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SENIOR THESIS APPROVAL

This Honors Thesis Entitled

The International Military Tribunals An Overview and Assessment

written by

Joshua Daniel Franklin

and submitted in partial fulfillment of the
requirements for completion of the
Carl Goodson Honors Program
meets the criteria for acceptance
and has been approved by the undersigned readers.

Dr. Wayne Bowen, Thesis Director

Dr. Kevin Brennan, Second Reader

Dr. Ray Granade, Third Reader

Dr. Doug Reed, Honors Program Director

15 April 2001

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As World War II drew to a close in Europe, the victorious Allies faced the question of what to do with the political and military leaders of defeated Germany. The war had been like none other; they needed a drastically new approach to the final treatment of those in charge of the Axis powers. While war crimes could be punished under the Geneva and Hague Conventions, no international agreements assigned personal responsibility to those who ordered the crimes.

While Axis leaders could have been simply executed, the Allies chose to plan a cooperative international trial. The resulting International Military Tribunal (IMT)—commonly known as the Nuremberg trial—was a carefully planned, well-funded and adequately staffed experiment in international law that is often cited today. Before the Nuremberg trial ended, a similar effort began in the Far East for Japanese leaders, but it had less support and has been the subject of far less historical analysis.

Why is the Nuremberg trial often considered a watershed event while its Tokyo counterpart is at best a legal footnote? After more than a half-century of criticism, it is obvious that a major war crimes trial for national leaders, though preferable to summary execution, was more suited to the situation in Germany than in Japan. The Allies developed the London Charter that governed the IMT to try German leaders for more than just conventional war crimes, and the Nuremberg trial was tied to those circumstances. While many Japanese leaders were guilty of war crimes, the situation might have been more effectively dealt with by separate courts-martial. In other words, the complexities of the Asian situation revealed the IMT framework's limitations.

Both Allied goals and the geopolitical context help explain the Japanese trial's relative lack of importance. At Nuremberg, the Allies were still attempting to establish a framework for international judicial cooperation and to discredit Nazism in Germany. The Tokyo trial lacked the same sense of urgency and purpose. Nuremberg had already set the legal precedent, time's progression had revealed a Western-Soviet rift, and the US-dominated occupation of Japan found other ways to meet democratization goals.

Background

It is a testimony to the influence of the International Military Tribunal (IMT) that today wartime atrocities are often, if not usually, defined with terminology first used for the trial.¹ The Nuremberg trial followed the rules and procedures set out in the London Charter, which was a product of the International Conference on Military Trials (ICMT). Article 6 of this document defines prosecutable crimes:

The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility:

(a) CRIMES AGAINST PEACE: namely, 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;

(b) WAR CRIMES: namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labor or for any 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;

(c) CRIMES AGAINST HUMANITY: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war or persecution on political, racial or religious grounds in execution or in connection with any crimes within the jurisdiction of the Tribunal, whether or not in violation of domestic law of the country where perpetrated.²

The United Nations, as the Allies then called themselves, argued in 1945 that each of these definitions was justified by established international law: 6(a) under the controversial Kellogg-Briand Pact of 1928, 6(b) under the Hague and Geneva Conventions of 1907 and 1929 respectively, and 6(c) under an international form of common law.

The Crimes Against Peace charge, based as it was on the Kellogg-Briand Pact, had a shaky legal foundation that was challenged before and during the trials. In fact, only the War Crimes charge was firmly established in international law. Since the defendants accepted the

¹In this paper, *war crime* denotes violations of the Hague and/or Geneva Conventions, while *atrocities* denotes violations in general.

²Charter of the International Military Tribunal. Available 20 Sep 2000 <<http://www.yale.edu/lawweb/avalon/imt/proc/imtconst.htm>>.

immorality of actions such as mass murder or slave labor, no one was likely to challenge the Crimes Against Humanity charge even though it had the least formal basis in international law.

One shortcoming of the Kellogg-Briand Pact is that it expressly allowed wars of self-defense, but defined neither that term nor “war of aggression”—an omission which the Japanese defendants at the Tokyo trial attempted to use to their advantage. Also, since the Pact took the form of a contract, some argued that violation invited compensational, not criminal, penalties.³ Several authorities on international law even held that violation of the Pact merely forfeited the rights to its benefits—for example, after Italy invaded Abyssinia (Ethiopia) in 1935, other Pact signatories could then attack Italy in a “war of aggression.”⁴

Negative opinions of the Kellogg-Briand Pact, and the Crimes Against Peace charge, originated with the belief that international law is based on formal agreements, not just precedent. For example, Professor André Gros, one of the two French representatives to the ICMT in London, stated, “We think [personal responsibility for starting wars] would be morally and politically desirable, but that it is not international law.”⁵ Many legal scholars withheld support pending an international agreement that would add specific criminal penalties to the Kellogg-Briand Pact. An opposing view of international law, especially in the United States, judged international law to be akin to Anglo-American common law; formal international agreements were helpful, but not required for a criminal charge. Based on this view, Article 6(a), Crimes Against Peace, was included in the London Charter.

The Allies also designed the Charter as a response to postwar public opinion; it applied specifically to publicized Nazi outrages, such as the extermination camps in Poland, to which Allied leaders had not directly responded during the war. A Crime Against Peace, the invasion of Poland “in violation of international treaties,” began the war. War Crimes, such

³Bradley F. Smith, *The Road to Nuremberg* (New York: Basic Books, 1981), 104.

⁴Some authorities are listed in Smith, *Road*, 106, along with Colonel William Chanler's attacks on them as having “built up [their view of international law] largely on their own and their predecessors' writings.”

⁵Document XXXVII:“Minutes July 19, 1945” in Robert H. Jackson, *Report of Robert H. Jackson, United States Representative to the International Conference on Military Trials, London, 1945*. (Washington, DC: United States Government Printing Office, 1947), 297.

as the massacre of Allied prisoners of war and civilians at Malmédy, Belgium, in December 1944, were still fresh in the public's mind, and the world press was still discussing the Crimes Against Humanity committed in the concentration and death camps.

Neither International Military Tribunal was designed to cover all wartime atrocities. Official Allied policy, established by the Moscow Declaration of November 1943, designated major and minor classes of war criminals. The London Charter targeted the “[m]ajor criminals whose offenses have no particular geographical location.” The International Military Tribunals meant to punish the highest authorities who planned aggressive war, ordered or encouraged conventional war crimes, and orchestrated gross violations of human rights. Junior officers and enlisted soldiers—who perpetrated the vast majority of conventional war crimes—made up the other category. They were to be “sent back to the countries in which their abominable deeds were done in order that they may be judged and punished.”⁶ These many small trials were beyond the scope of the Nuremberg trial, or the later Tokyo trial.⁷

Prosecuted German Atrocities

The major criminals were charged with Crimes Against Peace throughout Europe. Germany violated treaties with, or the neutrality of, a long list of countries during the war: Czechoslovakia (March 1939), Poland (September 1939), Denmark and Norway (April 1940), Belgium and the Netherlands (May 1940), Yugoslavia and Greece (April 1941), the Soviet Union (June 1941), the United States (December 1941), and Italy (May 1943). France and the United Kingdom, though Allied Powers, are not included on the list as both declared war on Germany after the invasion of Poland.

The war crimes violations were not physical murders, but orders to commit murder. German practice had been very different in Western and Eastern Europe. In the West, three

⁶Winston Churchill, Franklin Roosevelt, and Joseph Stalin, “The Moscow Declaration” in Michael Marrus, ed., *The Nuremberg War Crimes Trial, 1945-46: A Documentary History* (New York: Bedford Books, 1997), 21.

⁷Smaller trials later held at Nuremberg under Control Council Law Number Ten are sometimes called the Nuremberg trials, but the term International Military Tribunal refers only to the first Nuremberg trial.

issues formed the focus: unrestricted submarine warfare, the Commando Order,⁸ and slave labor deportations. The Germans had treated Western European civilians and prisoners of war (POWs) relatively well compared to those in the East. There, German conduct reflected Slavs' low place in the Nazi racial hierarchy—Polish civilians and soldiers were massacred and Soviet POWs were allowed to starve or freeze. Only 18% of Soviet POWs taken by the Germans survived, compared with 76% of British and American POWs.⁹ At Nuremberg, Nazi leaders were prosecuted for the directives that caused these war crimes.

To the layman, the Crimes Against Humanity charge defined in Article 6(c) of the London Charter seems to be a forerunner to the charge of genocide and to apply mainly to the Holocaust. Since much of the Holocaust was covered under War Crimes, Crimes Against Humanity actually had a much wider scope. The Crimes Against Humanity charge was designed to cover all Nazi war crime-like behavior that fell outside formal war crimes definitions, such as Nazi anti-Jewish laws, placement of German dissidents in concentration camps, and the deportation of Western European Jews.¹⁰

Prosecuted Japanese Atrocities

Led by its Imperial Army, Japan had also broken treaties with a string of countries, beginning with the 1931 takeover of Manchuria, a warlord-controlled Chinese region. In 1937, a full-scale invasion of the rest of China, known as the China Incident, followed. Around the same time, Soviet and Japanese troops fought two border incidents in Manchuria and Mongolia. Although they took place outside Soviet territory, in the Indictment these two episodes were included as instances of aggressive warfare against the USSR. Finally, in late 1941 came the attacks on British, United States, and Portuguese territories that started the

⁸The Commando Order, issued from the *Oberkommando der Wehrmacht* (OKW, or High Command of the Armed Forces) 18 October 1942, stated that all captured Allied commandos (usually raiding forces) or parachutists were to be turned in as criminals to the *Sicherheitsdienst* (SD, or Security Service) and usually executed, instead of being given prisoner-of-war status.

⁹Terence Pritie, *The Velvet Chancellors: A History of Post-War Germany* (London: Frederick Muller Limited, 1979), 24.

¹⁰International Military Tribunal at Nuremberg, "Indictment of the International Military Tribunal Against Hermann Göring et al." Available 20 Sep 2000 <<http://www.yale.edu/lawweb/avalon/imt/proc/count.htm>>.

Pacific War. The outbreak of war also induced the French government of Indo-China and Siamese (Thai) authorities to accept Japanese demands without a fight, and the Dutch to declare war on Japan before their East Indies colony was attacked.

War crimes were a more complicated matter, since neither Japan nor the USSR were signatories of the Geneva Convention of 1929—though in 1942 communiqués Japanese leaders agreed to observe all Geneva guidelines. The prosecution dealt with this problem by indicting the accused for a “plan or conspiracy...to order, authorise [*sic*] and permit...breaches of the Laws and Customs of War” or because they “deliberately and recklessly disregarded their legal duty to take adequate steps to secure the observance and prevent breaches [of the Laws of War].”¹¹

A few war crimes committed by Japanese forces, such as the Rape of Nanking and the Bataan Death March,* were well known. Also, only around 72% of British and United States POWs survived Japanese custody compared with 96% in the German case.¹² Although tropical diseases and life partially account for the higher death rate in Asia, Japanese camps certainly did not follow Geneva guidelines. The Japanese used both Allied POWs and local peoples as slave labor; ironically for a nation claiming to fight for the liberation of Asia, Asians fared much worse than European colonials under Japanese occupation. The Tokyo prosecution only of violations against citizens of the Western Powers and China excluded the majority of these crimes—which could have been covered under Crimes Against Humanity.

Unlike the German case, specific orders to Japanese units to commit atrocities do not exist.¹³ The prosecution case for Crimes Against Humanity thus was based largely on the failure of the accused to properly restrain lower officers—or even those in other branches of government. This dubious application of the military principle of command responsibility to international law remains controversial, as does whether or not Japanese leaders were

¹¹“Indictment” in Department of State, *Trial of the Japanese War Criminals* (Washington: United States Government Printing Office, 1945), 612.

¹²John Dower, *Embracing Defeat: Japan in the Wake of World War II* (New York: New Press, 1999), 446.

¹³Dower, *Embracing Defeat*, 466. There may have been orders among the documents destroyed during the two weeks between the Japanese surrender and the first landings of Allied occupation personnel.

responsible.

Development of the Trial Plan

The Moscow Declaration made no mention of trials to establish the guilt of those accused of wartime atrocities. This omission was partly motivated by the hope that lack of detail would encourage German authorities to adhere to the laws of war more closely. Specific punishments, on the other hand, might communicate to capital offenders—such as the high command—that the cause was already lost, which might lead to reprisals such as razing occupied territory or slaughtering all prisoners.¹⁴

The Big Three—Prime Minister Winston Churchill of the United Kingdom, President Franklin D. Roosevelt of the United States, and Marshall Josef Stalin of the Soviet Union—who issued the Moscow Declaration, made all the major Allied executive decisions during the war. Their decisions were the final ones, and it is clear that the Big Three did not assume capital offenders would be tried in a trial. Stalin first proposed the idea of a trial to Churchill and Roosevelt, although with Soviet show trials of the 1930s as a background this hardly meant impartial justice. At Tehran in November 1943, Stalin suggested to Churchill, possibly to irk him, that trials might result in the execution of 50,000 German officers. Anglo-American leaders understandably preferred a different approach; Churchill in particular was worried about *ex post facto* additions to international law.¹⁵ Churchill's answer to the problem was summary execution of Nazi leaders, a list of whom would be made up by the Allies. As precedent, he cited the British exile of Napoleon to St. Helena without a trial.¹⁶

Besides being attractively simple, this plan had the support of key officials in the US and British governments. Secretary of the Treasury Henry Morgenthau's department developed a comprehensive occupation plan for Germany, known as the Morgenthau Plan. A harsh

¹⁴Smith, *Road*, 9.

¹⁵Smith, *Road*, 271 n. 45. Churchill's *ex post facto* worries dealt with aggressive war in particular and were, as discussed earlier, well-founded.

¹⁶Telford Taylor, *The Anatomy of the Nuremberg Trials: A Personal Memoir* (New York: Alfred A. Knopf, 1992), 30-32.

document in many respects, on the punishment question it took a particularly hard-line approach. On the British side, Lord Chancellor John Simon was struck by the legal difficulties of an international trial and advocated a political, rather than judicial, solution—such as summary execution.¹⁷ In September 1944, Roosevelt and Churchill met for the Octagon Conference in Quebec, and Morgenthau and Simon brought their proposals to the discussion. Although the Soviet Union was not represented, the plan for a political solution gained preliminary approval as official Allied policy.

Soon after the Octagon Conference, details from the Morgenthau Plan appeared in German Propaganda Minister Joseph Goebbels' radio broadcasts. Roosevelt, running for reelection, faced accusations of needlessly lengthening the war with policies such as the Morgenthau Plan and the demand for unconditional surrender. Due to widespread opposition, he publicly withdrew his support for the Quebec agreement.¹⁸ Stalin hardened his stance in favor of war crimes trials, insisting shortly afterward that “[t]here must be no executions without trial, otherwise the world would say we were afraid to try them.”¹⁹

Specific plans for a war crimes trial developed in the US War Department, which was headed by veteran politician Henry L. Stimson. In 1931, as Herbert Hoover's Secretary of State, Stimson had supported the Kellogg-Briand Pact, and had unsuccessfully called for a decisive response to the Japanese invasion of Manchuria. After hearing details of the Morgenthau plan just before the Octagon conference, Stimson wrote Morgenthau: “Such methods, in my opinion, do not prevent wars; they tend to breed them.”²⁰ He immediately began preparing a War Department response to Treasury's Morgenthau Plan, enlisting support from Army Chief of Staff George C. Marshall and Judge Advocate General Myron B. Cramer for a judicial solution to the problem of major war criminals. Cramer, who was

¹⁷Smith, *Road*, 45.

¹⁸Smith, *Road*, 54-55.

¹⁹From a summary telegram from Churchill to Roosevelt discussing communication with Stalin. *Foreign Relations of the United States: Diplomatic Papers and the Conferences at Malta and Yalta* (Washington, DC: United States Government Printing Office, 1955), 401.

²⁰Document 13: “From Henry L. Stimson to Henry Morgenthau, Jr., September 5, 1944” in Bradley F. Smith, ed., *The American Road to Nuremberg: the Documentary Record* (Stanford, CA: Hoover Institution Press, 1982), 24.

familiar with the pitfalls of international law, advocated a simple approach: include only crimes prosecutable under existing international agreements such as the Geneva Convention, and try them under a simplified court-martial.

A much more extensive plan came from Lieutenant Colonel Murray C. Bernays, a formerly civilian attorney who had enlisted as a War Department legal adviser. Bernays' proposal included the controversial prosecution of aggressive war as well as an ambitious framework for defining "criminal organizations," such as the *Gestapo* or *SS*, so that "adjudication of guilt would require no proof... other than membership in the conspiracy."²¹ Bernays envisioned one very large initial trial followed by short hearings to cover *all* atrocities, not just those committed by top leaders. The plan was heavily criticized—even inside the War Department—as a pseudo-judicial political solution that could martyr the accused.

Bernays' idea was almost completely out of favor when an event during the Battle of the Bulge saved it. On 17 December 1944, near Malmédy, Belgium, a unit of the First *SS Panzer* Division massacred unarmed civilians and prisoners of war. This event convinced several top US officials—including Attorney General Francis Biddle and Judge Samuel Rosenman, one of Roosevelt's closest advisors—that a criminal Nazi conspiracy existed.²² Energized by the turn of events, Bernays and General John Weir drafted a memorandum for the President eventually signed by Rosenman and three cabinet secretaries—Biddle, Stimson, and Secretary of State Edward Stettinius.

Shortly after receiving the memorandum, Roosevelt departed for the Yalta Conference. Since the Conference took place in February 1945 during the final phase of the attack on Germany proper, most expected the Big Three to produce a final plan for dealing with the major war criminals. However, whether because of Yalta's demanding agenda or further disagreements on the trial issue, the Yalta Declaration stated only that "the question of the

²¹Document 16: "Trial of European War Criminals (by Colonel Murray C. Bernays, G1), September 15, 1944" in Smith, *American Road*, 36.

²²Smith, *American Road*, 51. See also the several Documents cited. Ironically, it was later revealed that the local commander was entirely responsible for the Malmédy Massacre and the action had not been part of any conspiracy.

major war criminals should be the subject of inquiry by the three Foreign Secretaries for report in due course."²³ In March, Roosevelt sent Judge Rosenman to London to work out a final plan for dealing with the major war criminals. Rosenman and Lord Chancellor Simon initially compromised on summary execution for the highest officials such as Adolf Hitler or Hermann Göring, but trials for all others, but on 12 April 1945 the British War Cabinet rejected the proposal. Since Roosevelt died on the same day, Rosenman had to return to Washington without meeting his goal.

Bernays' trial plan won its final victory when new President Harry Truman decided during his first briefing on the subject that a trial was indispensable. By the month's end, Truman had appointed Supreme Court Justice Robert H. Jackson as Chief Counsel of the United States for war crimes—before trials were even official Allied policy. Riding the resultant tide of publicity, Truman sent Judge Rosenman to the San Francisco Conference, where world representatives were founding the postwar United Nations organization.²⁴ Rosenman's mission was to secure agreement to a Four-Power trial representing the Republic of France, the Soviet Union, the United Kingdom, and the United States. The Foreign Ministers agreed in principle, but were again too busy to spend much time on specifics in San Francisco, so instead scheduled the International Conference on Military Trials (ICMT) to begin in June in London, charged with producing a charter for the court.

The International Conference on Military Trials

By the time the ICMT began, the war in Europe was over. Hitler and the highest-ranking Nazis—excepting Hermann Göring—were confirmed dead, greatly relieving worries that a trial would simply be a vehicle for Nazi propaganda. The other countries' ICMT representatives were no less prestigious than Supreme Court Justice Jackson. The Soviets sent General I. T. Nikitchenko of the Soviet Supreme Court and Professor A. N. Trainin, who had written a lauded book about Nazi leaders' culpability for the crime of aggressive war. France sent

²³"The Yalta Conference: Signed Agreements" in *Malta and Yalta*, 979.

²⁴Taylor, *Anatomy*, 45.

Judge Robert Falco of their highest court, and Professor André Gros, an international law authority. British representatives were the Lord Chancellor, Lord Simon, and the Attorney General, Sir David Maxwell-Fyfe. Halfway through the Conference, Churchill's coalition was defeated in elections and the new representatives became Lord Jowitt and Sir Hartley Shawcross, though for continuity the new government kept Maxwell-Fyfe as the official British liaison.

The Cold War rift began to emerge at the conference. General William Donovan, head of the US Office of Strategic Services (OSS, precursor to the CIA), took a special interest in the major war criminals and heavily influenced Jackson to distrust the Soviets.²⁵ Jackson's doubts about Soviet dedication to a fair trial appeared well-founded when Nikitchenko noted that at Yalta "Nazi organizations were declared to be illegal and criminal" and to try them would presume the possibility of overruling that decision.²⁶ Three days later, he again surprised the conference with the statement, "We are dealing here with the chief war criminals who have already been convicted and whose conviction has already been announced by both the Moscow and Crimea declarations. . . . Only the rules of fair trial must, of course, apply." Jackson deftly answered that the United States would not set up "a mere formal judicial body. . . . There could be but one decision in this case, . . . [b]ut the reason is the evidence and not the statements made by heads of state."²⁷

In addition to facing such political problems, the ICMT also initiated real multilateral negotiation on the subject of the trial. Up to this point, discussants had rather naively assumed that once they agreed on the principle of a trial, specifics would fall into place. Common law, which developed in Britain and the United States, differed in both philosophy and practice from the Roman-derived continental law of France and the Soviet Union. Continental law makes no presumption of innocence and regards the judiciary as an arm of state power—not as a balance to the legislative and executive branches.

²⁵ Ann Tusa and John Tusa, *The Nuremberg Trial* (New York: Atheneum, 1983), 78.

²⁶ Document XIII: "Minutes June 26, 1945" in Jackson, *Report*, 77.

²⁷ Document XVII: "Minutes June 29, 1945" in Jackson, *Report*, 104-106. This is especially interesting since Nikitchenko was later an IMT judge at Nuremberg.

These differences led to misunderstandings and delayed consensus. For example, Jackson's assertion that the court would have no part in prosecuting the criminals confused French and Soviet representatives since in their systems the prosecutor was a member of the court. The conference solved this problem by clearly specifying separation of powers—a principle of common law—in the Charter. Jackson also used the term *indictment* interchangeably with *presentation of charges*, while in continental law an indictment is a documentary collection of charges and evidence. The compromise on this issue included charges and some, but not all, of the evidence against the accused in the Indictment.

Another major issue to be negotiated was the criminality of aggressive war. This was unsurprising considering the imperfections of the various Allies—the USSR had attacked Poland, Finland, the Baltics, and Japan, and the Western Powers sent expeditions against Norway, Iceland, Persia (Iran), and various Vichy French possessions, all in violation of treaties. French representative Gros first called the Crimes Against Peace charge into question on 19 July 1945 on these points: "It is a creation by four people. . . . It is *ex post facto* legislation. . . . It is declaring as settled something discussed for years as if we were a codification commission." To this, Jackson characteristically replied, "But we are a codification commission for the purposes of this trial as I see it."²⁸ Since the issue had been discussed twice before in Washington, within the War Department and the Cabinet, Jackson should have offered more convincing arguments. For example, a memorandum existed that persuasively argued the criminality of aggressive war under current international law, but Jackson never referred to it or its arguments.²⁹

Soviet representatives attempted to settle the issue by placing a key phrase in Part (a), Article VI, the charge of aggressive war, defining aggressive war as criminal only when committed by the Axis Powers—to which Jackson vehemently objected.

A stalemate ensued for several sessions, leading Jackson to suggest that each of the Allies

²⁸Document XXXVII: "Minutes July 19, 1945" in Jackson, *Report*, 295-296.

²⁹Document 30: "War Department Memorandum (by Major Brown and Colonel Bernays, G1), January 4, 1945" in Smith, *American Road*, 93. It is possible Jackson himself never saw the document, but he would have been familiar with the ideas since Bernays was on his ICMT staff.

could conduct separate trials. The proposal was threatening to the USSR, which had only one suspected major war criminal in custody, Grand Admiral Erich Raeder, and so would get little publicity.³⁰ Jackson flew to Potsdam to meet with President Truman, who instructed him to back off on separate trials pending the Potsdam Declaration, which may have saved the ICMT. It stated specifically that the Allies wanted a single trial and hoped that “the negotiations in London will result in speedy agreement.”³¹ Returning on 2 August 1945, Jackson found everyone ready to include the aggressive war charge without the controversial phrase. After another week finalizing the phrasing of translations, Jackson and the other representatives signed the Charter of the International Military Tribunal on 8 August 1945. The trial would begin at the earliest feasible date—October 1945, less than two months away.

The International Military Tribunal at Nuremberg

When the trial opened, the Allies had occupied Germany for about five months. During the war they had concentrated on military campaigning but done little planning for what would happen after the end of hostilities. The majority of the Potsdam Declaration dealt with details of the Four-Power occupation in Germany, whose mission was to make it “possible for [the German people] in due course to take their place among the free and peaceful peoples of the world.”³²

Postwar Germany was just beginning to take shape. The Allies ruled through the Control Council, which included British, French, Soviet, and United States representatives. Each country’s occupation forces translated each Control Council decision into policy in its respective zone. The Allies kept the German bureaucracy mostly intact after purging Nazis from the civil service and local government, though at least at the beginning occupation guidelines were sometimes vague or unevenly applied. Against this background, the IMT

³⁰Taylor, *Anatomy*, 89.

³¹For an example of Jackson’s statements, see Document XVII: “Minutes of Conference Session of June 29, 1945” in Jackson, *Report*, 115. The full text of the Potsdam Declaration is available at <<http://www.yale.edu/lawweb/avalon/decade/decade17.htm>>; see Part VI. War Criminals.

³²“The Potsdam Declaration.” Available 12 October 2000 <<http://www.yale.edu/lawweb/avalon/decade/decade17.htm>>.

was virtually the only joint, well-planned project that took place. Despite disagreements, the Allies were pursuing a definite goal to provide “indisputable proof of the [criminality of the] Nazi regime” such as a trial would give.³³

The victorious powers had learned from the mistakes made at the Versailles Peace Conference after World War I, which the Nazis had used to rise to power in Germany. Though there are a few striking similarities between the Treaty of Versailles and the Potsdam Declaration—such as Germany bearing sole guilt for the war and having to pay reparations—in 1945, the Allies were in full control and determined to reform the German people. With this in mind, the Indictment submitted to the Nuremberg IMT targeted not just Nazis and their party apparatus but also bankers and industrialists and longer-lived organizations such as “the General Staff of the High Command of the German Armed Forces.”³⁴ The Allies also wanted to prove to the world—including their own citizens—that they had acted rightly and that World War II had been a just war. This purpose was closely tied to the Allies’ idealistic hopes of setting up a stable and rational postwar order, exemplified in the founding of the United Nations.

The Court and Defendants

Time constraints forced the prosecution to rush preparation of the Nuremberg Indictment, which it finally submitted on 6 October 1945, just twelve days before the trial began. After signing the London Charter, Jackson had only about two months to decide on defendants, collect evidence, and bring formal charges. A preliminary list of names had included twenty-four defendants and six accused organizations, who were selected to represent all the major branches of Nazism and anti-democratic Germany. Though the prosecution would have done well to revise this list, time did not allow.³⁵

³³Sir David Maxwell-Fyfe, quoted in Bradley F. Smith, *Reaching Judgment at Nuremberg* (New York: Basic Books, 1977), 42.

³⁴“Indictment Against Hermann Göring et al.” International Military Tribunal, *Trial of the Major War Criminals before the International Military Tribunal, Nuremberg, 14 November 1945-1 October 1946*, 42 vols. (Nuremberg: International Military Tribunal, 1947). Available 12 October 2000 <<http://www.yale.edu/lawweb/avalon/imt/proc/count.htm>>.

³⁵Taylor, *Anatomy*, 90.

The most famous defendant was Hermann Göring, who had long been the number two man in the Nazi party and headed the *Luftwaffe* (Air Force). He was, as Justice Jackson later stated in court, “the only living man who can expound. . . the true purposes of the Nazi Party and the inner workings of its leadership.”³⁶ The highest-ranking *SS* survivor, Ernst Kaltenbrunner, was indicted, as were other organizational heads such as Joachim Ribbentrop (Foreign Minister), Albert Speer (Minister for Armaments after 1942), and Robert Ley (Labor Front). Defendants outside the Nazi hierarchy included career military officers, industrialists, and conservative politicians such as Grand Admiral Karl Dönitz, head of the German Navy and Hitler’s successor as Führer; Field Marshall Wilhelm Keitel, head of the High Command of the Armed Forces; Gustav Krupp von Bohlen und Halbach of the Krupp conglomerate; and Franz von Papen, Chancellor in 1932 and influential in Hitler’s 1933 appointment as Chancellor.

The London Charter required that the International Military Tribunal meet in Berlin to receive the Indictment, though for practical reasons the ICMT had selected Nuremberg as the site of the trial. At this meeting, Britain, France, the Soviet Union, and the United States were each represented by two judges, one voting and a non-voting alternate. The judges announced the election of Lord Geoffrey Lawrence of Great Britain as President of the Tribunal and that the first court session would be in Nuremberg on 20 November 1945.

Before the first session, Robert Ley hanged himself in his Nuremberg cell, escaping trial. Then, on 7 November the Tribunal’s medical team pronounced Gustav Krupp unable to travel from his Austrian villa. This announcement led to a brief prosecution attempt to either try Gustav *in absentia* or amend the Indictment to add his son Alfried, against whom there was a stronger case. The latter strategy prompted main French judge Donnedieu de Vabres to demand, “Do you consider that you can propose to the Court to substitute one name for another?”³⁷ Though the rejection of both alternatives hurt the prosecution’s

³⁶“Cross Examination of Hermann Göring, March 18, 1946” in IMT, *Trial*, 9:417. Available 12 October 2000 <<http://www.yale.edu/lawweb/avalon/imt/proc/031846.htm>>.

³⁷“Preliminary Hearing: Wednesday, 14 November 1945” in IMT, *Trial*. Available 12 October 2000 <<http://www.yale.edu/lawweb/avalon/imt/proc/11-14-45.htm>>.

prestige, it perhaps strengthened the Tribunal's reputation for justice.

Proceedings

The prosecution, which dominated most of the proceedings, had separated the presentation of its case into four phases, which would be covered by teams from the United States, Great Britain, France, and the Soviet Union respectively. The first phase dealt with Count One, "the formulation or execution of a common plan or conspiracy," a charge only implied in the London Charter. On 21 November, Justice Jackson gave his opening address, "an optimistic, Wilsonian credo that looked to the future as much as to the past and that saw the trial as a blow against aggressive wars."³⁸ The conspiracy charge was based on a good deal of evidence ranging from *Mein Kampf* to secret Nazi party meetings that, the prosecution argued, showed that Hitler and other top Nazis planned aggressive warfare and other atrocities all along. While the prosecution had a good case against several defendants, the conspiracy presentation tended to oversimplify the workings of Nazi Germany as a monolithic state bent to one end. In reality, and as the defendants later argued, there were no well-planned and detailed goals—only general ones.

The United States' phase concentrated on documentary evidence (as opposed to witnesses), which resulted in copying and translation problems as well as boredom for the whole courtroom. However, some of the documents did cause a stir, such as a report on the destruction of the Warsaw Ghetto, which glorified the "energetic action" of the *SS* even though it was so one-sided that there were only 16 casualties versus 56,065 "proved" killed.³⁹ An innovation in presentation was professionally prepared film evidence from Nazi and Allied archives, which was presented through screenings with titles such as *The Nazi Plan* and *Nazi Concentration Camps*.⁴⁰ The United States team received a great deal of publicity for this, though the evidence presented in later phases would have been no less shocking had it come first.

³⁸Marrus, *Nuremberg Trial*, 83-84.

³⁹Quoted in Taylor, *Anatomy*, 170; also see the reaction on page 202.

⁴⁰Taylor, *Anatomy*, 200, and Marrus, *Nuremberg Trial*, 125.

The British phase was very short since it concentrated on Count Two (Crimes Against Peace), and consequently was little more than a list of treaties and when the Nazis had violated them. This does not mean that the British did not fully support the trial. Though there were only about one-tenth as many British as Americans, British barristers had already assisted during part of the United States phase. The British presented this part of the case well, and the American press amusingly “soon formed the opinion that the British prosecution team was plainly superior.”⁴¹

After the British phase, the United States and British prosecutors made a joint summation of evidence against each defendant. Following this, the court asked the prosecution to better define the criminal organizations, particularly the requirements for membership. For example, General Staff was a generic term, and while an officer might be identified as a staff officer, this was hardly membership in an organization. Also, the *SS* had actually drafted members late in the war; would draftees be guilty along with volunteers? General Roman Rudenko, Soviet head prosecutor, stated that “naturally, we cannot exclude the possibility that there might be individual members who might have been lured into the organization.”⁴² Unfortunately, millions of members pleading ignorance of an organization’s criminality would remove the charge’s main benefit.

Next began the French prosecution phase. The French and Soviets each covered both Counts Three (War Crimes) and Four (Crimes Against Humanity), with the French focusing on Western and the Soviets on Eastern Europe. Like the British, the French had a small prosecution team—understandably since most of the new French government’s energies went into rebuilding France’s institutions. They made forceful presentation of life under Nazi occupation, however, including Germanization, *Gestapo* torture, broad reprisals, and deportations. Even many defendants were disgusted at Göring’s participation in the theft of art treasures to sell for personal profit.⁴³

⁴¹Taylor, *Anatomy*, 213 and 220.

⁴²IMT, *Trial*, 8:471.

⁴³From the diary of G. M. Gilbert, Nuremberg Prison Psychologist, quoted in Taylor, *Anatomy*, 305-306.

The Soviet phase had a completely different character. The Nuremberg IMT took place shortly after the war's end, and the West was still discovering the the wartime brutality in Eastern Europe. French complaints about the destruction of World War I monuments seemed absurd compared to the tales of the millions slaughtered in Poland. Not to be outdone, the Soviets also presented a film, *Atrocities by the German Fascist Invaders in the USSR* that was much more graphic than the earlier ones. Other testimony covered the *Einsatzgruppen*, specialized SS units that shot Jews and Communist officials behind battle lines in the USSR, and "previously little-known information" about death camps like Auschwitz, where systematic killing was an added concentration camp terror.⁴⁴ After Soviet testimony, any defendant closely connected to these atrocities—such as Hans Frank, governor of Poland—was almost assured a death penalty.

The defense cases, though most were individually strong, helped the prosecution overall since many defendants tried to save themselves by implicating others. Of course, defense counsel were at a significant disadvantage compared to the prosecution. Most obviously, the London Charter, which governed the Tribunal and established its jurisdiction, had been written specifically to convict a list of war criminals that was "conveniently settled in advance."⁴⁵ While the authors may not have had each individual defendant in mind, the Charter's definition of international law at least put them in a bad light. Additionally, public opinion so opposed the Nazis that the defense certainly knew that many people were convinced only "with some difficulty, that summary execution was not a desirable solution."⁴⁶ The defense was also hurt by lack of time and resources—documents the prosecution had used were available, but the Allied archives were not.

After the Soviet phase concluded, the defense began its presentation with the case of Hermann Göring, who took the witness stand. Although in the Nazi regime's later years he had become a slovenly drug addict, during his time in prison he had returned to his

⁴⁴Marrus, *Nuremberg Trial*, 197.

⁴⁵Michael Biddiss, "Victor's Justice? The Nuremberg Trial" *History Today*, 45:5 (May 1995), 46.

⁴⁶Michael Marrus, "The Nuremberg Trial: Fifty Years After" *American Scholar* 66:4 (Autumn 1997), 565.

former fit and shrewd self. His testimony, though it failed to help his case since he freely admitted many crimes, was impressive in its scope and detail. Göring attempted to discredit the Tribunal by implying that its basis in international law was outdated or simply wrong: “[Following] these Hague Convention regulations for land warfare, . . . a modern war could not be fought under any circumstances.”⁴⁷ During Jackson’s cross-examination, Göring seemed to outsmart the Supreme Court Justice through superior knowledge of the facts. Telford Taylor, one of the United States team, observed, “It was a blow from which Jackson only gradually recovered.”⁴⁸

Most other defendants had far less spectacular cases. Ernst Kaltenbrunner had headed the Reich Main Security Office of the *SS*, which controlled both the *Gestapo* and the *Einsatzgruppen*. He unconvincingly argued that he really had authority only over matters of security and intelligence, while *SS* leader Heinrich Himmler had exercised direct control over most matters—naturally including the criminal ones. Another example was Albert Speer, a young architect who became Armaments Minister during the war, who revealed to the court that he had considered killing Hitler. Unlike Kaltenbrunner, however, Speer stated “[we] leaders must accept a common responsibility. . . . But to what extent that is punishable under law or ethics I cannot decide.”⁴⁹ Speer, though one of the few to accept any responsibility for wartime actions, still limited his personal culpability.

The case of Karl Dönitz, head of the German Navy after 1943, set a precedent in international law concerning submarine warfare. To defend him against the charge that orders to sink merchant vessels were illegal, Dönitz’s lawyer Otto Kranzbühler secured an affidavit from Fleet Admiral Chester Nimitz, commander of the United States Pacific Fleet. Nimitz answered questions describing the practice of the United States Navy concerning submarines and merchant ships, especially when a submarine crew had no way of knowing whether or not an enemy merchant ship was armed. German practice was indistinguishable from American,

⁴⁷Hermann Göring, “Testimony on the Applicability of the Hague Conventions of 1907, March 15, 1946” in Marrus, *Nuremberg Trial*, 180.

⁴⁸Taylor, *Anatomy*, 344.

⁴⁹Speer’s testimony in IMT, *Trial*, 16:586 and quoted in Taylor, *Anatomy*, 453.

making it “as clear as clear could be that if Doenitz and [German Admiral Erich] Raeder deserved to hang for sinking ships without warning, so did Nimitz.”⁵⁰ The court acquitted Dönitz and Raeder on the charge.

Judgment

After the last defense case rested, closing statements by the defense and prosecution followed and, on 31 August 1946, the Tribunal adjourned to prepare its judgment. Extensive notes taken by Francis Biddle, main judge for the United States, reveal the process by which the Tribunal reached its decisions during the recess.⁵¹ British and American staff did most of the work since they had the best knowledge of Anglo-American law, on which the London Charter was based. The judges themselves met for several sessions to discuss the individual guilt of each defendant for the Indictment’s four counts: Conspiracy, Crimes Against Peace, War Crimes, and Crimes Against Humanity.

In reaching its decision, the Tribunal never strayed from the London Charter in interpreting international law. Challenges to the inclusion of Crimes Against Peace, based on the Kellogg-Briand Pact, were ignored since the Charter was the law by which the Tribunal judged. The Indictment’s first charge, Conspiracy, was especially problematic since it was neither defined in the Charter nor a crime under the law practiced in France or Germany. French judge De Vabres argued that the charge could not then be part of international law and so should be thrown out, but the others overruled him. Only eight defendants, out of twenty-two, were convicted on Count One, and none were convicted solely on it.

The Tribunal read the judgment between 30 September and 1 October 1946. Twelve defendants—Martin Bormann, Hermann Göring, Alfred Jodl, Wilhelm Keitel, Ernst Kaltenbrunner, Hans Frank, Wilhelm Frick, Joachim Ribbentrop, Alfred Rosenberg, Fritz Saukel, Arthur Seyss-Inquart, and Julius Streicher—were sentenced to hang. Each was found guilty of Crimes Against Humanity, and also of War Crimes in every case except that of anti-

⁵⁰Taylor, *Anatomy*, 409.

⁵¹According to Taylor, these notes are now at Syracuse University. Taylor, *Anatomy*, 549.

Semitic publisher Julius Streicher. Three defendants—Franz von Papen, Hjalmar Schacht, and Hans Fritsche—were acquitted of being major war criminals, but after being released were arrested by German police and convicted of lesser crimes.⁵² Three others received life sentences, with the remaining four getting sentences ranging from ten (Admiral Dönitz) to twenty (Albert Speer) years. They served their time as the only inmates of Spandau Prison in the British section of Berlin. On 16 October 1946, after a petition to the Control Council was denied, those so sentenced were hanged in the Nuremberg prison gymnasium, ending the International Military Tribunal at Nuremberg.

The International Military Tribunal for the Far East

Unlike Germany, Japan was not invaded and did not surrender unconditionally, but rather accepted the terms of the Potsdam Protocol. Its provisions were not generous, but reassured Japanese leaders by stating that a new government would be established “in accordance with the freely expressed will of the Japanese people,” an ambiguous statement that allowed for the Emperor’s retention.⁵³ While the Potsdam Protocol also specified that war criminals would be punished, it did not state under what laws or mandate a trial of suspected major criminals.

Though the London Charter was signed before Japan surrendered, the Japanese government had little time to give its implications much thought, and had good reason to assume that the Allies played by different rules in Europe and Asia. Just before midnight on 8 August 1945, the same day the Allies signed the London Charter, Soviet troops invaded Japanese-controlled Manchuria, a violation of a neutrality pact that would not expire until 25 April 1946. The next day the United States used the second atomic bomb, on Nagasaki, killing over 70,000 civilian Japanese, as well as 2,500 Korean laborers and 350 prisoners of war. Since both of these actions—had they been committed by the Axis—would have been indictable under the London Charter, it is unlikely Japan’s top leaders would have thought

⁵²Taylor, *Anatomy*, 613-614.

⁵³<http://www.yale.edu/lawweb/avalon/decade/decade17.htm>.

they would be indicted for similar actions when they surrendered on 15 August.

Such contradictions did not just come at the end; the war in East Asia had been full of them. Perhaps most obviously, it was a war of colonial empires. Except for self-ruled parts of China and Thailand, the territories Japan attacked—including Hawaii—were populated mainly by Asians but ruled by Western overlords. Though early defeats of the imperial powers stimulated local independence movements, the victors restored the prewar *status quo* after defeating Japan. The American occupation censorship bureau even renamed the war—from the Great East Asia War (*Taiheiyo-Senso*) to the Pacific War—to emphasize the role of the United States in a predominately Asian conflict.⁵⁴

The Japanese had been at war since 1937 and invariably committed the worst atrocities, but both sides participated on a much larger scale than in Western Europe. Allied soldiers regularly shot defenseless Japanese pilots or seamen, ignored the few attempts to surrender, and collected grisly souvenirs. These practices were well-known, but it would have been “inconceivable, however, that teeth, ears, and skulls could have been collected from German or Italian war dead and publicized in the Anglo-American countries without provoking an uproar.”⁵⁵

Unlike Germany, Japan still had a representative government at the war’s end, though one with many voices silenced though heavy censorship. Military control of Japan stemmed from the requirement in Japan’s Meiji Constitution that both the Army and Navy Cabinet Ministers be active officers, which meant that the military could remove a Prime Minister at will by withdrawing its ministers. Prior to the 1930s, the military had responsible leaders and Japan appeared to be a conservative but stable constitutional monarchy. A period in the 1920s known as the Taisho Democracy was especially noted for its strong multiparty government.

However, the military’s aggressive attitude grew after World War I, and in the late 1920s

⁵⁴Dower, *Defeat*, 419.

⁵⁵John W. Dower, *War Without Mercy: Race and Power in the Pacific War* (New York: Pantheon, 1986), 66.

the military heavily influenced politics through assassination and intrigue. The pretense of civilian government finally ended in 1931, when the Kwantung Army took control of foreign affairs by invading Manchuria against government orders. Contrary to the stereotype of a monolithic Japan in Allied propaganda, by 1945 many Japanese welcomed defeat since it removed the militarists from power. These Japanese expected occupation authorities to mandate removal of the military's autonomy, gather reparations, and then leave—some business leaders were even overjoyed at being governed by American capitalists.⁵⁶

The former Empire of Japan was split less cooperatively than Germany. Of the major Allies, United States troops had dominated the fighting, and likewise the occupation. US General of the Army Douglas MacArthur became Supreme Commander for the Allied Powers (SCAP), and his word was final in Japan. The US occupied Okinawa, southern Korea, and most of the home islands with British Commonwealth soldiers in a few places such as Hiroshima. The Chinese Nationalist government got back Taiwan, which Japan had controlled since 1895, and Japanese-occupied parts of China. The Soviet Union received control of Manchuria, northern Korea, and the arctic island of Sakhalin, but had no part in occupying the Japanese homeland.

Throughout the war, Allied leaders had promised war crimes trials for violations of the Geneva Convention as the Allied public reacted to stories of cruelty to prisoners of war. The highest officers connected with some of the most notorious events of the war were tried very quickly. Japanese Generals Masaharu Homma and Tomoyuki Yamashita, commanders respectively at the Bataan Death March and the Sack of Manila, were tried and sentenced to death in late 1945, despite the fact that there was no compelling evidence that either was even notified by the junior officers who ordered the crimes.⁵⁷ These early trials under the Geneva Conventions also opened the possibility of a trial, under an arrangement similar to

⁵⁶Dower, *Defeat*, 530.

⁵⁷Japanese names are given in Western order, with given name first. Yamashita appealed to the US Supreme Court, who decided the case was out of its jurisdiction but with a dissenting opinion calling his trial "legalized lynching." See "Yamashita, Tomoyuki, General" in *The Oxford Companion to World War II* (London: Oxford University Press, 1995), 1292.

Nuremberg, of Japanese leaders responsible for the war itself.

When the occupation began, a popular topic of debate was the controversial possibility that the Emperor might be held as a war crimes suspect. MacArthur planned to rehabilitate the Emperor, Japan's most important symbol, whom he saw as the key to successful democratization. He also purposefully declined to have experts on Japan in his occupation staff, preferring to have a thorough, American-style, common-sense democratization carried out by occupation forces.⁵⁸ Since the United States maintained complete control with MacArthur as Supreme Commander, in most areas he could implement his wishes without negotiation. MacArthur made his support for the Emperor clear on 27 September, when he invited Hirohito to his residence, one of his first actions "to create the most usable emperor possible."⁵⁹

At the same time, plans to create a Far East counterpart to the IMT began. The Nuremberg trial was just beginning, and Japan, like Nazi Germany, had leaders to try for major crimes such as ordering the attack on Pearl Harbor or the mistreatment of prisoners of war. A Joint Chiefs of Staff directive formed the International Prosecution Section (IPS) to investigate war crimes, and President Truman named as its head Joseph Keenan, author of the Lindbergh kidnapping law and an influential New Dealer under President Franklin Roosevelt.⁶⁰ Keenan's former position, Assistant to the Attorney General, was noticeably inferior to that of the European prosecutor, Supreme Court Justice Jackson, leading to speculation that Truman simply wanted Keenan out of Washington.⁶¹ Despite its name, at first the IPS staff was entirely American.

The Court and Defendants

International Military Tribunal for the Far East was unilaterally instigated with a SCAP

⁵⁸Dower, *Defeat*, 224.

⁵⁹Dower, *Defeat*, 299.

⁶⁰Philip Piccagallo, *The Japanese on Trial* (Austin: University of Texas Press, 1979), 10. Richard Minear, *Victor's Justice: The Tokyo War Crimes Trial* (Princeton, NJ: Princeton University Press, 1971), 40.

⁶¹Arnold Brackman, *The Other Nuremberg: The Untold Story of the Tokyo War Crimes Trial* (New York: William Morrow and Company, 1987), 32.

Special Proclamation on 19 January 1946. Drafted by the IPS, the proclamation was nearly identical to the London Charter, with a few important exceptions. There could be as many as eleven judges, with no alternates, to be “appointed by the Supreme Commander for the Allied Powers from the names submitted by the signatories to the Instrument of Surrender, India, and the Commonwealth of the Philippines.” Also, in keeping with the US dominance of the occupation, MacArthur named a single head prosecutor—Keenan—who had subordinates appointed by any nation involved in the war against Japan. Additionally, though the prosecutable crimes—Crimes Against Peace, War Crimes, and Crimes Against Humanity—were the same, the jurisdiction of the IMTFE included only defendants “charged with offenses which include Crimes Against Peace.”⁶²

MacArthur, who theoretically controlled the whole process, took little interest in the IMTFE. He appointed the judges suggested by the Allies without reviewing their merits, with disheartening results. Only one, Radhabinod Pal of India, had any prior experience in international law, though few Nuremberg judges had such experience either. Five other judges had various shortcomings. Mei Ju-Ao of China had no judicial experience, and, as Chair of the Foreign Affairs Committee of the Chinese legislature, was a politician by occupation. General I. M. Zaryanov of the USSR, besides being a major figure in Stalin’s show-trial purges, spoke no English or Japanese, the Tribunal’s official languages. Delfin Jaranilla, though a member of the Supreme Court of the Philippines, was a survivor of the Bataan Death March, which would disqualify him from trying a similar case in most Anglo-American courts. Likewise, during the war William Webb of Australia had coordinated investigations of war crimes committed by lower-ranking Japanese. John Higgins, the United States’ first appointee, returned to his seat on the Superior Court of Massachusetts before the trial began, possibly because Keenan expressed disappointment that the US had not appointed a Supreme Court Justice.⁶³ Myron Cramer, Judge Advocate General of the

⁶²“Charter of the International Military Tribunal for the Far East” in *Trial of the Japanese War Criminals* (Washington: Department of State, 1948), 39-44.

⁶³Dower, *Embracing Defeat*, 465.

Army, who had previously been influential in War Department planning for war crimes trials, replaced him. On the other hand, Canada (E. Stuart McDougall), the United Kingdom (Lord William Patrick), the Netherlands (B. V. A. Röling), New Zealand (Harvey Northcroft), and France (Henri Bernard) sent well-selected representatives.

The IPS became truly international with the addition of Allied assistant prosecutors, whom Keenan consulted when preparing the list of defendants and the Indictment. When Soviet representative S. A. Golunsky arrived, he asserted that the USSR had the right to choose independently two defendants. Keenan reluctantly agreed, expecting the Soviets to name bosses of Japan's *zaibatsu*—huge family-controlled industrial conglomerates—which the Soviet press had criticized as the root of Japanese capitalist aggression. Surprisingly, Golunsky named the two signatories to the Instrument of Surrender: General Yoshijiro Umezu, former commander of the Kwantung Army along the Soviet border, and Mamoru Shigemitsu, former Ambassador to Moscow—neither of whom had been detained as a major offender.⁶⁴ Each nation represented on the prosecution staff had input, and so where at Nuremberg four nations split four counts evenly, at Tokyo the resulting Indictment included fifty-five separate counts. By the time the Tokyo Indictment was published on 29 April 1946, it was shorter than the Nuremberg Indictment but far less organized.

The defendants named in the Tokyo Indictment were meant to represent aspects of Japanese aggression. Over half of the twenty-eight were military men, including fourteen generals—Sadao Araki, Kenji Doihara, Shunroku Hata, Seishiro Itagaki, Heitaro Kimura, Kuniaki Koiso, Iwane Matsui, Jiro Minami, Akira Muto, Hiroshi Oshima, Kenryo Sato, Tei-ichi Suzuki, Hideki Tojo, and Yoshijiro Umezu—and three admirals—Osumi Nagano, Takasumi Oka, and Shigetaro Shimada. Additionally indicted were a military propagandist—Colonel Kingoro Hashimoto—and two civilian ones—diplomat Toshio Shiratori and Shumei Okawa, who while he “did not at any time hold an important responsible government position . . . was the intellectual leader behind Japan’s entire aggressive program.”⁶⁵ Top civilian

⁶⁴Brackman, *Other Nuremberg*, 81.

⁶⁵Solis Horowitz, “The Tokyo Trial” *International Conciliation* 465 (Nov 1950), 581.

representatives included two Prime Ministers—Kiichiro Hiranuma and Koki Hirota (Koiso and Tojo were also Prime Ministers, but are counted among the generals here)—and three Foreign Ministers—Yosuke Matsuoka, Mamoru Shigemitsu, and Shigenori Togo. Other former cabinet members were Naoki Hoshino (Cabinet Secretary) and Okinori Kaya (Minister of Finance). Lastly, in a class by himself, was Marquis Koichi Kido, Lord Keeper of the Privy Seal, who in many eyes was indicted as the Emperor's proxy. No *zaibatsu* leaders were indicted.

A preliminary hearing of the IMTFE on 3 May 1946, revealed a distinct disadvantage for the defense. Australian William Webb, who had been elected President of the Tribunal, declared that no counsel would be heard in court without being specifically selected by a defendant as his representative. This dispute led to the resignation of the Chief of Defense Counsel, US Navy Captain Beverly Coleman, who felt that the bench was biased toward the prosecution. The entire Navy contingent of the defense team also resigned in protest.⁶⁶ Though each defendant still had representation, this seriously harmed the defense as a whole, especially since Japanese lawyers usually play little role in court and so were relying heavily on US lawyers.⁶⁷ The prosecution, coordinated by Keenan, presented a single flowing case, while the defense fragmented into separate and often antagonistic cases. Additionally, defense resources, according to prosecution member Solis Horowitz, "were not as extensive... [but] upon completion of the prosecution case, prosecution language, document, and reproduction facilities were made available for the defense."⁶⁸ This meant that during the prosecution case, defense counsel had virtually no method of preparing evidence for their cases or checking the translation of prosecution documents, aside from personal time out of court.

These language and documentary problems were a far larger issue in the IMTFE than the IMT. Though Japanese borrows much of its vocabulary from Chinese, grammatically "Japanese is basically as different from Chinese as it is from English."⁶⁹ The language's

⁶⁶Brackman, *Other Nuremberg*, 115.

⁶⁷Horowitz, "Tokyo Trial," 491-492.

⁶⁸Horowitz, "Tokyo Trial," 493.

⁶⁹Edwin O. Reischauer. *Japan: The Story of a Nation* (New York: Tuttle, 1998), 8.

structure makes it notoriously difficult to translate simultaneously, which made a system like that used at Nuremberg impossible. Court time dragged on during witness examination while questions and answers were translated sentence by sentence. Translation of documents was no easier, and both prosecution and defense suffered from shortages of time, translators, and even paper.

Proceedings

The prosecution developed its case chronologically, beginning with a discussion of the Japanese takeover of Manchuria in 1931 and proceeding to the war with China after 1937 and the attacks of December 1941 which led to the Pacific War. These were Crimes Against Peace in the meaning of the Charter, but Keenan seemed to have little appreciation against whom they were committed. In his opening statement, he claimed the defendants were “determined to destroy . . . the system of government of and by and for the people”—a description that fit neither warlord-controlled Manchuria nor the Western colonial empires.⁷⁰

Many defendants were heavily implicated in war crimes and other atrocities such as the Mukden Incident in Manchuria (Araki and Doihara), the Rape of Nanking (Matsui and Hashimoto), and the encouragement of opium trafficking to fund the government of Japanese-controlled Manchuria (Hoshino and Kaya). As for the mistreatment of prisoners of war, the prosecution succeeded in showing that the practice was widespread, but never produced evidence that it had been explicitly ordered at the highest level. The Japanese had been far less meticulous about record-keeping than the Germans, so the prosecution relied more heavily on affidavits and witness testimony. More valuable than these sources, however, was the diary of Marquis Kido, which he had voluntarily turned over to the prosecution. According to Horowitz, it was their “working bible . . . and the main key to all further investigation.”⁷¹

The prosecution case took about seven months, from 3 June 1946 to 27 January 1947.⁷²

⁷⁰Joseph Keenan, “Opening Statement” in *Trial of the Japanese War Criminals*, 35. Hawaii was a territory at this time.

⁷¹Horowitz, “Tokyo Trial,” 494.

⁷²Piccagallo, *Japanese on Trial*, 18-21. Brackman, *Other Nuremberg*, 269.

The defense case began shortly afterward, and at the beginning attempted to present a unified case despite the Chief of Defense Counsel's resignation. However, each defendant's case was often antagonistic toward others, and defense counsel faced continuous problems procuring documents and finding witnesses. Finally, after five months, the defense requested a recess to avoid a collapse. The Tribunal reluctantly agreed to a six-week break which began 23 June 1947.⁷³ After the court reconvened, the defense cases lasted another six months, until 12 January 1948.⁷⁴

Kenzo Takayanagi, perhaps the foremost expert on Anglo-American law in Japan, opened the defense in February 1947 with arguments against several charges in the Indictment. He suggested that the Anglo-American concept of *conspiracy* had no basis in international law. Takayanagi also attacked the Tribunal for misusing Japanese agreement to war crimes trials in the surrender, arguing that the Japanese government had understood this to mean only conventional war crimes as defined by the Geneva and Hague Conventions, such as looting or mistreatment of prisoners. The inclusion of the Crimes Against Peace charge, especially, violated the Potsdam Protocol.

Few generals had much to say in their own defense. General Tojo, who had been Prime Minister at the time of Pearl Harbor, was the most famous defendant and his arguments were typical. Tojo argued that Japan was fighting a war of self-defense, not from military attack obviously, but from economic encirclement. In the early 1930s, civil war in China and the Great Depression seriously threatened Japan's economy. In China, the Nationalists boycotted Japanese goods while the Communists attacked Japanese businesses. Western nations, especially the United States, became increasingly protectionist and hostile to Japanese imports, tying them to raw materials exports. Japan's only options, the militarists argued, were to contract to a smaller and more vulnerable nation, or to expand and capture raw materials at the source in places like Manchuria. The United States actually forced Japan to war in mid-1941 by cutting off vital war supplies while Japan was involved in a war in

⁷³Brackman, *Other Nuremberg*, 310-311.

⁷⁴Brackman, *Other Nuremberg*, 356.

China.

Some civilian defendants, primarily Foreign Ministers Togo and Shigemitsu, had stronger cases due to prewar opposition to the militarists. Baron Hankey, a member of Churchill's War Cabinet and personal friend of the defendant Shigemitsu, worked in London upon hearing of the Indictment to gather evidence of Shigemitsu's efforts for peace and his powerlessness against the military. In a manuscript published after the trial, he took up Togo's cause as well. The Indictment charged that Shigemitsu and Togo had "waged a war of aggression" against various countries and failed "to secure the observance and prevent breaches" of the laws of war.⁷⁵ As for their involvement in Crimes Against Peace, "Study of the documents, however, reveals... both were lifelong workers for peace. Both were opposed to an Alliance with the European Axis. Both openly opposed the military party... Togo, at the risk of his life, brought the war to an end; and Shigemitsu, at the risk of his life, signed the surrender."⁷⁶ In dealing with war crimes, Hankey found that both had done what could be expected of a Foreign Minister; they passed on complaints from the Allies and the Swiss (representing the International Red Cross) to the responsible authority (the Japanese military), and returned replies, though the military took no action.⁷⁷

Judgment

After the defense rested, the Tribunal heard prosecution and defense rebuttal until 6 April 1948.⁷⁸ The IMTFE then adjourned to formulate its opinion. No counterpart to Biddle's extensive notes exist for the Tokyo bench, so very little is known about how the Tokyo judgment developed. It is known that the IMTFE did not meet together, but rather "seven organized the drafting, and presented the results to the other four as a *fait accompli*."⁷⁹

The recess lasted almost seven months.⁸⁰ The IMTFE dismissed all challenges to its

⁷⁵"Indictment" in *Trial of the Japanese War Criminals*, 54-56, 62.

⁷⁶Baron Hankey, *Politics, Trials, and Errors* (Chicago, IL: Henry Regnery Company, 1950), 119-120.

⁷⁷Hankey, *Politics*, 107.

⁷⁸Brackman, *Other Nuremberg*, 363-365.

⁷⁹Justice Röling, quoted in Dower, *Embracing Defeat*, 466. The others not included were President Webb, Bernard of France, and Pal of India.

⁸⁰Horowitz, "Tokyo Trial," 542.

jurisdiction. On 12 November 1948, the reading of the verdicts and majority opinion was accompanied by the announcement of five additional opinions; three were full dissents and two were critical of some aspects.⁸¹ No defendants were acquitted and all but two (Matsui and Shigemitsu) were found guilty of the controversial conspiracy charge. Two defendants, Matsuoka and Nagano, had died of natural causes during the trial, and Okawa was under psychiatric and medical care for symptoms of advanced syphilis. Seven were sentenced to hang: Doihara, Hirota, Itagaki, Kimura, Matsui, Muto, and Tojo. Shigemitsu got seven years, Togo twenty, and the rest life sentences.

After sentencing, defendants could appeal to MacArthur. Several defense attorneys prepared an extensive criticism of the judgment as unfair and not in keeping with the spirit of the trial. Some individual defendants asked to have their life sentences 'reduced' to hanging—highlighting a difference in Japanese and Western value systems. On 25 November MacArthur rejected all petitions. After an attempt to appeal to the US Supreme Court, which on 20 December decided the appeal was out of its jurisdiction, the seven defendants so sentenced were hanged at Sugamo Prison, with only military personnel and press present to verify, as MacArthur ordered.⁸²

Assessment

Though the International Military Tribunals at Nuremberg and Tokyo ended at different times and in different settings, the immediate aftermaths were very similar. The sentencing and executions captured headlines, but the public soon lost interest since the Cold War quickly overshadowed the past with the possibility of another catastrophic war. Since war crimes trials were about satisfying legal principles as well as public opinion, smaller national trials for non-major war criminals followed the IMTs.

During the Cold War's first decade, the ideals which provided the basis of the Nuremberg

⁸¹Minear, *Victor's Justice*, 32. The four justices excluded from the majority opinion's drafting and Jaranilla, who said some sentences were too lenient, submitted the opinions.

⁸²Horowitz, "Tokyo Trial," 573. Brackman, *Other Nuremberg*, 369, 403.

and Tokyo IMTs fell by the wayside along with the organization also founded on those ideals, the United Nations. In the 1960s, the UN experienced a renaissance with colonialism's end in most of Africa and Southeast Asia, and Adolf Eichmann's trial in Jerusalem renewed interest in the Holocaust and also Nuremberg. The Tokyo trial has enjoyed no such positive second look, though some scholars now see the transcripts as "an embarrassing judicial disaster but a goldmine of information."⁸³

After the USSR's collapse in 1991, the UN became a more viable player in international politics and in some ways took up the cause abandoned after Nuremberg. The recurrence of Crimes Against Humanity in Rwanda and the former Yugoslavia led to the establishment of two International Criminal Tribunals on the Nuremberg model.⁸⁴ Though they lack the benefits Allied hegemony gave the IMTs and have had less than spectacular success, the UN ICTs confirm the longterm Nuremberg legacy.

Comparing the International Military Tribunals

The examination of the International Military Tribunals at Nuremberg and Tokyo reveals no obvious reason to compare them. The Nuremberg trial was far better covered in the press and had more famous defendants. Since then, scores of articles, books, and films have noted the wide importance of Nuremberg in realms such as politics, law, and morality. Predictably, Nuremberg is consistently the precedent cited, while few people remember that a trial of Japanese leaders even took place.

The apparent strength of the Nuremberg IMT was colored by preconceptions about the Nazi defendants. Japanese defendants, "despite the grievous crimes of which they were accused . . . failed to exude the aura of evil personified that choked the courtroom where their Nazi counterparts were tried."⁸⁵ Justice for Hitler's accomplices appeared to be an

⁸³R. John Pritchard, "What the Historian Can Find in the Proceedings of the International Military Tribunal for the Far East (IMTFE)" in *Japan and the Second World War* (London: Suntory-Toyota Centre for Economics and Related Disciplines, London School of Economics, 1989), 8.

⁸⁴See, for example, Lara Santoro, "One for the Law Books: In Africa, A UN Court Prosecutes Genocide" *Christian Science Monitor* 13 March 1998: 1, 8. This article describes the development of international war crimes trials, including Nuremberg and Jerusalem, but does not mention Tokyo.

⁸⁵Dower, *Embracing Defeat*, 459.

extraordinary accomplishment—until the same trappings were fitted to a trial of imperialist leaders being charged, tried, and punished by their equally imperialist competitors. In other words, the ideas behind the Nuremberg trial need to be confirmed by the Tokyo proceedings.

This imbalance is precisely why the IMTs should be compared and contrasted. They featured the same major powers—France, the UK, USA, and USSR—during the same postwar period. Comparing Nuremberg with Tokyo is in that way more significant than, for example, comparing Nuremberg and the International Criminal Tribunals set up by the United Nations to judge the leaders of Rwanda and the former Yugoslavia for atrocities similar to those committed during World War II. Even if the trials' most important aspects are the similarities in their historical settings, certainly comparison should narrow down and perhaps reveal the reasons for their decidedly uneven legacies.

The Allies encouraged such comparison and fully expected to be examined and hopefully justified by history. In his opening statement at Nuremberg, Justice Jackson stated, “We must never forget that the record on which we judge these defendants is the record on which history will judge us tomorrow.”⁸⁶ The Allies claimed to apply universal legal principles, ones that should hold true for all people in all places at all times. Reconciling the courtrooms at Nuremberg and Tokyo helps reveal the difference between principle and practice—to borrow a phrase from a recent study, reveal “the politics of war crimes trials.”⁸⁷

Similarities

It is no coincidence that the same leaders ensured that both the Nuremberg and Tokyo trials took place. This is a key similarity between the IMTs since other trials have failed without such executive support—for example, the post-World War I plan to try Kaiser Wilhelm II.⁸⁸ The trial plan succeeded because President Truman gave the pro-trial group in Washington a strong mandate to proceed.⁸⁹ The origins of the Tokyo trial were less direct

⁸⁶IMT, *Trial*, 2:100.

⁸⁷Gary Jonathan Bass, *Stay the Hand of Vengeance: The Politics of War Crimes Trials* (Princeton, NJ: Princeton University Press, 2000)

⁸⁸Marrus, *Nuremberg Trial*, 10-13.

⁸⁹Bradley, *Road*, 195.

but also came from Washington.⁹⁰ The heads of state during the IMTs—Atlee, Stalin, and Truman—did not direct the trials, but both were dependent on executive authority for their creation.

Since the London Charter governed Nuremberg and was copied for Tokyo, it reveals a great deal about the trials' successes and shortcomings. First, it provided all major judicial aspects of the IMTs, including jurisdiction, rules and procedures. Second, the London Charter also extended the range of charges beyond traditional war crimes: Crimes Against Peace, Crimes Against Humanity, and the Anglo-American concept of conspiracy. Third, it secured the bench (and prosecution) for the victors only, an aspect of both trials which has been repeatedly criticized. While public opinion would not have stood for inclusion of even anti-Nazi German or anti-military Japanese justices, there was good reason for the prosecution to include representatives of the Polish government in exile, the Czech or Korean resistance, or perhaps even neutral nations. Lastly, though an original purpose of the non-traditional charges was to prosecute crimes of Germans against Germans (particularly Jews), neither tribunal prosecuted crimes of leaders against their own people. One Japanese researcher regards this as "one of [the IMT's] greatest failings" that meant "the Japanese people were never informed" of many crimes the militarists committed against Japanese as well as their colonial subjects in Korea and Taiwan.⁹¹ Of course, it is important to remember the "conception [of the trials] during the war in an atmosphere of mutual hate."⁹²

The greatest impact of the London Charter's governance of jurisdiction, rules, and procedures at both IMTs was the prosecutorial bias built into the system. Theoretically, this was of little consequence since the prosecution teams should not have abused their many privileges, but in practice abuses occurred at both trials. The most obvious was of documentary resources, which resulted in some absurd situations. For example, at the beginning of the Nuremberg case, 250 copies of documents were given to the press but only 5 to all defense

⁹⁰Piccagallo, *Japanese on Trial*, 10. The Tokyo orders came from the Joint Chiefs of Staff (JCS).

⁹¹Yuki Tanaka, *Hidden Horrors: Japanese War Crimes in World War II* (Boulder, CO: Westview Press, 1996), 133-134.

⁹²Hankey, *Politics*, xiii.

counsel, to whom the archives were closed.⁹³ Witness testimony provides another example: at Tokyo, due to the impossibility of simultaneous translation, affidavits—prepared with prosecution help—were accepted in place of courtroom witness testimony. The defense was not permitted to have similar affidavit sessions with such witnesses, but had to call them to court to perform cross-examinations.⁹⁴

This is not to say that defendants were afforded no protections. Though the London Charter was designed to convict Nazi leaders, the Nuremberg and Tokyo trials were not show trials. The judges took their positions seriously, and never allowed the prosecution to control the courtroom. Several defendants, notably Göring and Tojo, had little hope of getting light sentences but understood the nature of the trial and made use of the platform their testimony provided. Others, such as Albert Speer, Germany's Armaments Minister, and Mamoru Shigemitsu, who had been a leader of the peace faction in Japan, were able to gain considerable mitigation.

The precedent-setting charges are the basis of the legal importance of both trials, though especially Nuremberg. The IMTs would have had little significance in international law if they had been simply trials under well-established definitions of war crimes, or under domestic laws—as were held in Germany in the 1950-60s and were planned in occupied Japan but forbidden by SCAP.⁹⁵ Instead, these were the first trials whose defendants were charged with beginning wars of aggression, as well as with the less controversial charge of Crimes Against Humanity. The nature of the charges led one participant in the Tokyo trial to declare its “great consequence to jurists and students of international law.”⁹⁶

Differences

The Nuremberg and Tokyo trials did not take place simultaneously, only generally in

⁹³Taylor, *Anatomy*, 175, and Otto Kranzbühler, “Challenge to the Nuremberg Procedures” in Marrus, *Nuremberg Trial*, 248.

⁹⁴Brackman, *Other Nuremberg*, 147.

⁹⁵Christopher Browning, *Ordinary Men: Reserve Police Battalion 101 and the Final Solution in Poland* (New York: Harper Perennial, 1998), 144-145, and Dower, *Embracing Defeat*, 474-484.

⁹⁶Horowitz, “Tokyo Trial,” 475.

the same postwar period. Nuremberg was clearly the first; Supreme Court Justice Robert Jackson's April 1945 appointment as US Chief Prosecutor took place before Germany surrendered. While the planning for the Nuremberg IMT was not completed at that time, that Truman chose a member of the central judicial institution of the United States—when he could easily have assigned the task to some lesser civilian authority or the military—was not taken lightly. Jackson, who devoted his life to a career in a legal system that prided itself on justice, was a symbol of Anglo-American law, which “could not go along with pretended trials.”⁹⁷

In contrast, Truman waited to appoint Jackson's Far East counterpart until the end of November 1945, more than three months after the Pacific War ended. Even then he chose former Assistant Attorney General Joseph Keenan, who, though an excellent lawyer and organizer, had many shortcomings. Besides his noticeably lower rank, Keenan, who was a recovering alcoholic, moved in political instead of judicial circles, demonstrated lack of knowledge of Asian affairs, and had an abrasive personality that made him “often at the center of a storm.”⁹⁸ His first week in Tokyo he made a fool of himself by proposing that the major war criminals be tried under American law for starting wars in China and the Pacific “since the initial attack was against American territory at Pearl Harbor.”⁹⁹

More mundane aspects of the justices' courtroom presence gave each courtroom a different feel. At the first IMT, voting judges and alternates both participated and their individual opinions and personalities emerged in the record. Due to the bench's larger size at the IMTFE, the justices decided that only President of the Tribunal William Webb would normally address the court, so only he had a microphone.¹⁰⁰ The result was that everything coming from the judges was filtered through Webb's sometimes brusque personality, and transcripts reveal the Tokyo courtroom's more authoritarian setting.

Broader regional affairs during the period differed completely. In Europe, most of the

⁹⁷Jackson, quoted in Taylor, *Anatomy*, 46.

⁹⁸Brackman, *Other Nuremberg*, 55.

⁹⁹Quoted in Brackman, *Other Nuremberg*, 54-55.

¹⁰⁰Brackman, *Other Nuremberg*, 150.

continent was returning to stability and beginning to rebuild. Tensions between the West and Soviet Union over the shape of postwar central and eastern Europe were the biggest worries. Most of East Asia, on the other hand, went from one war into another. In China, the civil war between Communists and Nationalists resumed after Japanese troops withdrew, and local nationalists in what would become Indonesia, Malaysia, and Vietnam fought the returning imperial powers. The Philippines and India pushed for the independence they had been promised, and Korea was divided between the United States and USSR, making occupied Japan virtually the only politically stable area in the whole region.

While the Charters that ruled the IMTs were nearly identical, a different process produced each. After Jackson's appointment, the four victorious Great Powers—the UK, USA, USSR, and France—scheduled the International Conference on Military Trials (ICMT) in London to decide details. Each representative, whose positions held equal or superior status to Jackson's, had been granted executive authority to sign an agreement on behalf of his country. The resulting London Charter, a cooperative venture throughout, allowed for each signatory power to appoint a chief prosecutor for the trial.

The Tokyo Charter reveals itself as an exclusive product of the US occupation simply by its formal name: SCAP Special Proclamation of 19 January 1946. Though it was a modestly edited copy of the London Charter, this editing was a unilateral project; SCAP and the International Prosecution Section, which at the time included only Keenan and his appointments, controlled it completely. Though it allowed for more international representation—nine nations initially, with justices from India and the Philippines included later—the Tokyo Charter allowed for only one Chief Prosecutor appointed by the American commander, General MacArthur.

The charge of “a common plan or conspiracy” to commit aggressive war exposed this separate development. The initial reason the charge had been approved was that US leaders were convinced that a conspiracy, at least within the SS, existed.¹⁰¹ In other words, it

¹⁰¹Smith, *Road*, 117.

was easy to imagine Adolf Hitler at the center of a conspiratorial group including Heinrich Himmler, Hermann Göring, the *Gestapo*, and the *SS*. However, conspiracy was a crime defined only in Anglo-American common law, and was a particularly hard sell for Jackson at the ICMT in London. To convince French representative André Gros of its necessity, he finally resorted to naming a specific possible defendant, Hjalmar Schacht, who might be convicted only on that charge. Differences of opinion surfaced later as well. As the judges discussed sentencing, French justice Donnedieu de Vabres recommended that the conspiracy charge be thrown out, and though this was rejected, only eight of the twenty-two defendants were convicted on the count.¹⁰² After the trial, Henry Stimson stated, "If there is a weakness in the Tribunal's findings, I believe it lies in its very limited construction of the legal concept of conspiracy."¹⁰³

The situation in Japan was completely different. Japanese militarists had transformed the Emperor, Japan's only central figure, into a symbol of Japanese nationalism, but he was a timid private man—hardly a Hitler. There were no national organizations similar to the *SS*. Japanese leaders had never developed or adapted an ideology comparable to Nazism, though the native Shinto religion had been misused as a vehicle for nationalistic propaganda.

Inclusion of conspiracy as a crime was not a decision made by any international conference—only by Americans who were already familiar with the charge. This "gives a telling impression of the extent to which America could be driven by a respect for its own law. . . . The conspiracy charges worked particularly badly at the Tokyo trials."¹⁰⁴ The prosecution had to define the conspiracy widely enough to catch in its net nearly every cabinet member of the Japanese government plus the highest military officers for the previous fifteen years. Almost anyone could have participated in such a common plan, and twenty-three of twenty-five defendants were convicted on that count.

Another possible explanation for the immediate success of Tokyo's conspiracy charge—

¹⁰²Taylor, *Anatomy*, 550.

¹⁰³Henry L. Stimson, "Assessment of the Judgment," in Marrus, *The Nuremberg Trial*, 250.

¹⁰⁴Bass, *Stay the Hand*, 171.

and for its later infamy—lies with the judges who passed the verdicts. To spectators, the most obvious difference between the Nuremberg and Tokyo benches was the number of people: four versus eleven. At Nuremberg, two came from Anglo-American law practice, and two did not; at Tokyo, more than half were trained in Anglo-American law—the representatives of the US, UK, Canada, Australia, New Zealand, the Philippines, and India.¹⁰⁵ At the Tokyo trial, a simple majority determined all judgments; at Nuremberg, with only four voting judges, a simple majority was also a two-thirds majority. While familiarity with the concept of conspiracy certainly does not equate to a vote for conviction, doubtless it neither hurt the Anglo-American prosecutors' case nor helped the Japanese defense unfamiliar with it.

There was also a clear conflict of interest in some of the Nuremberg participants. At the ICMT, Justice Jackson and Sir David Maxwell-Fyfe had personally set the jurisdiction of the court before which they were prosecuting. Presiding were fellow designers Robert Falco, French alternate judge, and General Nikitchenko, the sitting Soviet representative. Nikitchenko's position is especially troubling, since at the ICMT he expressed the opinion that they were "dealing here with the chief war criminals who have already been convicted and whose conviction has been already announced by both the Moscow and Crimea declarations."¹⁰⁶

Two representatives on the Tokyo bench had conflicting interests of a different sort. Justice Radhabinod Pal, an Indian nationalist, clearly sympathized with the Japanese position and may have decided to acquit the defendants before the trial began.¹⁰⁷ Deflin Jaranilla of the Philippines had fought the Japanese as a volunteer and had been mistreated as a prisoner of war; his concurring opinion complained of the leniency of the sentencing.

The prevalent imperialist attitudes and outright racism of the time must also be considered in thinking about the Tokyo trial. The amendment of the Tokyo Charter to include representatives from India and the Philippines only partially solved the problem of imperial

¹⁰⁵Brackman, *Other Nuremberg*, 69.

¹⁰⁶"Minutes June 29" in Jackson, *Report*. Available 12 October 2000
<<http://www.yale.edu/lawweb/avalon/imt/jackson/jack17.htm>>.

¹⁰⁷Brackman, *Other Nuremberg*, 45.

powers trying their Japanese competitors. As for racism, even General Douglas MacArthur, who later showed great respect for the Japanese, was convinced early in the war that European mercenaries were flying enemy aircraft since Japanese racial features prevented them from being effective pilots.¹⁰⁸

Post-Trial Variances

Since the trials, the Nuremberg record has been more widely available and much more studied.¹⁰⁹ The complete transcript of the Nuremberg trial, widely available today, was published immediately after the trial in forty-two volumes including index under the name *Trial of the Major War Criminals before the International Military Tribunal, Nuremberg, 14 November 1945 - 1 October 1946*. This availability, combined with its relatively easy use, must be considered as a major reason for the far greater amount of scholarly work on the Nuremberg trial.

As for Tokyo, "public indifference to the Tokyo Trial has been matched by an apparent lack of interest on the part of the sponsoring governments themselves."¹¹⁰ No official collection of the Tokyo transcripts has ever been published. The first publication of even part of the Tokyo record was Justice Pal's dissenting opinion, which he published privately in India in 1953. The complete judgment, along with concurring and dissenting opinions, was edited and published in the Netherlands by Justice Röling in 1977. A private company finally published the complete transcripts in 1981—more than thirty years after the trial ended.¹¹¹ As for scholarship, the major English-language works on the Tokyo trial can be counted on one hand. Nuremberg has been remembered and praised, Tokyo forgotten.

¹⁰⁸William Manchester, *American Caesar: Douglas MacArthur 1880-1964* (Boston: Little and Brown, 1978), 171. For more examples, see Dower, *War Without Mercy*, 104.

¹⁰⁹See, for example, John R. Lewis, *Uncertain Judgment: A Bibliography of War Crimes Trials* (Santa Barbara, CA: Clio Books, 1979).

¹¹⁰Telford Taylor, "Preface," in Horowitz, "Tokyo Trial," 473.

¹¹¹B. V. A. Röling and C. F. Ruter, eds., *The Tokyo Judgment: The International Military Tribunal for the Far East (I.M.T.F.E.), 29 April 1946-12 November 1948* 2 vols. (Amsterdam: APA University Press, 1977) and R. John Pritchard and Sonia Magbanua Zaide, *The Tokyo War Crimes Trial* 22 vols. (New York and London: Garland, 1981).

Conclusion

As the Allies developed a plan to deal with the leaders of occupied Germany, they did not have such luxuries as detailed studies of the Nazi regime, helpful summaries of available information, or even deadlines, since surrender could come at any moment. The Nuremberg trial's development included haphazard planning, logistical challenges, and fears that a trial would turn into a Nazi propaganda vehicle. The trial plan became official policy only after President Truman publicly appointed Supreme Court Justice Robert H. Jackson as "chief of council" and Hitler's death was confirmed.¹¹²

What made this last-minute trial develop into a landmark of international law? Its importance stems from decisions made at the International Conference on Military Trials (ICMT), which met in London in the summer of 1945. The resultant Charter of the International Military Tribunal (IMT) first defined as criminal such actions as conspiracy and aggressive war. The major goal was not simply to punish the guilty—other means could have quickly and easily done so. Instead, the Allies had a much grander aim: in the words of Justice Jackson's opening address, "to utilize international law to meet the greatest menace of our times—aggressive war."¹¹³ While Jackson gave the most idealistic speech, all four head counsels at Nuremberg highlighted this goal.¹¹⁴ The aggressive war charge culminated a decades-long attempt to expand the scope of war crimes beyond violations of the Hague and Geneva Conventions.

The IMT was not perfect. The conspiracy charge probably should have been dropped since it "unnecessarily complicated the trial and failed to serve the purpose for which it was intended."¹¹⁵ Likewise, the prosecution of organizations in addition to individuals accomplished little since de-Nazification laws met the same goals. Creators of the London Charter were present both in the prosecution, which abused its privileges, and on the bench, which

¹¹²Smith, *Road*, 208.

¹¹³Marrus, *The Nuremberg Trial*, 80.

¹¹⁴See Marrus, *The Nuremberg Trial*, 79-97.

¹¹⁵Marrus, "Nuremberg: Fifty Years After," 567.

disallowed embarrassing comparisons to Allied actions such as the Soviet invasion of Poland.

However, the Allies demonstrated their commitment to predefined law. The prosecution explicitly opened its case to future criticism as well as defense rebuttal. Unlike the outgoing Axis regimes, the Allies were willing to admit that they might be wrong, which helps explain continuing interest in Nuremberg despite its shortcomings and failure as a deterrent. While the prosecution dominated the defense, the justices controlled the courtroom and refused to compromise justice. The unanimous judgment dealt harshly with the guilty—delivering twelve death sentences and three for life imprisonment—but also acquitted three defendants.

Between the Nuremberg trial's beginning and judgment, a similar effort began for the wartime leaders of Japan. On paper, the two trials were remarkably similar. Both IMTs took place in the same postwar era, under basically the same rules and principles, and claimed to harbinger a new responsibility in international relations. Each trial punished high-ranking Axis leaders for heinous crimes, though courts-martial might have accomplished this with less time and effort. Each also successfully revealed a great deal of information, including otherwise inaccessible witness testimony, about the character of the regimes that had been in power in Germany and Japan.

In reality, while the Nuremberg trial was developed cooperatively and took place in a relatively stable Europe, the International Military Tribunal for the Far East (IMTFE) was dominated by the United States, received little attention from governments or the press, and took place while much of East Asia was in revolution or civil war. At the same time as the Western powers tried Japanese leaders for attempting to conquer East Asia, they were forcibly reimposing their will in places like the Dutch East Indies and French Indochina. While the Tokyo trial had greater international representation, the United States wielded far greater control than any nation had done at Nuremberg. This was a product of the Pacific War, in which United States troops had done most of the fighting, and the occupation of Japan, which was not divided up like Germany.

At the IMTFE, seventeen of the twenty-six defendants were high-ranking military officers,

reflecting military control of the Japanese government. MacArthur, with the prosecution's cooperation, protected the Emperor from prosecution, though his Lord Keeper of the Privy Seal, Marquis Koichi Kido, was tried as a proxy of sorts. The prosecution used Kido's extensive diary as a guide to investigation, which raises questions about the validity of using one defendant's opinions against others. The Tokyo proceedings revealed more intrigue and divergent goals among the accused than those at Nuremberg. The military defendants argued that Japan was fighting a war of economic self-defense. These arguments, the same that Japan had used before and during the war, were unlikely to convince Allied judges of their innocence.

The lack of screening for the Tokyo Tribunal's judges has been its most criticized aspect.¹¹⁶ Several justices had prominent shortcomings or conflicts of interest. More than half had a background in Anglo-American law, which was not practiced in Japan and therefore was unfamiliar to the defendants. The Tokyo Judgment, supplemented by three full and two partial dissents, delivered seven death sentences, ten life imprisonments, and no acquittals.

The most surprising sentence was hanging for former Prime Minister Hirota, who had no direct connection to atrocities. Though all the justices except Pal signed a secrecy agreement, from the information in dissenting opinions and his own recollection Justice Röling later concluded that Hirota had been sentenced to death on a 6-5 vote.¹¹⁷ The bench also found all but two defendants guilty of a conspiracy to commit aggressive war; at Nuremberg, only eight of twenty-two were convicted on that charge. The IMTFE's decisions were not unanimous; in their later published opinions, Justice Pal and President Webb objected to the conspiracy charge, Webb calling it "nothing less than judicial legislation."¹¹⁸

Why is the International Military Tribunal today considered a landmark of international law in contrast to its counterpart in the Far East? The Nuremberg trial's positive legacy is easier to explain than the Tokyo trial's negative one. Despite its shortcomings, the Nurem-

¹¹⁶See, for example, Minear, *Victor's Justice*, 75-92.

¹¹⁷Dower, *Embracing Defeat*, 628 n.29.

¹¹⁸William Webb, "Separate Opinion" in Röling and Ruter, *Tokyo Judgement*, 1:475. Quoted in Minear, *Victor's Justice*, 42, and Dower, *Embracing Defeat*, 463.

berg trial had truly impressive results. For the first time, victorious powers were willing to let international law—albeit a form dictated by the winners—decide the fate of their foes.

At Tokyo, however, discrepancies between the European and Pacific situations became apparent. The Pacific War had been no just war, as was clear to both the Japanese defendants and their judges. While Japanese troops committed worse crimes, the Allies were imperialist powers guilty of many of the same crimes—mistreatment of enemy soldiers and civilians, abusing native peoples, and attacking other countries aggressively—as the Japanese. The Nuremberg trial had emphasized that the Allies were different; the Tokyo highlighted the Allies' shortcomings.

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