⁶ Whether those provisions will be more than a formal paper victory and will promote effective prosecution is far from clear.

There are, of course, good reasons to keep one's optimism in check about the effect of such agreements in practice. Nonetheless, apparently, because of the Dayton accords, the Tribunal has been getting more cooperation and respect.⁶⁷ Thus, President Milosevic of Serbia, in a hopeful sign, has recently made good on his pledge to hand over two Serbs charged with the slaughter of captured Muslims.⁶⁸ Furthermore, the U.S. army, despite its stated fears of mission creep, is protecting the Tribunal's investigators in their grisly examination of suspected mass graves.⁶⁹ The army is not, however, trying

64. See Morris B. Abram, *Peace and Justice are Inseparable*, WALL ST. J., Feb. 16, 1996, at A10. *But cf.* Forsythe, *supra* note 58, at 415 (referring to greater uncertainty regarding the wise resolution of the dilemma previously expressed by Mr. Abram). See also Therese Raphael, *The War Crimes Tribunal Has Clout...*, WALL ST. J., Apr. 2, 1996, at A14; James Podgers, *The World Cries for Justice*, 82 A.B.A. J. 52, 53 (1996).

65. See U.S. Dept. of State, Dayton Peace Agreement, Nov. 21, 1995, art. 2, § 8 (released by Office of Spokesman Dec. 1, 1995). These provisions were included in the Agreement formally signed in Paris.

66. *Id.* at art. IX, § 1. This provision was presumably aimed at the Bosnian Serb leaders, Karadzic and Mladic, both of whom the Tribunal indicted for the second time, shortly before the peace talks began. See Podgers, *supra* note 64, at 61.

67. See Raphael, *supra* note 64, at A14.

68. *Id.* Later, the Bosnian government turned over two Muslims indicted by the ICTY for the murder of Serbian prisoners and for whom ICTY arrest warrants had been issued. See N.Y. TIMES, May 5, 1996, at A3.

69. See Mike O'Conner, *In Bosnia Field, Changes Refuel Talk of Graves*, N.Y. TIMES, Apr. 3, 1996, at A1. The U.S. army spokesman, however, disclaimed any reason for his subordinates to leave their vehicles to inspect alleged mass graves that were out of sight. Mike O'Conner, *War Crimes Aides Say Bodies in Graves May Have Been Moved*, N.Y. TIMES, Apr. 4, 1996, at A11.

affirmatively to apprehend indictees.⁷⁰

Indeed, it does not yet appear how the Tribunal will get custody of very important indictees, such as Dr. Karadzic and General Mladic, the Bosnian Serb leaders; they may never stand trial. They will, however, not be free to travel outside their country, without risking arrest.⁷¹ Although the Tribunal is barred from conducting trials in absentia, the prosecution, after meeting specified conditions, may spread on the record the evidence against indictees evading the Tribunal's process.⁷² Such evidence may stigmatize the absent suspects and, along with restrictions on their travel and their ineligibility for office, may, the prosecution hopes,⁷³ drive the absentees from office. Furthermore, the United States has recently added to the pressure by announcing that foreign aid will be denied to areas, such as Republika Srpske, the Bosnian Serb area, headed by indicted war criminals.⁷⁴ Evidence of serious offenses by absentee suspects might also help provide a catharsis for the victims. On the other hand, truth, without more, may strengthen the demand for retribution through self-help if need be.

It is not surprising that difficulties and uncertainties have surrounded the important and unprecedented effort to enforce international humanitarian standards by a neutral international tribunal. Those difficulties reflect the divisions and ambivalence of international political leaders. These leaders have been appalled by, and wish to redress, the terrible events that have occurred in the former Yugoslavia. But those leaders, collectively, have been unwilling to devote the resources needed for, or to take the risks posed by, vigorous efforts to apprehend and try powerful indictees. Those difficulties may, of course, discourage further enforcement efforts in a variety of situations. Indeed, many have urged that the "failure" of the ICTY, for whatever reason, would be a serious blow to efforts to establish a standing international criminal court⁷⁵—efforts that have persisted for almost a half century despite the overwhelming

70. See Theodore Meron, *A Trial Without Witnesses*, N.Y. TIMES, Mar. 7, 1996, at A25.

71. See U.N. Doc. IT/32/Rev. 7, ICTY Rules & Procedure and Evidence, Rules 54-60 (adopted Feb. 11, 1994, and amended through Jan. 18, 1996).

72. *Id.* at 61.

73. See Graham Blewitt, *Identifying and Prosecuting War Crimes: Two Case Studies - The Former Yugoslavia and Rwanda*, 12 N.Y.L. SCH. J. HUM. RTS. (forthcoming June 1996) (manuscript at 235, on file with author). Goldstone, *supra* note 63, at 619-20.

74. See Craig R. Whitney, *\$1.23 Billion Is Pledged In New Aid For Bosnia*, N.Y. TIMES, Apr. 14, 1994, at A4. For recent expressions of the position of the U.S. and other countries regarding the establishment of a standing international criminal court, see Barbara A. Crasette, *U.N. Seeks Accord on Permanent War Crimes Court*, N.Y. TIMES, Apr. 7, 1996, (Int'l Sec.) at 8.

75. See, e.g., Podgers, *supra* note 64, at 56. Justice Goldstone, in September of 1995, stated that he would judge the Tribunal's success on whether it tried the leaders responsible for the war crimes. See WALL ST. J., Oct. 10, 1995, at A18.

obstacles involved.⁷⁶ In any event, I obviously do not know of a calculus for weighing the relevant imponderables. Nonetheless, I agree with those who urge that the difficulties facing the ICTY are outweighed by the importance of holding the architects and executors of atrocity accountable. To deny the ICTY the necessary support would deepen cynicism and skepticism regarding U.S. and NATO commitments. Such denial would, moreover, impair not only our moral position but also our power generally to shape events throughout the world.⁷⁷

Whatever the outcome of the ICTY's work, Justice Goldstone (who is soon to leave the Prosecution)⁷⁸ and his colleagues have, I believe, earned our gratitude for their skill, energy, and tenacity. For they have shown their awareness of a charge not made at Nuremberg but resonating from it: the charge, as Elie Wiesel has reminded us, of the crime of silence and indifference. In remembering Nuremberg and reflecting on the atrocities in the former Yugoslavia, it is right that we remember that charge—perhaps above all others.

76. On the long standing obstacles to the establishment of an international criminal justice system, see Rupa Bhattacharya, *Establishing a Rule-of-Law International Criminal Law System*, 31 *TEX. INT'L L.J.* 57, 95 (1996).

77. See Robert Kagen, *American Power—A Guide for the Perplexed*, COMMENTARY, Apr. 1996, at 21, 29-31. *But cf.* Marc D. Charney, *Conversations*, Telford Taylor, *The Laws of War are many but Self-Interest is the only Enforcer*, N.Y. TIMES, Dec. 25, 1994, § 4, at A1.

78. His withdrawal is considered a great loss. See Podgers, *supra* note 64, at 58. Louise Arbor, a member of the Ontario Court of Appeal, has been nominated by the UN Secretary General to succeed to Justice Goldstone subject to the Security Council's approval. *Id.*