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INTERNATIONAL MILITARY TRIBUNALS' GENESIS, WWII EXPERIENCE, AND FUTURE RELEVANCE

Henry Korn*

I. INTRODUCTION

It is generally known that during World War II (“WWII”), the Allies agreed that following the war, Nazi leaders would face charges of violating international law for the conduct of the war and the extermination of innocent people based on their religious beliefs, and they would face the prospect of death by a military tribunal hearing the evidence. What is not generally known is that the Allies had no precedent for creating an international tribunal and defining anew the very war crimes they would face—an approach that some considered to be *ex post facto* laws. The International Military Tribunal in Nuremberg was the first time government officials, military leaders, and citizens of a defeated nation were tried under principles of international law in tribunals jointly established by victor nations to hear and sentence the defendants involving crimes that did not appear in any national body of penal laws.¹ This Article discusses precedent, offers personal insights into the proceedings, and suggests the future holds a limited role for such proceedings.

The Allies could have ditched the entire endeavor and lined the war criminals against a wall and shot them. The sentiment offered by Jerome Shaker, a New York City resident, in a telegram to President Truman on October 12, 1946 makes that point:

Today, Columbus Day, is the birthday of a great, generous and proud nation. May I please be permitted to contribute enclosed check of \$10.00 to pay for the expense of bullets instead of a rope for members of the German High Command to be executed at Nurnberg Germany. May God Bless the President of the United States for his generosity in granting my plea.²

* © 2017 Henry Korn. Thanks to Julianna Meely, a student at Cornell University, who assisted with research for preparation of the Article during the summer of 2016.

¹ See *The Trial of German Major War Criminals, Proceedings of the International Military Tribunal Sitting at Nuremberg, Germany 1*, 49–50 (1945) [hereinafter *Proceedings*] (quoting Justice Robert Jackson as saying “The privilege of opening the first trial in history for crimes against the peace of the world imposes a grave responsibility.”); see also TELFORD TAYLOR, *ANATOMY OF THE NUREMBERG TRIALS* 47 (1st ed., 1972).

² *Telegram from Jerome Shaker to Harry S. Truman on Oct. 12, 1946*, HARRY S. TRUMAN: LIBRARY & MUSEUM, https://www.trumanlibrary.org/whistlestop/study_collections/nuremberg/documents/index.php?documentid=2-9&pagenumber=1 [<https://perma.cc/FBW8-KNHW>].

The Allied leaders had no doubt that targeting German military leaders for all out aggressive war (one of the internationally defined war crimes for the later proceedings) would be judged with skepticism, conflicting with the famous maxim: “war is cruelty,” as General William Tecumseh Sherman said 100 years before to justify defeat of an enemy force.³ As he said, “we can make war so terrible that they will realize . . . however brave and gallant and devoted to their country, still they are mortal and should exhaust all peaceful remedies before they fly to war.”⁴ To one of his cavalry commanders, he would “propose to leave a trail that will be recognized fifty years hence.”⁵ He would wage “aggressive war,” and “[i]f the people raise a howl against my barbarity and cruelty, I will answer that war is war, and not popularity seeking.”⁶

The Allies chose a jurisprudential course for Nazi officials. The United States, Great Britain, France, and the Soviet Union executed the London Agreement (“Agreement”) of August 8, 1945 to establish the International Military Tribunals in order to prosecute individuals identified as Nazi war criminals.⁷ August 8th was Victory in Europe (“VE”) Day, as the Germans surrendered, but the genesis of this Agreement was years before—after the December 7, 1941 Japanese attack on Pearl Harbor, after the Nazis declared war on the United States, before D-Day, and at a time when the outcome of the war was uncertain.⁸ The Germans controlled the European continent. Only Great Britain was free of Germany’s European hegemony.⁹

³ Letter of William T. Sherman to James M. Calhoun, E.E. Rawson, and S.C. Wells, September 12, 1864, CIVIL WAR ERA NC, <http://cwnc.omeka.chass.ncsu.edu/items/show/23> [<https://perma.cc/G3TM-7PUB>].

⁴ Letter from William T. Sherman to Ellen Ewing Sherman (October 22, 1862), in THE SHERMAN LETTERS: CORRESPONDENCE BETWEEN GENERAL AND SENATOR SHERMAN FROM 1837 TO 1891 (ed. Rachel Sherman Thorndike, 1894).

⁵ WILLIAM TECUMSEH SHERMAN, MEMOIRS OF GENERAL W. T. SHERMAN 38 (2010).

⁶ *Id.* at 38–39.

⁷ Proceedings, *supra* note 1, at 1.

⁸ The initial decision of the Allies to convene an international military tribunal to prosecute the Nazi leaders was made in October 1943, over 9 months before the Allies landed at Normandy to liberate Europe from Nazi domination. Clearly, Germany controlled Europe when the Allies conceived the war crimes tribunals as the modality to deal with the Nazi officials when war came to an end.

⁹ In a resolution dated October 10, 1943, the Executive Committee of the League of Nations Union announced that individuals, including governmental officials, military officials and industrialists, in Germany should be prosecuted by international military tribunals for war crimes, including a system of terror by slaughter and torture, “unjustified by any military necessity and aimed at men, women and children of all ages and in certain cases dictated by racial or religious prejudice as in the wholesale massacre of Jews.” *Statement, Punishment and Prevention of War Crimes, Resolution of the Executive Committee of the League of Nations Union, October 10, 1943*, HARRY S. TRUMAN: LIBRARY & MUSEUM, https://www.trumanlibrary.org/whistlestop/study_collections/nuremberg/documents/index.php?documentdate=1943-10-10&documentid=C107-10-2&pagenumber=1 [<https://perma.cc/573N-SXV4>].

The War Crimes prosecutions did not just involve the Nazis; there were prosecutions of Japanese war criminals, although the US chose not to prosecute the Emperor for clearly political reasons.¹⁰ The decision on the Japanese front to selectively prosecute its principal civilian and military officials, excluding the Emperor from consideration and eventually the U.S. decision by 1954 to commute the prison terms of all remaining incarcerated Nazi defendants by 1954, leads to the conclusion that in the end the use of military tribunals to target national figures for war crimes is fundamentally a political consideration which this Article discusses below.¹¹

II. THE AUTHORIZING ALLIES AGREEMENT & PRECEDENT

The Declaration of the Four Nations, or the Four Power Declaration, was signed on October 30, 1943 by the United States, the United Kingdom, the Soviet Union, and the Republic of China at what is known as the Moscow Conference.¹² The Declaration formally established the four-power framework that would later influence the international order of the postwar world. Thereafter, the Agreement for the Prosecution and Punishment of the Major European Axis War Criminals was signed by the United States, United Kingdom, Soviet Union, and the Provisional Government of France on August 8, 1945.¹³ It established an International Military Tribunal (“IMT”) to prosecute Nazi war criminals.¹⁴ The specifics of how war criminals would be arraigned, prosecuted, and, if found guilty, sentenced, were identified in the Charter of the IMT, adopted by the Allies on execution of the Agreement.¹⁵

The most revolutionary of the provisions of the Charter was its definition of war crimes. Article 6 of the Charter specified the nature of international war crimes subject to the IMT jurisdiction.¹⁶ These crimes found *no precedent* in any national

¹⁰ H.W. BRANDS, *THE GENERAL VS. THE PRESIDENT: MACARTHUR AND TRUMAN AT THE BRINK OF NUCLEAR WAR 19–20* (2016).

¹¹ The decision of then Secretary of State John J. McCloy, with the support of President Eisenhower, to commute the prison terms of the Nazi officials was part of the U.S. effort to reintegrate Germany into a European force to confront the Soviet Union during the Civil War. *See id.* at 9; *see also* TAYLOR, *supra* note 1, at 640.

¹² Declaration of German Atrocities, 9 DEP’T ST. BULL. 310 (1943), <http://www.legal-tools.org/doc/3c6e23/> [<https://perma.cc/7PFH-RAGN>].

¹³ Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Fr.-U.K.-U.S.-S.S.R., Aug. 8, 1945, 59 Stat. 1544, 83 U.N.T.S. 279 [hereinafter London Agreement], <http://avalon.law.yale.edu/imt/imtchart.asp> [<https://perma.cc/TF75-NVCL>].

¹⁴ *Id.*

¹⁵ *See id.* at 1544–45; Charter of the International Military Tribunal, Aug. 8, 1945, 59 Stat. 1546, 82 U.N.T.S. 284.

¹⁶ The Charter consists of five pages and specifies what the “Crimes” are, the general procedural stages for the proceedings through judgment and sentencing, and the general rights of the accused to a “fair trial.” Charter of the International Military Tribunal, Aug. 8, 1945, 59 Stat. 1546, 82 U.N.T.S. 284. There is no provision in the Charter for a convicted

criminal law. These crimes were new to jurisprudence. The Charter also established the first body of international war crime law and the principle of accountability for leaders of a country where such crimes were committed.

The Article 6 crimes included “*crimes against peace*,” defined in Article 6 of the Charter as the “planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing.”¹⁷ The Article 6 offenses included “*war crimes*,” defined in the same Article as

violations of the laws or customs of war. . . . [I]nclud[ing], but not limited to, murder, ill treatment or deportation to slave labor or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity.¹⁸

Lastly, the IMT was authorized to adjudicate “*crimes against humanity*,” defined as

murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.¹⁹

The accountability principle was also specified in Article 6, and it provided that “[l]eaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan.”²⁰

Where did the drafters of the Charter find the precedent for such revolutionary legal principles? Surprising as it sounds, the precedent may be found during the American Civil War, and its source was a military code drafted by a former Prussian officer who immigrated to the United States before the Civil War and whose sons fought on both sides of that conflict.²¹ The precedent is the Lieber Code drafted by Franz Lieber and adopted in 1863 by President Lincoln as a code Union forces were expected to follow.²²

individual appealing to a higher tribunal. *See id.* Based on the author’s review of available resources concerning the Nuremberg proceedings, the author concludes there was no appeal process afforded to the accused.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ TAYLOR, *supra* note 1, at 8–9.

²² *Id.*

The Lieber Code²³ insisted upon the humane, ethical treatment of populations in occupied areas.²⁴ It was the first codified law that expressly forbade giving “no quarter” to the enemy (i.e., killing prisoners of war), except in such cases when the survival of the unit that held these prisoners was threatened.²⁵ It forbade the use of poisons, stating that use of such puts any force who uses them entirely outside the pale of the civilized nations.²⁶ It forbade the use of torture to extract confessions.²⁷ It described the rights and duties of prisoners of war and of capturing forces.²⁸ It described the how war was to be conducted in occupied territories, the ends of war, and discussed permissible and impermissible means to attain those ends.²⁹

Other than the Lieber Code, in their consideration of precedent for the creation of the international war crimes tribunals, the Allies could look to the 1899 and 1907 Hague Conventions.³⁰ For example, the Hague Convention (III) of 1907 prohibited commencement of hostilities between nations without explicit warning.³¹ Use of poisonous gas, later introduced by Germany and used by all major belligerents throughout WWI, violated the Hague Declaration (IV, 2) of 1899 and Convention (IV) of 1907.³²

After WWI, the Allies convened a Peace Conference in Versailles in 1919 and appointed a fifteen-member Commission to review war crimes during that war.³³ The Commission defined war crimes as “offenses against the laws and customs of war or the laws of humanity,” rendering offenders liable to criminal prosecution.³⁴

Although the Commissioners concluded that Germany had declared war in pursuance of a policy of aggression, they believed that a trial on that issue would be very prolonged and difficult since International law had not yet advanced to a stage where a premeditated war of aggression would be treated as a punishable offense under established law.³⁵ The Americans, in particular, argued that no international

²³ FRANCIS LIEBER, INSTRUCTIONS FOR THE GOVERNMENT OF ARMIES IN THE UNITED STATES IN THE FIELD (Wash., Gov't Printing Office 1898).

²⁴ *See id.* at 14.

²⁵ *Id.* at 21.

²⁶ *Id.* at 23.

²⁷ *Id.* at 8.

²⁸ *See id.* at 20.

²⁹ *See id.* at 31.

³⁰ TAYLOR, *supra* note 1, at 10–11, 13.

³¹ Hague Convention (III) Relative to the Opening of Hostilities, art. 1–2, Oct. 18, 1907, 36 Stat. 2259.

³² Hague Declaration (IV, 2) Concerning Asphyxiating Gases, July 29, 1899, 26 Martens Nouveau Recueil (2d) 998; Hague Convention (IV) Respecting the Laws and Customs of War on Land, art. 23, October 18, 1907, 36 Stat. 2277.

³³ The Commission, chaired by U.S. Secretary of State Robert Lansing, concluded: “All persons belonging to enemy countries, however high their position . . . who have been guilty of offenses against the laws and customs of war or the laws of humanity are liable to criminal prosecution.” *See Benjamin B. Ferencz, International Criminal Courts: The Legacy of Nuremberg*, 10 PACE INT'L L. REV. 203, 207 (1998).

³⁴ *Id.*

³⁵ *Id.* at 208–09.

court had ever before tried a sovereign head of state for aggressive war.³⁶ For the future, however, the Commissioners recommended that penal sanctions be provided “for such grave outrages against the elementary principles of international law.”³⁷

To avoid allegations of ex post facto law, the German Kaiser was not charged with aggression, but, instead, the Treaty of Versailles provided that he would be arraigned “for a supreme offense against international morality and the sanctity of treaties.”³⁸ Other Germans who had committed war crimes or atrocities would be handed over for trial by allied courts.³⁹ But Germany refused to honor the Treaty, and Holland, noting that there was no competent international criminal court available to act on the basis of existing statutes making aggression by a sovereign punishable, refused to extradite the Kaiser and he was never tried.⁴⁰ German officers who committed atrocities were not handed over either and got off with light sentences by a German court.⁴¹

III. WAR CRIMES AND PROCEDURE

The elements of the war crimes charged against the Nazi defendants thus were unprecedented. The prosecutors were working with new clay to frame the charges within the procedural charter adopted by the Allies. The magnitude of this enterprise is keenly summarized in the October 7, 1946 letter that Justice Robert H. Jackson wrote to President Truman, the original of which is archived at the Truman Library in Independence, Missouri.⁴² As Justice Jackson advised President Truman:

- The first trial of Nazi governmental officials and military leaders began on November 20, 1945 and occupied 216 trial days.
- 33 witnesses were called by the prosecution and subject to defense attorneys’ cross examination.
- The defense attorneys called 61 witnesses and 19 of the 22 defendants testified in their defense.
- 143 other witnesses called by the defense attorneys gave testimony through written interrogatories.

³⁶ *Id.* at 208.

³⁷ *Id.* at 207.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² The author visited the Truman Library on October 30, 2016 and was permitted to access all relevant documents involving the origins of, war crimes charges, and procedure, and viewpoints expressed by senior government officials, including President Truman, about these proceedings.

- The proceedings were conducted and recorded in 4 languages, English, German, French, and Russian, and daily transcripts in the language of the choice of the attorneys were prepared.⁴³
- The English transcript covered over 17,000 pages.
- For the trial preparation, Justice Jackson stated that over 100,000 captured German documents were screened and examined and about 4,000 were translated into the 4 languages and used in whole or in part at the trial and marked as trial exhibits.
- Of the millions of feet of captured film, over 100,000 feet were presented at trial as exhibits.
- Over 25,000 photographs were examined by the prosecution and more than 1,800 were trial exhibits, and Hitler's photographer was a prosecution witness who authenticated the photographs.
- Justice Jackson also summarized the administrative aspects of trial preparation and trial, stating that the US staff directly engaged in the trial included 654 lawyers, secretaries, translators, interpreters and clerical staff. 365 of the foregoing were civilians.
- The press and radio had a maximum of 249 accredited representatives.
- The courthouse in Nuremberg was a bombed shell and had to undergo extensive repairs before proceedings could be held.
- The courthouse kitchen served over 1,500 lunches on court days.⁴⁴

The take-away from the Nuremberg War Crimes initial trial of leading governmental officials and military leaders,⁴⁵ including Hermann Goering (head of

⁴³ The author and his wife in 1998 acquired the entire private collection of trial transcripts and investigative materials assembled by William Donovan, Director of the Office of Strategic Services, and donated the Donovan Collection to Cornell University, where they are available to the public through Cornell's library website at lawcollections.library.cornell.edu/nuremberg. Issues involving the conflict between General Donovan and Justice Jackson (clearly very strong personalities) over the manner in which evidence should be presented at the trials, including use of defendants as witnesses testifying pursuant to cooperation agreements, eventually led to Donovan's resigning from participation as lead investigator, the details of which are found in a series of interesting letters between Donovan and Jackson and President Truman, and which are also archived in the Truman Library. See discussion *infra* Section IV (discussing the Donovan/Jackson conflict).

⁴⁴ Report to the President by Mr. Justice Jackson, Oct. 7, 1946, *in* International Conference on Military Trials, London, 1945 [hereinafter Justice Jackson Letter], <http://avalon.law.yale.edu/imt/jack63.asp> [<https://perma.cc/5PUX-KCWB>].

⁴⁵ In addition to the trial of the major Nazi war criminals that covered the period of November 20, 1945 through October 1, 1946, there were 12 other trials of Nazi war criminals. See Telford Taylor, Final Report to the Secretary of the Army on the Nuremberg War Crimes Trials Under Control Council Law No. 10, Memorandum for the Secretary of War, at 36 (1946) [hereinafter Taylor Memorandum]. The chief prosecutor of the first trial involving senior governmental officials and military leaders was Robert H. Jackson, who

the German air force and principal Nazi official below Adolph Hitler to head the German government), Joachim von Ribbentrop, Nazi foreign minister, and Admiral Erich Raeder and Karl Donitz, chiefs of German naval forces, is clearly spelled out in Chief Prosecutor Robert H. Jackson's October 7, 1946 letter to President Harry Truman.⁴⁶ That letter, and a treasure trove of other correspondence and documents on the war crimes proceedings, is part of the archives of the Truman Library.⁴⁷

Writing about the conviction and sentencing of 19 of the 22 defendants in this trial, Justice Jackson highlighted the four principles that were set by these proceedings, stating:

The vital question in which you and the country are interested is whether the results of this trial justify this heavy expenditure of effort. While the sentences imposed upon individuals hold dramatic interest, and while the acquittals, especially of Schact and Von Papen, are regrettable, the importance of this case is not measurable in terms of the personal fate of any of the defendants who were already broken and discredited men. We are too close to the trial to appraise its long-range effects. The only criterion of success presently applicable is the short-range test as to whether we have done what we set out to do. This was outlined in my report to you on June 7, 1945. By this standard we have succeeded.

The importance of the trial lies in the principles to which the Four Powers became committed by the Agreement, by their participation in the prosecution, and by the judgment rendered by the Tribunal. What has been accomplished may be summarized as follows:

1. We negotiated and concluded an Agreement with the four dominant powers of the earth, signed at London on August 8, 1945, which for the first time made explicit and unambiguous what was theretofore, as the Tribunal has declared, implicit in International Law, namely, that to prepare, incite, or wage a war of aggression, or to conspire with others to do so, is a crime against international society, and that to persecute, oppress, or do violence to individuals or minorities on political, racial, or religious grounds in connection with such a war, or to exterminate, enslave, or deport civilian populations, is an international crime, and that for the commission of such crimes individuals are responsible. This

before his tenure as trial counsel representing the United States was a Justice of the U.S. Supreme Court. *Id.* at 22. General Telford Taylor succeeded Justice Jackson and was chief counsel of the remaining 12 separate trials. *Id.* at 259. Only Jackson prosecuted major Nazi war criminals who were tried before the International Military Tribunal, and whose jurists were selected from each of the Allied countries. *See id.* at 10–11. The remaining 12 trials were conducted before U.S. military tribunals, also in the same courthouse as the first trial, and those 12 trials covered the period December 9, 1946 through December 1948. *See id.*

⁴⁶ Justice Jackson Letter, *supra* note 44.

⁴⁷ *Public Papers of the Presidents: Harry S. Truman 1945-1953*, HARRY S. TRUMAN LIBRARY & MUSEUM, <https://www.trumanlibrary.org/publicpapers/index.php> [<https://perma.cc/CR8N-RL59>].

Agreement also won the adherence of nineteen additional nations and represents the combined judgments of the overwhelming majority of civilized people. It is a basic charter in the International Law of the future.

2. We have also incorporated its principles into a judicial precedent. 'The power of the precedent,' Mr. Justice Cardozo said, 'is the power of the beaten path.' One of the chief obstacles to this trial was the lack of a beaten path. A judgment such as has been rendered shifts the power of the precedent to the support of these rules of law. No one can hereafter deny or fail to know that the principles on which the Nazi leaders are adjudged to forfeit their lives constitute law and law with a sanction.

3. The Agreement devised a workable procedure for the trial of crimes which reconciled the basic conflicts in Anglo-American, French, and Soviet procedures. In matters of procedure, legal systems differ more than in substantive law. But the Charter set up a few simple rules which assured all of the elements of fair and full hearing, including counsel for the defense. Representatives of the Four Powers, both on the Bench and at the Prosecutors' tables, have had to carry out that Agreement in day-to-day cooperation for more than a year. The law is a contentious profession and [] litigation offers countless occasions for differences even among lawyers who represent the same clients and are trained in a single system of law. When we add the diversities of interests that exist among our four nations, and the differences in tradition, viewpoint and language, it will be seen that our cooperation was beset with real difficulties. My colleagues, representing the United Kingdom, France, and the Soviet Union, exemplified the best professional tradition of their countries and have earned our gratitude for the patience, generosity, good will and professional ability which they brought to the task. . . .

4. We have documented from German sources the Nazi aggressions, persecutions, and atrocities with such authenticity and in such detail that there can be no responsible denial of these crimes in the future and no tradition of martyrdom of the Nazi leaders can arise among informed people. No history of this era can be entitled to authority which fails to take into account the record of Nurnberg. While an effort was made by Goering and others to portray themselves as 'glowing patriots,' their admitted crimes of violence and meanness, of greed and graft, leave no ground for future admiration of their characters and their fate leaves no incentive to emulation of their examples.⁴⁸

Notwithstanding Justice Jackson's advice to President Truman that the first War Crimes trial of Nazi officials achieved the objectives of the Allies serving as a precedent binding procedure for bringing individuals to court to address charges of broad international law violations, there was some doubt at the highest levels of the

⁴⁸ See Justice Jackson Letter, *supra* note 44.

Truman Administration whether further War Crimes trials were appropriate.⁴⁹ Even Justice Jackson addressed the arguments why additional international War Crimes trials might not be appropriate.⁵⁰ In his May 13, 1946 Memorandum for the President on American Participation in Further International Trials of Nazi War Criminals, he raised his concerns about the proposed trial of the industrialists, stating he had misgivings “as to whether a long public attack concentrated on private industry would not tend to discourage industrial cooperation with our Government in maintaining its defenses in the future while not at all weakening the Soviet position, since they do not rely upon private enterprise.”⁵¹ He concluded his Memorandum to the President advising “the balance of my judgment at this time is against further international trials,” noting that other war criminals would not be free since then American Military Commissions would be free to prosecute them.⁵²

General Taylor, who succeeded Jackson as chief trial counsel, had a different perspective, which he outlined in his July 29, 1946 Memorandum for the Secretary of War in great detail.⁵³ Taylor’s views were adopted by the President.⁵⁴ As Taylor explained, if the United States were to oppose further prosecutions, it would deter bringing individuals before international war crimes tribunals to face charges of violation of international law.⁵⁵

The United States, through Mr. Justice Jackson, was the source of the inspiration and energy which brought about the [Agreement among the Allies in 1945 to bring war criminals to justice]. The United States has an enormous moral investment in the declarations of the . . . Agreement. If the United States now becomes the prime mover for termination of the Agreement, this cannot help but injure the prospects for universal acceptance of the principles embodied in the Agreement. A termination could, to be sure, be presented and explained as being, not a renunciation of those principles, but a mere decision that one international trial in Europe is enough. But I doubt that such explanation will completely satisfy the peoples of the other signatories and adherents who are still eager to put those principles into practical application.⁵⁶

While twelve other trials of Nazi war criminals were held through 1948 at the same Nuremberg Palace of Justice, these subsequent trials were not held before the IMT but before US military tribunals, where the justices who presided were all either

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ Taylor Memorandum, *supra* note 45, at 277. Jackson’s concern about an industrialist war crimes trial was at odds with the Soviets, who favored such prosecutions, as is clear from his Memorandum.

⁵² *See id.* at 279.

⁵³ *Id.* app. J at 271–276.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.* at 272.

state or federal jurists in the United States.⁵⁷ The defendants in the twelve subsequent trials under the control of General Taylor were afforded the same procedural rights as those who were tried by Justice Jackson.⁵⁸ The most notorious of these subsequent trials is known as the Doctors' Trial, which covered the period from December 9, 1946 through August 20, 1947.⁵⁹ The most highly visible doctor, Josef Mengele, evaded capture—likely moving to Paraguay or Argentina—and of the twenty-three doctors prosecuted, seven were acquitted, sixteen were convicted, seven received death sentences, and the remainder faced prison terms of ten years to life.⁶⁰ Many of the defendants' prison sentences were commuted for political reasons by the High Counsel of Germany, John J. McCloy, in the early 1950s and they were released from prison during that decade.⁶¹ At that time, the United States needed a strong German ally as it faced the Cold War with the Soviets and the commutation was part of a policy of détente with German Chancellor Konrad Adenauer.⁶²

⁵⁷ While there were twelve subsequent war crimes trials involving another 100 or more Nazi officials, including lawyers and jurists in the Judges' Trials that started on March 5, 1947 and ended on December 4, 1947, and that fact suggests that Justice Jackson was prescient about the precedent value of the prosecutions, the fact all twelve subsequent proceedings were somewhat streamlined and solely before US jurists suggests that the concerns of those opposing the continued prosecutions were adopted. In any event, political reasons ultimately resulted in commutation of those imprisoned after their convictions, just as political reasons explain why the war crimes proceedings were initiated and pursued to an end.

⁵⁸ Justice Jackson emphasized the importance of maintaining the same procedural rights identified in the Charter of the International Military Tribunal for the remaining trials, which he outlined in his May 13, 1946 Memorandum for the President on American Participation in Further International Trials of Nazi War Criminals. See London Agreement, *supra* note 13. This Memorandum was one of many documents Jackson prepared following the conviction of the major Nazi war criminals and after Justice Jackson concluded that he would not oversee any other trials and would return to the Supreme Court of the United States from which he took a leave of absence to take on the Nuremberg Trials. *Id.* The issue of compliance with the Charter procedures in these 12 subsequent trials also was addressed in General Taylor's Memorandum for the Secretary of War dated July 29, 1946. See Taylor Memorandum, *supra* note 45. Both documents can be found in the Tribune Library Archives at www.trumanlibrary.org.

⁵⁹ The author and his wife were fortunate to meet one of the court stenographers of the Doctor war crimes trials, proceedings held after the initial government and military defendants were tried. Vivian Spitz, who died in 2014, was a young court reporter who was part of the civilian staff at Nuremberg and who was the court reporter assigned to the Doctors' Trials. Her experience there is documented in her gripping account of these proceedings, published by First Sentient Publications in 2005, entitled "*Doctors from Hell: The Horrific Account of Nazi Experiments on Humans*." After the Holocaust deniers became active in the late 1990s, Ms. Spitz traveled the country offering blunt evidence that such claims were outrageous fantasies and lies. Ms. Spitz was an honored guest at the Broadway re-release of "Judgment at Nuremberg" in 2001.

⁶⁰ See TAYLOR, *supra* note 1, at 640.

⁶¹ *Id.*

⁶² *Id.*

IV. THE CONFLICT IN PRESENTATION OF EVIDENCE

There is an interesting sidelight to the prosecution of the Nazi war criminals. It is the conflict between General Donovan and Chief Counsel Justice Jackson, which ultimately led to the resignation of Donovan from the prosecution team and impacted how the evidence was presented. Donovan was a unique character in US history and in the US role in WWII.⁶³ Before he headed the Office of Strategic Services (“OSS”), established in 1942 by executive order of President Roosevelt, Donovan was a prominent attorney in New York City, a WWI veteran who was awarded the Congressional Medal of Honor, and a tenacious United States Attorney for the Northern District of New York.⁶⁴ The OSS, which he created, conducted espionage activities behind enemy lines, primarily in the European theater of war.⁶⁵ The OSS was the predecessor of the CIA, the latter created with passage under the Truman Administration of the 1947 National Security Act.⁶⁶

As a former prosecutor, Donovan believed the best way to present evidence of war crimes would include the use of accomplices who traded their testimony for some form of leniency by the prosecution team.⁶⁷ Justice Jackson rejected this approach, believing the war crimes evidence could effectively be presented through the documents maintained by the Nazis, seized during the close of the war, and

⁶³ In the author’s opinion, the best biography of General “Wild Bill” Donovan is the biography by Anthony Cave Brown. *See* ANTHONY CAVE BROWN, WILD BILL DONOVAN: THE LAST HERO (1982).

⁶⁴ *Id.* at 349–65, 551–64.

⁶⁵ National Security Act of 1947, 50 U.S.C. §§ 401–405.

⁶⁶ An example of Donovan’s perspective that getting a Nazi defendant to cooperate and testify would be of value to the prosecution is found in his letter dated November 27, 1945 to Justice Jackson, which is among the private papers of President Truman and is found in the Truman Library archives at www.trumanlibrary.org. In that letter, he offered that “a confession from the last sane leader of the gang might well be of value in a larger sense. This was not intended as a ‘stunt,’ or as a dramatic episode, but as a very practical means of bringing home to the German people the guilt of these men.” *Letter from General Donovan to Justice Jackson, Nov. 27, 1945*, HARRY S. TRUMAN: LIBRARY & MUSEUM [hereinafter Donovan’s November 27, 1945 Letter], https://trumanlibrary.org/whistlestop/study_collections/nuremberg/documents/index.php?documentid=7-5&pagenumber=2 [<https://perma.cc/9WJ4-GFZS>]. In that same letter, he explained his criticism of the prosecution approach, stating, “it needed an affirmative human aspect with German as well as foreign witnesses.” *Id.* In a subsequent letter to President Truman dated December 1, 1945, Justice Jackson explained that his and Donovan’s difference of approach to the prosecution ended in Donovan’s departure from the U.S. prosecution team. *Letter from Robert Jackson to Harry S. Truman, accompanied by related materials, December 1, 1945*, HARRY S. TRUMAN: LIBRARY & MUSEUM [hereinafter Jackson’s December 1, 1945 Letter], https://trumanlibrary.org/whistlestop/study_collections/nuremberg/documents/index.php?documentdate=1945-12-01&documentid=7-6&pagenumber=1 [<https://perma.cc/M825-YYTH>].

⁶⁷ *See* Jackson’s December 1, 1945 Letter, *supra* note 66.

assembled as exhibits for the trials.⁶⁸ Donovan believed that the approach to trial of the case primarily as a documents driven presentation would result in a lack of compelling evidence, in the words of accomplices, of the intent, the crimes, and their execution.⁶⁹

The Truman Archives contain examples of this, and ultimately the correspondence from Donovan of his resignation.⁷⁰ Thus, in Jackson's letter of November 26, 1945 to Donovan, Jackson made clear "[y]ou and I appear to have developed fundamental differences in viewpoint about this case. Time alone will tell which of us is right, but there can be no doubt that the case cannot follow both of our lines."⁷¹ As Jackson told Donovan, "my own confidence grew with study of the document analyses that our case could safely rest wholly on documents and that witnesses need be used, if at all, only incidentally. With this you disagreed and proposed more reliance on oral testimony."⁷²

Jackson took particular aim at Donovan's belief that some of the Nazi General staff would present compelling evidence in exchange for some consideration offered them to induce their testimony.⁷³ Jackson said,

I do not think we can afford to negotiate with any of these defendants or their counsel for testimony. . . . I would not put one of the defendants on the stand as our witness. To use one of them ourselves will create the impression that there was some kind of bargain about his testimony, opening the door to that defendant to plead for leniency on the ground he was 'helpful' and may give a background for claims that promises were made to that effect. My view is, therefore, that we should prove our case against these defendants with no use of them as witnesses.⁷⁴

Jackson all but noted the value such turn-coat witnesses provide for presentation of dramatic trial evidence that would mesmerize the public. As he wrote, "I know the 'turning of state's evidence' would be dramatic and sensational—but I think it better for the reputation of our case that each defendant do any confessing on his own behalf—not on ours."⁷⁵

This was hardly a pleasant disagreement, as Donovan's November 26, 1945 letter to Jackson demonstrates. That letter is also found in the Truman Archives, and bears on its face the mark of confidentiality as Papers of Harry S. Truman. Donovan

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ See, e.g., *Letter from Robert Jackson to William Donovan, November 26, 1945*, HARRY S. TRUMAN: LIBRARY & MUSEUM, https://trumanlibrary.org/whistlestop/study_collections/nuremberg/documents/index.php?documentdate=1945-11-26&documentid=7-4&pagenumber=1 [<https://perma.cc/4ADC-CWGX>].

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

even proposed that in lieu of the manner in which the defendants were to be tried and surmised “perhaps it would have been better to have shot the guilty ones” instead of the trial proceedings.⁷⁶ As for use of accomplices, Donovan offered the broader principle—“a confession from the last sane leader of the gang might well be of value in a larger sense. This [use of accomplice testimony with some inducement to the defendant] was not intended as a ‘stunt,’ or as a dramatic episode, but as a very practical means of bringing home to the German people the guilt of these men.”⁷⁷

Jackson accepted Donovan’s resignation—perhaps more a test of strong willed and proud men than a test of principle in terms of trial strategy.⁷⁸ Jackson explained the Donovan resignation to President Truman in his letter dated December 1, 1945, reporting “[w]hen I asked him to work with me I was repeatedly told that he would not work in second place with anybody. I knew the difficulties of that, but he was the head of O.S.S. and I needed what help that organization could give.”⁷⁹ Jackson then explained that their ideas about presenting the cases “were far apart,” so far apart that Jackson reported “I had to tell him I would not put him on the floor to conduct any part of the case.”⁸⁰

The Donovan and Jackson conflict on the extent to which accomplices should be used in international war crimes prosecutions turning state’s evidence and recounting their and other defendants’ criminal acts in consideration of some leniency in sentencing is a conflict that has to impact how more recent international war criminal proceedings are tried. In fact, the United Nations International Criminal Court procedures specifically contemplate the use of accomplice witnesses and a means to provide them with protection if they turn state’s evidence and testify.⁸¹ Still, the reluctance expressed by Justice Jackson to make “deals” with Nazi officials for their testimony has to impact the approach to building the prosecution cases where war crimes occur and national leaders are brought to justice.

V. TOKYO WAR CRIMES TRIALS

By contrast to the Four Powers Allies creation of the tribunal to prosecute Nazi war criminals, in Japan, General George MacArthur, as Supreme Commander for the Allied Powers in occupied Japan, established the International Military Tribunal for the Far East (“IMTFE”).⁸² The Japanese War Crimes trials were not created by an international agreement but by MacArthur’s proclamation in 1946 pursuant to his authority to “issue all orders for the implementation of the Terms of Surrender, the

⁷⁶ Donovan’s November 27, 1945 Letter, *supra* note 66.

⁷⁷ *See id.*

⁷⁸ *See* Jackson’s December 1, 1945 Letter, *supra* note 66.

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *See Witnesses*, INT’L CRIMINAL COURT, <https://www.icc-cpi.int/about/witnesses> [<https://perma.cc/7FR7-PL2J>].

⁸² *See The Nuremberg Trial and the Tokyo War Crimes Trials (1945–1948)*, OFFICE OF THE HISTORIAN, history.state.gov/milestones/1945-1952/nuremberg [<https://perma.cc/8Y98-YLLF>].

occupation and control of Japan, and all directives supplementary thereto.”⁸³ The charter establishing the tribunals for Japanese war criminals, explicitly gave MacArthur as Supreme Commander the power to appoint the judges from the countries that had signed Japan’s instrument of surrender, and each of the countries was authorized to appoint a judge of the tribunals.⁸⁴

The IMTFE presided over the prosecution of nine senior Japanese political leaders and 18 military leaders.⁸⁵ Among the military leaders, who also was Japan’s prime minister from 1941–1944, convicted, sentenced to death, and hanged, was General Hideki Tojo.⁸⁶ The most senior civilian official convicted, sentenced to death, and executed was former prime minister of Japan, Koki Hirota.⁸⁷ MacArthur explicitly did not include Emperor Hirohito and his family as defendants in the proceedings, allowing Hirohito to retain his position on the throne as part of MacArthur’s plan for Japanese de-militarization and democratization.⁸⁸ The Tokyo War Crimes trials, as they were also called, occurred from May 1946 through November 1948.⁸⁹ The tribunals found all defendants guilty with sentences ranging from seven-year imprisonments to death.⁹⁰

VI. THE FUTURE OF WAR CRIMES PROCEEDINGS

Years after the prosecution of Nazi and Japanese war criminals, the United Nations created an International Criminal Tribunal as part of its commitment to bring to justice persons engaged in war crimes, as those crimes were defined during the WWII proceedings.⁹¹ Ultimately, specific tribunals, organized by the United Nations, were created to bring to justice war criminals.⁹² In 1993, a tribunal was formed to prosecute former Yugoslav officials and military personnel for atrocities committed during what is known as the Yugoslav wars.⁹³ In 1994, a tribunal was formed to prosecute officials in Rwanda for evidence of ethnic genocides.⁹⁴ There

⁸³ See *id.*; see also Shira Megerman, *The Tokyo War Crimes Trials (1946–48): Notes, Selected Links and Bibliography*, UMKC, <http://law2.umkc.edu/faculty/projects/frtrialstokyo/tokyolinks.html> [<https://perma.cc/356Y-276B>].

⁸⁴ See Megerman, *supra* note 83.

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ See *id.*

⁸⁸ See BRANDS, *supra* note 10.

⁸⁹ See Megerman, *supra* note 83.

⁹⁰ *Id.*

⁹¹ *About*, INT’L CRIMINAL COURT, <https://www.icc-cpi.int/about?ln=en>; see Rome Statute of the International Criminal Court (July 17, 1998), https://www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf [<https://perma.cc/H965-3SEL>].

⁹² *About*, INT’L CRIMINAL COURT, <https://www.icc-cpi.int/about?ln=en> [<https://perma.cc/7KB9-FJH8>].

⁹³ *Id.*

⁹⁴ *The ICTR in Brief*, UNITED NATIONS MECHANISM FOR INT’L CRIMINAL TRIBUNAL, <http://unictr.unmict.org/en/tribunal> [<https://perma.cc/5ESB-4YQX>].

is no permanent tribunal, however, as the United States stands as a vocal opposition to such a criminal court with a pronounced antipathy to such courts proceeding against US military personnel.⁹⁵ As the US State Department has stated, there are “insufficient checks and balances on the authority of the ICC prosecutor and judges” and “insufficient protection against politicized prosecutions or other abuses.”⁹⁶ In the absence of US support, there will be no permanent tribunal and, at best, on an individual basis, the United Nations will create separate tribunals to address war crimes, leaving the choice of such prosecutions open to criticism that political objectives not appropriate for the wielding of such international resources govern, thereby diminishing the precedential value of the wielding of such power.

Today, prosecution of war criminals is undertaken on a case by case basis by a permanent ICC established pursuant to the Rome Statute of 1998. As the US State Department has made clear, the US will not agree to a permanent court but rather accepts a case-by-case prosecution thereby avoiding the prospect of politics or other public relations considerations serving as the basis for singling out US citizens, including US political officials. We are 70 plus years away from that time of international unity to bring to justice the military and political officials of vanquished nations. We do not have that unity today. In the absence of the US support of such a permanent court, the efficacy of international criminal tribunals as not only the source of law on the substantive crimes prosecuted but on procedural obligations of the prosecution and rights of the defendants is doubtful.

⁹⁵ The “ICC” is the International Criminal Court which pursuant to the United Nations Rome Statute of 1998 contemplates formation for each instance where the United Nations concludes that national individuals should be prosecuted as war criminals. *See* sources cited *supra* note 91.

⁹⁶ Frequently Asked Questions About the U.S. Government’s Policy Regarding the International Criminal Court (ICC), U.S. DEP’T OF STATE (July 30, 2003), <https://2001-2009.state.gov/t/pm/rls/fs/23428.htm> [<https://perma.cc/C72P-GRXY>].