

Inaugural March of the Living CLE Program Itinerary*

Co-sponsored by:
The Miller Center for Community Protection and Resilience,
Rutgers the State University of New Jersey, New Jersey State Bar Association,
and Rutgers School of Law

Friday, April 13

- 9:00-9:20** **Opening Remarks:** John Farmer, introducing Paul Miller and Richard D. Heideman
- 9:20-11:45** **Morning Program: The Role of Lawyers and Judges in the Holocaust and its Aftermath**
Moderator/Emcee: **Stuart M. Lederman**, Partner, Riker Danzig.
Speakers:
Richard D. Heideman, The Nuremberg Laws and the Legalization of Hate
The Honorable Irwin Cotler, Holocaust, Genocide and Human Rights:
Universal Lessons for the Legal Profession in Preventing and Combating Mass Atrocity.
John Farmer and Joshua Greene, Video interview regarding the role of lawyers in seeking justice after atrocity
The morning program will explore the ethical dimension of the role of lawyers and judges in facilitating – and in some cases frustrating – the Nazi program of isolating, and ultimately eliminating, German and European Jewry. Its relevance to the modern practice of law cannot be overstated. Lawyers and judges are confronted on a regular basis with potential ethical dilemmas relating to the organizations in which they work, the clients they represent, and the relative justice or injustice of the legal framework within which they practice. The history of the conduct of lawyers and judges during the Nazi period offers object lessons in the pitfalls of conformity to an unjust structure and of the real cost of the exercise of courage in struggling against overwhelming injustice.
- 10:40-10:55** **Coffee break**
- 11:45-12:20** **Luncheon Keynote: Professor John Q. Barrett**, St. John's School of Law: Robert H. Jackson and the Holocaust.
Justice Jackson is rightly celebrated by many as the leading Supreme Court Justice of his era – and perhaps of the twentieth century. But his greatest legacy may lie in his work during the Nuremberg Trials. In insisting that the gravest atrocity could be not merely avenged but brought to justice within the rule of law, Justice Jackson became, in those months, the conscience of world civilization.
- 12:20-13:00** **Buffet Luncheon**
- 13:00-14:30** **Never Again, Part One: Modes of Direct Intervention**
Moderator/Emcee and presenter on the role of civil litigation in the post-Holocaust era: **Richard D. Heideman**
Speakers:
Richard D. Heideman, Senior Counsel, Heideman Nudelman & Kalik, P.C., “Holding Sponsors of Terror Legally Accountable”
William Shawcross, author, *Justice and the Enemy*, on the lessons learned from Nuremberg as applied to prosecutions of the 9/11 conspirators.
Michael Hurley, retired CIA officer and former MSC staff expert on the Balkans, on the pursuit of Serbian war criminals
Dr. Elisa Forgey, Director, Holocaust Education and Genocide Prevention Program, Stockton University, on current genocide prevention efforts.
Irving Roth, Holocaust survivor, on what he is doing to prevent genocide.
Legal efforts to rectify modern atrocities and to prevent future genocides are an underappreciated legacy of the effort to do justice after the Holocaust. This panel will explore several such efforts, ranging from the use of civil litigation to compensate victims of terrorist attacks and to frustrate efforts to conceal assets, to the continuing efforts to find and prosecute perpetrators of genocide, to efforts in settings from Iraq to Rwanda to prevent genocide from occurring where atrocity seems imminent.

* Please note that speakers and schedule are subject to change.



14:30-14:40 Coffee Break

14:40 -16:00 Roundtable: *Never Again, Part Two: Modes of Prevention: Lessons from Europe and the United States*

With close to 1 billion people worldwide living in nations other than where they were born, we live now in a world of vulnerable populations. This panel will explore the legal aspects of ongoing efforts to protect vulnerable populations in Europe and the United States. It will highlight the potential legal obstacles to police-community cooperation and facilities protection in different settings (e.g., laws regarding privacy protection, laws discouraging collaboration, building codes and zoning laws that compromise security), and will identify methodologies and best practices to achieve greater security for vulnerable populations.

Roundtable Moderator: **Russ Deyo**

Roundtable Participants:

Elie Honig, Director of New Jersey Division of Criminal Justice; **Jonathan Biermann**, Director Jewish Community Security, Brussels; **Paul Goldenberg**, former Director Secure Communities Network (US); **John Farmer**; **Richard Benson**, founding director, Community Security Trust;

With close to 1 billion people worldwide living in nations other than where they were born, we live now in a world of vulnerable populations. This panel will explore the legal aspects of ongoing efforts to protect vulnerable populations in Europe and the United States. It will highlight the potential legal obstacles to police-community cooperation and facilities protection in different settings (e.g., laws regarding privacy protection, laws discouraging collaboration, building codes and zoning laws that compromise security), and will identify methodologies and best practices to achieve greater security for vulnerable populations

• **Presentation of Award to Shalom Ministries: Prof. David Machlis & Prof. John Farmer**

16:00 Closing conversation, Dialog with a righteous gentile

Friday Night (Shabbat) Dinner

Conversation: Malcolm Hoenlein, Executive Vice-Chairman and CEO, Conference of Presidents of Major American Jewish Organizations and **Dr. Monica Crowley**, Senior Fellow at the London Center for Policy Research in conversation with **John Batchelor**, host of the nationally syndicated John Batchelor Show (Introduction by Paul Miller) **During Friday Dinner**

Against the backdrop of the rising tide of right-wing and neo-Nazi sentiment in both Europe and the United States, this discussion will highlight the role that lawyers should play in mitigating the effects of this resurgence and in frustrating its ultimate goals. This discussion will also look at the political changes occurring around the world and their implications for law development and enforcement.



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Legalizing Hate: The Significance of the Nuremberg Laws and The Post-War Nuremberg Trials

RICHARD D. HEIDEMAN*

I. INTRODUCTION

The establishment of the Nuremberg Laws was a defining moment in history, as the embodiment of state-sponsored, sanctioned and enforced hate, religious discrimination, economic boycotts, and persecution of Jews in Germany reached epidemic proportions. While some believe the implementation of the Nuremberg Laws occurred overnight, the process in fact, although relatively brief, was gradual, beginning in the earliest phases of Nazi activities. Even prior to the 1933 election of Adolf Hitler as Chancellor, and the official onset of the National Socialist German Workers' Party (NSDAP) as the national ruling government organization, concerted efforts had already been initiated to delegitimize the very existence of the Jewish people in Germany and eventually throughout Europe.

The progressive strength of these social endeavors paved the way for governmental sanctions that would effectively serve as the first anti-Semitic decrees, among which were the Nuremberg Laws. These laws solidified the political position as it related to the Jewish citizens of Germany, drawn from the ideology laid out in the Nazis' twenty-five-point plan of 1920.

A study of state-sanctioned hate is essential to understanding the wide-ranging and devastating impact of the Nuremberg Race Laws. The Nuremberg Laws and decrees highlight the tremendous power and horrendous misuse of popular government in hijacking and corrupting the rule of law. It is inconceivable to the modern mind that a democratic

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government could be seized and used to implement laws so perverse that they rejected, denied, and derogated an entire people's right to live free, respected, and enabled in an educated, cultured, and modern society. These laws emboldened an entire nation to turn against their fellow citizens, neighbors, colleagues, and friends, many of whom had fought alongside them in the First World War, and subjected the Jewish people to social, economic, and political isolation, ultimately culminating in the attempted mass extermination and genocide of an entire people and other minorities.

The laws of the Nazi government made the Holocaust possible. They permeated all aspects of daily life in German society, stoked national Anti-Semitism, and enabled, influenced, and emboldened the police and German judiciary to act with complete disregard for the inalienable rights of people to be safe and free. This article addresses a myriad of ways in which radical Nazi ideology took root, shaped public opinion, and transformed the rule of law into the ultimate weapon of terror.

II. THE NUREMBERG LAWS: ENACTMENT, IMPLEMENTATION AND DEVASTATION

Immediately after the Nazis took power in 1933, Jews were faced with government-enforced discrimination. Nearly two years before the Nuremberg Laws were enacted, the behavior of the bodies and forces involved in both government and society reflected the blatant hatred toward its Jewish citizens.

In March 1933, Storm Troopers (SA) raided Jewish-owned stores throughout Germany in order to segregate Jews from Germans. The SA dragged Jewish workers into the streets, where they proceeded to humiliate and degrade them by forcing them to march in public carrying signs that identified them as "Jewish swine," alongside Germans who employed or engaged socially with Jews. Almost immediately, the campaign to promote boycotting Jewish establishments took root, urging the citizenry to buy their goods only from Aryan, German businesses.¹ Less than a month later, Jews became barred from holding public office, were banned from certain forms of employment such as academia, media, banking, farming, and public cultural appearances; Jewish employees in Christian homes were fired, for fear of their influence on Aryan children; Jewish immigrants were denaturalized and sent to refugee

1. *The Boycott of Jewish Businesses*, U.S. HOLOCAUST MEM'L MUSEUM, <https://www.ushmm.org/outreach/en/article.php?ModuleId=10007693> (last visited Jan. 13, 2017).

camps on the border of Poland;² and Jewish lawyers were banned from practicing in German courts. The entire society was transformed in the image of the exemplary Nazi and Aryan ideal.

The Nazis actively abused their power in an effort to change the way the general public saw Jews. Signs began to appear in shops and other windows that said, “Jews Not Welcome,”³ and communities even began posting placards and banners with the same message. The fact that these actions were not imposed by the government, but rather by the local population itself speaks volumes regarding the impact of the governmental incitement and endorsement.

The largest action took place on April 1, 1933, with a daylong nationwide boycott of Jewish businesses. Members of the SA and Gestapo (SS) were stationed in front of stores and offices to inform passersby that these shops had Jewish proprietors, discouraging them from entering or purchasing. Many store windows had the German word “Jude” (Jew) written across them, or a large Star of David painted across the door. Nazi rhetoric had long proclaimed the Jews as evil aggressors who sought to destroy Germany and the German way of life. In front of a store in Berlin, official SA forces held a sign that said, “Germans! Defend Yourself! Don’t buy from Jews!”⁴ In some towns anti-Jewish violence erupted and, despite the official boycott ending at midnight, local boycotts continued in subsequent years.⁵

A week after the national boycott, a law was passed restricting employment in the civil service to “Aryans,” causing Jewish government workers, including teachers, to be fired based entirely on their religion and heritage. In the following weeks, laws targeting other Jewish professionals, such as lawyers and doctors, were passed by the Nazi state.⁶ Today in Schöneberg, a district in Berlin, there are signs citing the various four hundred laws or decrees that forcefully excluded Jews from society:

“Jews in Berlin may only buy food between four and five o’clock in the afternoon.” “Jews are not allowed to have pets.” “Jewish Veteri-

2. Greg Bradsher, *The Nuremberg Laws: Archives Receives Original Nazi Documents that ‘Legalized’ Persecution of Jews*, 42 PROLOGUE, no. 4, Winter 2010, <https://www.archives.gov/publications/prologue/2010/winter/nuremberg.html>.

3. *This day in History – September 15, 1935: Nuremberg Race Laws Imposed*, HISTORY.COM, <http://www.history.com/this-day-in-history/nuremberg-race-laws-imposed> (last visited Jan. 13, 2017).

4. *Photograph*, U.S. HOLOCAUST MEM’L MUSEUM, https://www.ushmm.org/outreach/en/media_ph.php?MediaId=2672 (last visited Jan. 13, 2017).

5. *Jews in Prewar Germany*, U.S. HOLOCAUST MEM’L MUSEUM, <https://www.ushmm.org/outreach/en/article.php?ModuleId=10007687> (last visited Jan. 13, 2017).

6. *Id.*

narians may not open practices.” “General employment ban.” “Jews aren’t allowed to leave home after 8PM.”⁷

The laws went far beyond inhibiting only economic activity. The Nazis attempted to isolate Jews by controlling their economic, social, religious, family, and private lives through a series of oppressive laws designed to segregate, ostracize, and destroy the sanctity of home and community, resulting in the burning of books, destruction of culture and religious institutions, and leading to both the ghettoization of the Jewish communities and the deportation of millions of people whose lives and families were ultimately destroyed.

In doing so, the Nazis effectively segregated the Jewish community in its entirety, dictated what they were allowed to do, when they were allowed to do it, and forced them to live as second-class citizens. Designed to impoverish the Jews and create uninhabitable conditions, the Nuremberg Laws fostered the belief that Jews were evil and Germany would only be successful again if there were no Jews to weaken, poison, or sabotage their purity as a nation.

In addition to the anti-Jewish legislation and laws, the Nazi regime sought to alter the way Germans thought and acted in their daily lives. The resulting “groupthink mentality” helped the Nazis achieve multiple goals: on the one hand, fostering an oppressed, ostracized, punished Jewry, and on the other, creating a society that enabled and supported torture, murder, and subsequently, full-scale extermination.

In the Weimar Republic, civil servants were deemed politically neutral in order to prevent them from enforcing one party’s agenda over others, regardless of who was in power. Under the Nazis, however, laws “redefined [civil servants] as ‘inherently political’” in an effort to turn the entire political system against Jews.⁸ Civil servants had to vote along Nazi party lines, live their lives in accordance with Adolf Hitler’s views, and were barred from filing complaints against superiors even if they disagreed with the morality or legality of an order.⁹ Nonpolitical entities were thus coerced or corrupted so that they would become tools of the Nazi Party. The courts were similarly infected with radicalism as

7. Ian Johnson, *‘Jews Aren’t Allowed to Use Phones’: Berlin’s Most Unsettling Memorial*, NEW YORK REVIEW, <http://www.nybooks.com/daily/2013/06/15/jews-arent-allowed-use-telephones-berlin-memorial/> (last visited Jan. 13, 2017). For a larger sampling of the over four hundred anti-Semitic Nazi decrees, see *Antisemitic Legislation 1933–1939*, U.S. HOLOCAUST MEM’L MUSEUM, <https://www.ushmm.org/wlc/en/article.php?ModuleId=10007901>, where twenty-nine of them are listed and briefly explained.

8. INGO MULLER, *HITLER’S JUSTICE: THE COURTS OF THE THIRD REICH* 82 (Deborah Lucas Schneider trans., Harv. Univ. Press 1991).

9. *Id.* at 82–83.

German law professors were conscripted to write defenses of clearly discriminatory and blatantly illegal, yet seemingly binding, laws.

Academia was also infected with the venom of Nazi ideology. Professors wrote indefensible and absurd arguments that justified or considered radical laws “‘advisable’ from a legal point of view” so as to further the Nazi agenda.¹⁰ There was no one to argue against the party’s changes as Hitler and the Nazis proceeded to dismiss “120 of the 378 scholars who had been teaching at German law schools in 1932.”¹¹

It was through this unique campaign of persecution and terror that the Nazis eliminated their political enemies, resulting in the eventuality that essentially left no one who was willing to challenge Nazi laws that simultaneously crippled the Jews’ and non-Nazi Germans’ ability to counter the onslaught of their ideology of hate. Justice gave way to radicalism as the court system became a Nazi propaganda tool that was more concerned with promoting the party’s ideology than protecting the country’s citizens. It supported insidious laws with ludicrous explanations that based right and wrong on medieval values such as duty and honor in service to the Nazi government and Aryan race.¹² It was simple for Third Reich courts to continue supporting the Nazi laws after creating early precedents in 1933 that took away political rights from anyone who opposed the NSDAP. After taking away their opponents’ political rights, it was easy for them to justify stripping other liberties from German Jews, inhibiting their ability to thrive economically, socially, religiously, or humanly, now considered official enemies of the state.

The growing momentum of these laws came to a head when, on September 15, 1935, the Nazi Party revealed and instituted the Nuremberg Race Laws at their annual party rally. Hitler did not simply issue a dictatorial decree establishing his new laws; instead, he requested that the Jewish expert at the Interior Ministry, Bernhard Lösener, help draft laws that would achieve his goals. Lösener was unable to capture Hitler’s ideas in legitimate laws, so eventually Hitler told him to “simply draw up something that corresponded with a certain passage from his book *Mein Kampf*.”¹³ Additionally, to utilize the full force of law and to ensure that his new race laws were universally accepted, Hitler read them to the German Parliament, which proceeded to vote on and approve the laws. The representatives of the people applauded Hitler’s

10. *Id.* at 68.

11. *Id.* at 68–69.

12. *Id.* at 77.

13. Nathan Stoltzfus, *Societal Influences on the Promulgation and Enforcement of the Nuremberg Laws*, 94 *SOUNDINGS*, no. 3/4, Fall/Winter 2011, at 378.

new laws and disseminated support for the legalized Nazi ideology to their constituencies. In this way, Hitler and the Nazi Party were able to adhere to valued German traditions by respecting the separate powers of government and representation of the people, while simultaneously stripping a section of the population of their citizenship.

Much like the restrictions imposed in the first years of the Nazi regime, this new set of laws identified Jews as low-class citizens, stripped Jews of their German citizenship, prohibited them from marrying or engaging in sexual relations with Aryan Germans, and classified them as foreign nationals no longer entitled to the protections and rights of German citizens under the law.¹⁴

The Nuremberg legislation became the cornerstone for legalized persecution against former German citizens.¹⁵ Unlike any other laws in history, these laws directly targeted German citizens with the intention of formalizing a statewide campaign towards their “*entfernung*,” or their elimination. The Reichstag (Germany’s Parliament) and German judiciary adopted and upheld the laws as valid legal doctrine that they knew would have significant adverse effects on what became former-citizens. The laws classified hundreds of thousands of people as Jews based on whether they had the blood of three or four Jewish grandparents. The Nazis were hesitant to label those who were half-Aryan and half-Jewish as Jews because they did not want to alienate such a large portion of the population. Extremists such as Dr. Gerhard Wagner argued that “partial Jews were more dangerous than full Jews because their mix of German and Jewish blood would enable them to lead the state’s enemies with the skill of Aryans.”¹⁶ Nonetheless, countless individuals from intermarried families found themselves swept up in the reign of terror and cornered into a Jewish identity they had never possessed. Even more than formalizing a code of laws to target Jews, the Nuremberg Laws encouraged a new code of conduct for the German people which forced and enabled them to turn against their neighbors, colleagues, former friends, and even distant family members. With the laws, institutions, and people of Germany against them, there was no hope for Jews to have a decent life or to be safe in their homes, communities, religious institutions, businesses, schools, or chosen professions.

Some of the best examples of how the race laws affected people can be identified through an examination of the ways in which peoples’

14. *The Nuremberg Laws: Background & Overview*, JEWISH VIRTUAL LIBR. (2016), <http://www.jewishvirtuallibrary.org/jsource/Holocaust/nurlaws.html>.

15. Bradsher, *supra* note 2.

16. *The Nuremberg Laws: Background & Overview*, *supra* note 14.

attitudes changed toward “mixed race” couples of Germans and Jews. The Nazis referred to the mixing of races as “race defilement” and convinced the German people that the “German *Volk*” (or what the Nazis termed Aryans) would only survive if there was a system in place to ensure Germans had only pure Aryan children.¹⁷ Thousands of Germans were either brought to trial for the crime of race defilement or investigated but not charged. Mixed couples grew weary of the “condemnation and harassment they faced on a near daily basis” from the rest of their community.¹⁸ In small towns, such as Ramscheid, Jews in mixed couples were arrested due to “community outrage” over incidents such as a Jewish man and his girlfriend having a child out of wedlock, despite their marriage having been delayed twice due to anti-Jewish discrimination and violence.¹⁹ While Ramscheid officials probably exaggerated the community outrage, children and adults alike talked about the couple as a serious scandal.²⁰

Smaller happenings, such as harassing couples until they stopped going to riverfronts and beaches together in their bathing suits, occurred regularly. Some confrontations turned violent as Jewish men and their non-Jewish girlfriends were assaulted in the street and paraded around town, announcing their crime of having social and sexual relations with someone of a different race.²¹ The communal disapproval began even before the Nuremberg Laws were enacted; due to their passage, many mixed couples simply decided that it was better to split when their relationship became a burden and source of danger.

Aryan men and women alike ended their relationships with Jews “in order to spare [themselves] further trouble and inconvenience” despite potentially never previously facing harassment.²² The constant threat of arrest, humiliation, and being categorized with Jews was enough to make most Aryan Germans reconsider and put an end to their sexual and social involvement with Jews. In 1932, just before the Nazis came to power, 65.1% of Jews in Germany were marrying someone not racially considered Jewish. However, by 1939 that number had plummeted down to 20.6% of Jews involved in new marriages.²³ The towns

17. Patricia Szobar, *Telling Sexual Stories in the Nazi Courts of Law: Race Defilement in Germany, 1933 to 1945*, 11 J. HIST. OF SEXUALITY (SPECIAL ISSUE) 131, 131–32 (2002).

18. *Id.* at 135.

19. *Id.* at 136.

20. *Id.*

21. *Id.*

22. *Id.* at 137.

23. Nico Voigtländer and Hans-Joachim Voth, *Married to Intolerance: Attitudes toward Intermarriage in Germany, 1900–2006*, 103 AM. ECON. REV. 79, 80 (2013).

that showed the biggest decrease in approval of mixed marriages between 1932 and 1939 are reportedly among the least tolerant today.²⁴

In the early years of the blood purity laws, Jews were sentenced to short jail sentences ranging from three months to one year. However, the Ministry of Justice decided a longer punishment was necessary, and many Jews perished during their multi-year incarcerations due to harsh conditions.²⁵ Jewish women could not be charged or sentenced for race defilement, though they could be charged as witnesses and were often held in custody during the investigation and sometimes for months after the trial ended. By the 1940s all Jewish men and women involved in race-defilement cases were turned over to the secret state police, as official policy mandated.²⁶

Anti-Semitism of the Nazi Party represents a complex ideological conspiracy through the blending of acts committed under the “authority” of government and the willing conduct of citizens, demonstrating evil intent, design, and an enterprise committed to disenfranchisement, destruction, and death. Moreover, it successfully fostered negative perceptions and animosity toward Germans of Jewish descent, which were wholly based upon the fallacious assertion of “purity of race,” an issue that easily garnered and emboldened hatred. The true objective, as some historians claim, was the obliteration of people born into, and practicing, their religion, beliefs, and way of life—totally disregarding the sanctity of life, right of expression, and the rich contribution the Jewish people had made to the culture, education, and society of German civilization.

Attacks upon Jewish institutions increased, and the infamous *Kristallnacht*—the Night of Broken Glass—in November 1938, saw the convergence of state and individual actors burning synagogues throughout Germany.²⁷ The full power of the government, combined with the activated and legitimized hatred of the citizens, sanctified destruction, hate, and murder. The violence and murder, however, must be viewed in the context of the government initiated and encouraged policies and practices of defilement.

Without the German people’s consent and approval, it would have been impossible for the Nazis to enforce their inhumane laws. By first convincing the average German that the loss of the First World War and

24. *Id.* at 81.

25. Szobar, *supra* note 17, at 139.

26. *Id.* at 139–40.

27. *Kristallnacht*, U.S. HOLOCAUST MEM’L MUSEUM, <https://www.ushmm.org/wlc/en/article.php?ModuleId=10005201> (last visited Jan. 13, 2017).

the economic hardship that followed was all because of the Jews, and subsequently identifying the dangers they represented to every man, woman, and child, the Nazis made the Jew the common enemy of every German and the Reich as a whole. Hence, while the Nuremberg Laws may have, in one sense, been in line with the emergence of a body of self-justified public opinion, these concepts created and promulgated by the Nazis were borne from the long history of anti-Jewish sentiment in German society.²⁸ The laws made it legally acceptable for people to condemn and attack Jews—a significant step beyond making it simply socially acceptable to lash out at them. The Nuremberg Laws also permitted and encouraged the German people to become more suspicious of the private lives of people with whom they had been friendly for years. Court cases relied heavily on witness testimonies, drawing the German population into the process of determining who was a Jew and who was not. Family members were compelled to testify before the court and asked to explain their relative's ancestry and racial descent.²⁹

Not everyone could identify a Jew by sight or name because of the generations of mixed couples and the misassumptions about “Jewish characteristics.” To counteract this, courts and police instructed people on ways to distinguish between Jewish and Aryan women. On an institutional level, the government attempted to teach German citizens how to separate themselves from the undesirable Jews based solely on looks, physical characteristics, and social interactions.

Organizations, such as the police force, promoted discriminatory practices on their own, without direct orders from the Nazi government. They explained different ways to determine if someone was Jewish, such as: if she used Jewish expressions; portrayed “characteristically Jewish traits;” her appearance; the fact that she had Jewish acquaintances; and racial-appearing physical characteristics beyond hair and eye color.³⁰ Courts also pointed to pictures of Jewish women to show features that could be seen hidden behind blonde hair and blue eyes. The race laws and the institutions that promulgated them encouraged the average German to pay extra attention to the people with whom they and their neighbors interacted. Even when Jews tried to follow the law by engaging in sexual relations only with people they believed to be Jewish, they could be punished. Before the Stettin County Court, for example, a Jewish man pleaded that he asked his partner if she was Jewish

28. DANIEL JONAH GOLDHAGEN, *HITLER'S WILLING EXECUTIONERS: ORDINARY GERMANS AND THE HOLOCAUST* 32 (Vintage Books 1997).

29. Szobar, *supra* note 17, at 146.

30. *Id.*

and that the woman assured him that her mother was Jewish.³¹ While he initially won the case, on appeal at the Supreme Court it was decided that Jews had the legal obligation to check official documents and that he had failed to do so; therefore, he violated the Law for the Protection of German Blood and German Honor. When Jews attempted to comply with the law, the courts found ways to ignore the facts and condemn the Jews to concentration camps, even including determining that official documents were not enough to prove a person's nationality.³²

Court decisions included language that supported the Nazi myth that Jews were fundamentally different from Germans. They claimed that Jewish women were sexual deviants, while the men were animalistic "pimps, pornographers, and 'white slave traders' whose sole desire was to sexually exploit 'German Women.'"³³ As to be expected, Germans found these to be horrifying violations of acceptable social behaviors and were encouraged to avoid interactions with Jews who intended to "spread syphilis and other sexual diseases . . . in a plot to undermine the Aryan race."³⁴ The elite, and the members of society responsible for determining and enforcing acts for the good of the nation, further promoted the separation of races by infecting the average German with hateful lies that served to create a larger divide between what it meant to be German and what it meant to be Jewish.

Following the implementation of discriminatory laws, there was a widespread movement against Jewish life that influenced everyone from children to community officials. After the assassination of Ernst vom Rath, a German embassy official in Paris, by a Jewish teenager, chief Nazi leaders decided there should be a night of violent raids against Jews since "World Jewry" was responsible for the murder.³⁵ Rather than make it an official attack, the Nazis used local leaders and the Hitler Youth units throughout Germany to destroy Jewish-owned homes and businesses in a night of "spontaneous" riots designed to further divide German civilians from the Jewish population. The tragic events of *Kristallnacht*—twenty-four hours of devastation of synagogues, religious institutions, and Jewish businesses—largely destroyed the fiber and fabric of the Jewish communities and Jewish life. The effects of Nazi law and ideology were evident as young Germans were rallied to violence, while German police arrested as many Jews as possible, specifically

31. MULLER, *supra* note 8, at 105–06.

32. *Id.* at 106.

33. Szobar, *supra* note 17, at 147.

34. *Id.*

35. *Kristallnacht*, *supra* note 27.

targeting young, healthy men.³⁶ Police recorded incidents of rape, murder, and suicide during and after *Kristallnacht*, but they only arrested Jewish men, not the German perpetrators.

Out of fear that German insurance companies would lose money fixing the damaged buildings, shattered windows, and other evidence of destruction, the Nazi government passed legislation forcing the Jewish community to pay one billion Reichsmarks (US \$400 million at 1938 rates), and transferred Jewish-owned businesses to Aryans for a fraction of the value.³⁷ Jews had two options: comply with the law or be arrested and possibly transported to some of the first concentration camps that formed before and after *Kristallnacht*. These post-*Kristallnacht* laws aimed to further remove Jews from social life and eventually resulted in the expulsion of Jewish children from schools, as well as a ban preventing Jews from being admitted to German public places such as theaters and concert halls.³⁸

Germans banded together, closing their ranks, and their increased ridicule and repression of Jewish life snowballed into massive support for the government in its efforts to “protect” the German people from outsiders. It became so extreme that the courts decided that “dishonor to the race . . . can also be committed without physical contact” or intentional sexual situations.³⁹ Despite the court’s clear knowledge of how interrogations were performed coercively in order to extract a confession from Jews, they convicted Jews of violating the Blood Laws.⁴⁰ Courts allowed any means necessary in order to “protect” German blood. After the Nazis removed any jurists willing to fight for true justice, legal institutions realized it was better to conform to the Party’s ideas of defending the Aryan race.

The Nuremberg Laws did as much damage to Jewish life as the Nazi violence. Gradually removed from public life and anti-Semitism being codified into law, the ideology of persecution became the accepted norm among German citizens and, subsequently, the nations occupied by Nazi Germany. The outburst of anti-Semitic violence was a signal to the Nazi elite that anti-Jewish measures would be welcomed and an increase in radicalism would not be met with any resistance.

As World War II raged on into the 1940s, the Nazis decided that they needed a better system for distinguishing between Jews and Ger-

36. *Id.*

37. *Id.*

38. *Id.*

39. MULLER *supra* note 8, at 102.

40. *Id.* at 102–13.

mans, reviving the medieval practice of the “Jew badge” used in various countries throughout Europe.⁴¹ Almost immediately following the invasion of Poland on September 1, 1939, Jews were forced to wear a yellow Star of David or a white armband with a blue Star of David (depending on their location) whenever they went out in public, but on September 6, 1941, the Nazis decreed that all German Jews had to wear armbands beginning September 19th so that everyone could see who was a Jew.⁴² This was detrimental to the ability of Jews to go out in public without facing some sort of embarrassment or harassment, also preventing escape from the persecutions and tortures imposed on them.

The Nazis corrupted a system of justice and turned it into a weapon of terror, hate and a false justification for acts against Jewish people, their businesses and their very existence. By twisting the law to attack their own citizens, the Nazis were able to use government systems and independent institutions, such as the police and judiciary, to enforce radical ideas of racial superiority and to launch repeated persecutions against the Jewish people. This false predicate served as a foundation for the determination and decision that the only answer was extermination as the final solution to the “Jewish Question”—the problem of what to do with the Jews. The Nazis managed to influence a majority of the German population through various deceptions and propaganda that led to a widespread belief that it was necessary to segregate and eventually remove all of the Jews in Germany. The Nazi ideology became so ingrained in people that organizations began to take it upon themselves to find ways to further the Nazi goal of ridding Germany of every Jew, leading to an aggressive campaign of segregation, deportation, concentration and annihilation—all under the seeming color of law.

Six million Jews, and millions of other minorities, were massacred in the Holocaust; humans were beaten, shot, burned, and gassed through a systematic effort aimed at annihilation committed under the watchful and blind eye of whole societies. The systematic murder of innocent people was and remains beyond comprehension as acts of both the government in power and of ordinary people, behaving within and empowered by the scope of law, in the belief that state-sanctioned conduct toward the Jews, no matter how heinous, was somehow justifiable, acceptable conduct. There was no justice, only death, destruction, degradation, dehumanization, and depravation—under the deceptive color

41. ROBERT S. WISTRICH, *ANTISEMITISM: THE LONGEST HATRED* 26 (Pantheon Books 1991).

42. Martha Jelenko, *Germany*, 44 AM. JEWISH Y.B. 185 (American Jewish Committee 2008).

of law.

III. THE NUREMBERG TRIALS: IMPERFECT JUSTICE

Nuremberg will always be remembered for the perversion of law that occurred in the Nazi era; but, in an ironic twist of history, it also is enshrined, as a result of the Nuremberg Trials, as the place where hate was put on trial and justice was enacted. These trials, although imperfect, prevailed in creating a new era of international norms.

As the war, and the Holocaust, came to an end and in the aftermath of the murder and genocide against the Jewish people and other minorities, it became increasingly clear that accountability for the horrendous and heinous crimes that had been perpetrated by Germany, the SS, and the collaborators was essential. Lord Justice Sir Geoffrey Lawrence, who served as president of the 1945–1946 International Military Tribunal at Nuremberg (“IMT”), wrote later that there had been three possibilities: let the atrocities go unpunished, put the Germans “to death or punish them by executive action; or to try them.”⁴³ Justice Robert Jackson echoed this sentiment in his June 1945 report to President Truman in which he wrote, “we could set [the Nazi prisoners] at large without a hearing . . . we could execute or otherwise punish them without a hearing . . .” so, therefore, “the only other course is to determine the innocence or guilt of the accused after a hearing” so that there will be a clear record of the United States’ motives.⁴⁴ After World War I, the alleged criminals were tried in German courts with few convictions with the rest receiving minimal sentences for their crimes. However, in the aftermath of World War II and the shocking reality of the Holocaust, the Allies created the Nuremberg Trials, an IMT, held in front of Allied judges instead of relying on a single nation’s judges to ensure that justice reached the clear perpetrators of what came to be established as war crimes by the Geneva Conventions. Although it was a joint effort between the victorious Allied nations, there is no doubt that Nuremberg was an American creation,⁴⁵ as evidenced by the subsequent twelve US military tribunals that were held without the other Allies.

Had it been left up to Winston Churchill or Joseph Stalin, some

43. The Right Honourable Lord Justice Lawrence, *The Nuremberg Trial*, 23 INT’L AFF. (ROYAL INST. OF INT’L AFF. 1944–), Apr. 1947, at 152–53.

44. Justice Robert Jackson, Report to the President on Atrocities and War Crimes, June 7, 1945, AVALON PROJECT, http://avalon.law.yale.edu/imt/imt_jack01.asp (last visited Jan. 13, 2017).

45. Henry T. King, *American Bar Association’s Commemoration of the 60th Anniversary of the Nuremberg Trials, November 11, 2005*, Georgetown School of Law, Washington, DC, 40 INT’L LAWYER, no. 1, 2006, at 3.

number of Nazi leaders might have faced a firing squad, perhaps without trials or after show trials, and that would have been the end of it. However, in order to promote fairness over vengeance, it was necessary to find a fair way to punish any state and its actors.⁴⁶ Rather than merely penalize the losers, America argued that it was necessary to create a uniform code that could apply to the vanquished and victors alike, so that in the future there could be no doubt as to the principles that would be established through the trials. The only way that this legal precedent could be seen as legitimate and produce lasting results, was if all states—particularly the victorious states responsible for the trials—were willing to submit to the future international laws that were established.⁴⁷ What can now only be described as a victory for justice in the place where the Nazis perverted law to attack their own citizens, the Nuremberg Trials' use of witnesses and physical evidence established precedent for the way trials operate nationally and internationally in modern courts.

Despite this, most Nazis escaped being brought to justice. The trials were limited in number and selective in their attempt to hold the most visible perpetrators accountable. Over time, there have been trials held in various venues, including recently in German state courts. However, the Nuremberg Trials truly set the standard for the world to mete out justice where no complete justice was achievable. The full effects of the Trials were not seen in the international community until after the Cold War ended due to conflict between the world's two superpowers. Even inside a divided Germany, it took decades to achieve a more complete assessment of what had happened. Nazi-era jurists categorically denied any participation in the injustices perpetrated by Hitler and the Nazis; instead they blamed the lawmakers and claimed that they did their job as judges by ruling based on the laws with which they were provided and which were in effect at the time.⁴⁸ However, even if true that the judges simply followed the letter of the law as it was written, that alone demonstrates a major deviation from the application and implementation of the lofty concepts of the rule of law and the basic inalienable rights of the victim and their entitlement to protection from persecution by the state.

The Cold War is also partially responsible for the imperfect justice that was achieved through the Nuremberg Trials. For nearly twenty

46. *Id.* at 5.

47. See F. B. Schickm, *The Nuremberg Trial and the International Law of the Future*, 41 AM. J. INT'L L. 770, 772 (1947).

48. MULLER, *supra* note 8, at 219.

years the West German Judiciary continued to be dominated by former Nazi judges. By 1945, “at least 80 percent of all serving German judges, prosecutors, and legal bureaucrats . . . had become party members,” making it impossible to create a judicial system without former Nazis because it would leave the system with too few experienced judges and attorneys.⁴⁹ Karl Loewenstein, a German who fled the Nazis by coming to the United States and was one of the Americans responsible for recreating the German judiciary, struggled separating the jurists who joined the Nazi party as opportunists and those who were true believers. To him, both were “equally culpable” in the desecration of the rule of law and “unfit for the practice of law in a democracy.” However, before he was able to recommend his plan to Charles Fahy, Legal Advisor of the Department of State and Allied head of the de-Nazification of the German legal department, Fahy began turning de-Nazification over to the Germans.⁵⁰ Within three years Germany was responsible for its own de-Nazification and the German jurists, who did not feel guilty or responsible for the Nuremberg Laws or the Holocaust, held farcical tribunals that granted amnesty for the majority of Nazis resulting in judgeships being filled with former Nazis.⁵¹ More recently, the German courts themselves have sought to hold Nazi perpetrators, albeit at a lower level, responsible through ongoing trials, seemingly in a quest to achieve a measure of justice during the lifetimes of both survivors and perpetrators.

It is the duty of government and courts to protect the people from cruel and discriminatory laws. With regard to those working for the legal profession, it was as equally wrong to be complicit with and enforce the Nuremberg Laws as it was to participate in them. By allowing the government to make and enforce laws that systematically oppressed Jewish Germans, the Nazi-era courts failed in their duty to uphold legitimate laws and strike down tyrannical ones.

The Nuremberg Trials are considered a major step forward toward the establishment of international law; they directly led to the United Nations Genocide Convention (1948), Universal Declaration of Human Rights (1948), and the Geneva Convention on the Laws and Customs of War (1949).⁵² Prior to the IMT there was little precedent of international

49. R.W. Kostal, *The Alchemy of Occupation: Karl Loewenstein and the Legal Reconstruction of Nazi Germany, 1945–1946*, 29 L. & HIST. REV. 23 (2011).

50. *Id.* at 24–25.

51. William E. Griffith, *Denazification in the United States Zone of Germany*, 267 ANNALS AM. ACAD. POL. & SOC. SCI., Jan. 1950, at 72–74.

52. *The Nuremberg Trials*, HISTORY.COM, <http://www.history.com/topics/world-war-ii/nuremberg-trials> (last visited Jan. 13, 2017).

law enforcement. The tribunal completed the shift, begun in the period between the First and Second World Wars, away from seeing war as a common and useful tool of foreign policy to the modern system of international law and accountability as a deterrent force against tyranny. Planning or executing a war was no longer a conflict between two nations and their allies; the IMT proclaimed war as a violation against all of humanity and that it is in every nation's interest to avoid senseless violence that could potentially kill entire generations.⁵³ The impact of the Nuremberg Trials goes well beyond war, as they also established other valuable principles that have guided subsequent international trials and hearings. One important example of the lasting effects of the Trials is the tribunals created in the 1990s for war crimes and crimes against humanity that were committed in Yugoslavia and Rwanda.

While the Nuremberg Trials certainly fulfilled a preliminary obligation of seeking justice for the nearly six million Jews and reportedly ten million other people killed in the Holocaust—including Soviet civilians, Soviet prisoners of war, non-Jewish Polish civilians, Serb civilians, people with disabilities, Gypsies, Jehovah's Witnesses, repeat criminal offenders and so called asocials, German political opponents and resistance activists in Nazi-held territories, and homosexuals, as reported by the United States Holocaust Memorial Museum⁵⁴—and the tens of millions more casualties from the Second World War, the true legacy of Nuremberg is the principles that were established and the precedent of using international law to establish accountability in the world's most troubled places. The Nuremberg Trials established genocide and aggression as international crimes and rejected proposed defenses such as head-of-state immunity and the following-orders argument.⁵⁵ These principles have enabled the world to have the legal ability to deter and punish perpetrators for acts of hatred, genocide, and attempted annihilation.

There was no question that what Hitler and Germany did were crimes against humanity and that they started a war of aggression. In 1945 and 1946, US Supreme Court Justice Robert Jackson felt that aggression was the most important crime discussed at Nuremberg. He led the fight to establish the highest standards for The Nuremberg Trials,

53. George A. Finch, *The Nuremberg Trial and International Law*, 41 AM. J. INT'L L. 20, 30 (1947).

54. See *Documenting Numbers of Victims of the Holocaust and Nazi Persecution*, U.S. HOLOCAUST MEM'L MUSEUM, <https://www.ushmm.org/wlc/en/article.php?ModuleId=10008193> (last visited October 26, 2016).

55. James Podgers, *As Time Goes by: Nuremberg Trials Offer Precedent for Using International Law in World's Trouble Spots*, 92 ABA J., Jan. 2006, at 63.

leading to a verdict that has been heralded as an example of seeming world accountability for atrocities of unimaginable proportions. During his closing argument, Justice Jackson emphasized the significance of The Nuremberg Trials when he said:

If we cannot eliminate the causes and prevent the repetition of these barbaric events, it is not an irresponsible prophecy to say that this twentieth century may yet succeed in bringing the doom of civilization . . .

. . . .

. . . [The Nazis] have been given the kind of Trial which they, in the days of their pomp and power, never gave to any man. But fairness is not weakness. The extraordinary fairness of these hearings is an attribute of our strength.⁵⁶

While the world may not have liked giving the Nazis a chance to explain themselves and attempt to prove their innocence, notwithstanding how the Nazis silenced their victims, The Nuremberg Trials were a broad demonstration of the power of democracy and the rule of law, based upon the principles of fundamental fairness, presumption of innocence, and the right of the accused to receive a just and fair trial and punishment. However, Jackson believed the application of those principles gave the trials such strength and importance and that they could serve as a benchmark in history for when the victors were fair and kind to the defeated so that future generations will have an example to follow when they resolve even devastating conflicts. Without these trials, Jackson foresaw the end of civilization because mankind would surely have been doomed to repeat the same mistakes as after the First World War. The cycle of war, indiscriminate punishment, and then another war would assuredly result in the complete destruction of mankind.

The Judgment from the International Military Tribunal at Nuremberg found that most of the defendants were overwhelmingly guilty of war crimes for their culpability in World War II and in having planned and executed the Holocaust. Notably, not every defendant faced the same fate. Hans Fritzsche, Hjalmar Schacht, and Franz von Papen were acquitted, seven former Nazis received sentences between ten years and life imprisonment, while twelve of the twenty-two, including Hans Frank and Hermann Goering were given the death penalty during the main Nuremberg Trail.⁵⁷

56. *One Hundred and Eighty-Seventh Day, Friday, 26 July 1946*, XIX TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL, NUREMBERG, 14 NOVEMBER 1945–1 OCTOBER 1946, at 397–99 (Nuremberg, 1947).

57. Ben S. Austin, *The Nuremberg Trails: Brief Overview of Defendants & Verdicts*, JEWISH

IV. THE NUREMBERG LAWS AND THE NUREMBERG TRIALS: FROM HATE TO JUSTICE

The convergence between the Nuremberg Laws and the Nuremberg Trials is perhaps best noted in the findings by the justices that:

In order to place the complete control of the machinery of Government in the hands of the Nazi leaders, a series of laws and decrees were passed which reduced the powers of regional and local governments throughout Germany, transforming them into subordinate divisions of the Government of the Reich. Representative assemblies in the Laender were abolished, and with them all local elections. The Government then proceeded to secure control of the Civil Service. This was achieved by a process of centralization, and by a careful sifting of the whole Civil Service administration. By a law of 7 April it was provided that officials "who were of non-Aryan descent" should be retired; and it was also decreed that "officials who because of their previous political activity cannot be guaranteed to exert themselves for the national state without reservation shall be discharged." The law of 11 April, 1933, provided for the discharge of "all Civil Servants who belong to the Communist Party." Similarly, the judiciary was subjected to control. Judges were removed from the Bench for political or racial reasons. . . . Special courts were set up to try political crimes and only party members were appointed as judges. Persons were arrested by the SS for political reasons, and detained in prisons and concentration camps; and the judges were without power to intervene in any way. Pardons were granted to members of the Party who had been sentenced by the judges for proved offences. . . . In 1942 "judges' letters" were sent to all German judges by the Government, instructing them as to the "general lines" that they must follow."⁵⁸

The Nazis were found guilty of promulgating racism and violence in order to establish complete control of the government and judiciary so that they could initiate an aggressive war and with justification commit numerous crimes against humanity. Individually, however, each instance was considered and weighed to determine each prosecution's sentence separately. The unfortunate reality is that a large number of perpetrators, ranging from top-level officers to the *Einsatzgruppen* (Special Mobile Killing Squads), and even common foot soldiers, remain unpunished to

VIRTUAL LIBR., <http://www.jewishvirtuallibrary.org/jsource/Holocaust/verdicts.html> (last visited Jan. 13, 2017).

58. *Judgement*, I TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL, NUREMBERG, 14 NOVEMBER 1945–1 OCTOBER 1946, at 178–79 (Nuremberg, 1947).

this day for their crimes.⁵⁹

The Nuremberg Trials were far from complete or perfect, and despite the many important lessons scholars may take from them, they do not provide the answer to many of today's questions. An important issue arising out of the Trials is the interaction between two controversial principles: international jurisdiction and national sovereignty. The Trials also did not adequately provide a way to solve political disputes between states.⁶⁰

The methods, manner, and massive proportions which the perpetrators exercised in their attempt to achieve the death and annihilation of the Jewish people during the Holocaust are indeed beyond all comprehension. The extraordinary challenge of seeking accountability and rendering justice was a task of insurmountable proportions. To those who were committed to achieving justice, as were Justice Jackson and the others who were prosecutors and judges at Nuremberg, the world owes a debt of gratitude for their determination, perseverance and commitment to seeking, telling and preserving the records of the truth, and in attempting to establish principles and practices designed to avoid ever again the committing of such barbarity and heinous crimes against the Jewish people and all of mankind.

V. CLOSING NOTE

Eighty years have passed since the enactment of the Nuremberg Laws and seventy years have passed since the start of the Nuremberg Trials. International law continues to evolve and adapt to the reality of the modern world. Despite the differences between then and now, it is critical that we continue to adhere to many of the essential values that were agreed upon at Nuremberg after the war. The Nuremberg Laws are an example of how dangerous the abuse of the rule of law can be when there is no system of justice protecting all people. The Trials represent a shift in world ideology as nations agreed to outlaw war, to stand firmly against genocide and attempted annihilation, while still providing the right to legitimate trials even for the worst criminals. The importance of the Nuremberg Trials cannot be overstated, as in many respects they are the foundation upon which the international community now rests.

The Nuremberg Symposium, held in Krakow, Poland in May

59. The complete Judgment and other documents from the IMT can be accessed online through the Library of Congress, https://www.loc.gov/rr/frd/Military_Law/NT_major-war-criminals.html, and *The Avalon Project* created by Yale Law School.

60. William Eldred Jackson, *Putting the Nuremberg Law to Work*, 25 FOREIGN AFF., Jul. 1947, at 560.

2016, was sponsored by March of the Living International, the Holocaust education organization that has brought more than 250,000 people to Auschwitz and Birkenau over the past twenty-eight years for the most powerful experience of learning the lessons of hate through the study of the Holocaust. The Symposium was cosponsored by Jagiellonian University, with appreciation and thanks to Dr. Jolanta Ambrosewicz-Jacobs, and the Raoul Wallenberg Centre for Human Rights. Special tribute is due to Professor Alan Dershowitz and Professor Irwin Cotler, Co-Chairs of The Nuremberg Symposium, and to each of the scholars and justices who presented at the Symposium and whose remarks are included within this important publication of *Loyola of Los Angeles International and Comparative Law Review*. Special thanks to Dr. Shmuel Rosenman, Chairman, Aharon Tamir, Director-General, Dr. David Machlis, Vice Chairman, Eli Rubenstein, Director of Education and Ariana Heideman Tipograph, Program Coordinator of The Nuremberg Symposium, of March of the Living International. Sincere appreciation to Ben Alkon, Legal Intern, Heideman Nudelman & Kalik, P.C., for his research contribution, to Dr. Elana Heideman for her substantive review and input, and to Mary Beth Warner for her editing contributions to this article. Special tribute is paid to Cameron Schlager, Editor-in-Chief, Loyola Law School Los Angeles International and Comparative Law Review, for his vision and commitment to excellence in undertaking the publication of this Special Edition on The Nuremberg Laws and The Nuremberg Trials: From Hate to Justice.

The Nuremberg Symposium was convened to examine how a modern state could create and twist laws to self-justify and enable the Nazi state and its citizenry to commit unconscionable and heinous crimes; to honor and remember the millions of lives taken during the Holocaust; and to examine and recognize the essential power of the use of a specially created international court in seeking justice and accountability; and in providing a path forward for understanding the incomprehensible.



The Nuremberg Symposium
 An International Legal Symposium
 on
 The Nuremberg Laws
 &
 The Nuremberg Trials

PRESENTED BY THE INTERNATIONAL MARCH OF THE LIVING,
 JAGIELLONIAN UNIVERSITY IN KRAKOW, POLAND,
 AND THE RAOUL WALLENBERG CENTRE FOR HUMAN RIGHTS*

In Memoriam

Professor Elie Wiesel, Nobel Laureate and esteemed survivor of the Holocaust, served as Honorary Chairman for The Nuremberg Symposium. His recent passing has left an irreplaceable void. His vision, wisdom, and voice were indeed the moral compass of the world. May his memory serve as a blessing.

* Note: Submission Taken from Oral Presentations Delivered During The Nuremberg Symposium, Some of Which Have Been Reviewed, Modified and Edited by Various Speakers For Inclusion in this Submission. © 2017. The Nuremberg Symposium. All Rights Reserved. THE NUREMBERG SYMPOSIUM Presented by: International March of the Living, Jagiellonian University, and Raoul Wallenberg Centre for Human Rights.

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Narrator: The rise of Nazi Germany and the Nuremberg Laws are a stark reminder of how marginalization and the denial of basic human rights led to Auschwitz and the murder of millions of innocent people. It is a reminder we fail to heed at our own peril.

Executive Producer: Eli Rubenstein, March of the Living

Producer: Naomi Wise, Garrison Creek Media

THE NUREMBERG TRIALS: A SUMMARY INTRODUCTION

*Professor John Q. Barrett, Board Member, Robert H. Jackson Center,
Professor of Law, St. John's University**

In the broad landscape of post-World War II Europe, there were thousands of trials of war criminals. Most were national trials, often military trials, focused on crimes perpetrated in particular locations.

The Nuremberg trials, a small set, were trials of Nazis who were regarded as arch-criminals, whose crimes were major and transcended any particular location.

There were thirteen Nuremberg trials. They occurred in the German city of *Nürnberg* (Nuremberg), which in the years following Nazi Germany's surrender was in the United States zone of military occupation.

One and only one Nuremberg trial was an international trial—conducted by the U.S., the U.S.S.R., the U.K. and France, it occurred in late 1945 and much of 1946.¹

The international Nuremberg trial was followed, between late 1946 and spring 1949, by twelve subsequent trials in Nuremberg that the U.S. conducted by itself.²

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1. A leading, scholarly primer is MICHAEL R. MARRUS, *THE NUREMBERG WAR CRIMES TRIAL OF 1945-46: A DOCUMENTARY HISTORY* (Boston & New York: Bedford/St. Martin's, 1997). An excellent participant's account is TELFORD TAYLOR, *THE ANATOMY OF THE NUREMBERG TRIALS: A PERSONAL MEMOIR* (1993).

2. Two leading books on these Nuremberg "subsequent proceedings" are KEVIN JON HELLER, *THE NUREMBERG MILITARY TRIBUNALS AND THE ORIGINS OF INTERNATIONAL CRIMINAL LAW* (Oxford Univ. Press, 2011), and *REASSESSING THE NUREMBERG MILITARY*

I will, in this introduction, touch upon ten topics:

- first, the predicate behavior, which is the human practice of making war;
- second, international law's progress, before World War II, in addressing that behavior;
- third, Nazism as human and national regression;
- fourth, World War II;
- fifth, legal analysis and war condemnation during the World War II years;
- sixth, the Allies' military defeat of the Nazis;
- seventh, the Allies' international Nuremberg trial of 1945-1946;
- eighth, the twelve subsequent American trials in Nuremberg;
- ninth, the legal legacy of the Nuremberg trials; and
- tenth, the human rights legacy, including the Holocaust knowledge legacy, of the Nuremberg trials.

1. War

First, as a matter of background, is war. It is a reality of human behavior across millennia. And for much of history, war was viewed as a matter of power, a matter of sovereignty, and a matter of legality—war-makers existed and, if they were lucky in war, they lived on in a realm of impunity. This was the human reality up through and including the 19th century.

2. Nations Renounce War as a Sovereign Prerogative

The view that war was a matter of power, sovereignty, and impunity began to give way, late in the 19th century, to views of legalism and constraint. The Hague conventions began to define war crimes—rules of behavior for civilized nations to follow when they engaged in the war endeavor. After the Great War (1914–1918), a European continental calamity that later was renamed World War I, leaders contemplated prescribing war itself. They also considered holding perpetrators, even up to the level of national leaders, responsible for the evils of war. Nations began to make commitments,

TRIBUNALS (Kim C. Priemel & Alexa Stiller, eds., New York & Oxford: Berghahn Books 2012).

An online, recent bibliography that lists and also describes in narrative, in fifteen concise pages, leading book-length publications (i.e., books and long articles) on all thirteen Nuremberg trials—both the International Military Tribunal (the IMT) and the subsequent U.S. Nuremberg Military Tribunals (the NMTs)—is Kevin Jon Heller & Catherine E. Gascoigne, *Nuremberg Trials*, in OXFORD BIBLIOGRAPHIES (2015), www.oxfordbibliographies.com.

both in bilateral and in multinational treaties, foreswearing those activities of such destructiveness. In 1928, for example, President Calvin Coolidge signed the Kellogg-Briand treaty on behalf of the U.S. It was one of dozens of nations, including Germany, that renounced war as an instrument of national policy.

3. Nazism

But Nazism soon ruled Germany. Dachau, the first of the German concentration camps, a place to confine enemies of the state, was created in 1933. The Nazis began to use Nuremberg, a city of beauty and history connecting back to the Holy Roman Empire, as the site of fervent, frenzied Nazi Party Rallies. In 1935, the Nuremberg Laws were announced, subjugating Jews and others whom the Nazis regarded, often based in mad eugenic theories, as inferiors and enemies.



Adolf Hitler, Hermann Goering (a future Nuremberg defendant) and others, saluting in front of the *Frauenkirche* in Nuremberg's main market square.

4. World War II

By the end of the decade, the Nazis brought war again—and the number, World War II. We today cannot truly comprehend its enormity and horror. The war, the Nazi aggression and atrocities, became the framework for the Holocaust that was perpetrated in Poland and

throughout the European continent. German troops and tanks conquered Poland in September 1939. Captives became slaves and victims of planned extermination.

5. Legal Condemnation of Nazi Aggression

In this period, legal thinking began to analyze and condemn Nazi aggression as criminal. This thinking generally had begun, as noted, during World War I and its aftermath. But in the Allied nations, particularly as Nazi Germany went on the march in the later 1930s and continuing into 1940 and 1941, legal thinking about war as crime occurred at the highest levels.

In the United States, President Roosevelt in 1940 appointed Robert H. Jackson to serve as Attorney General. In that position, Jackson's primary work was legal issues connected to war preparation. He, working with brilliant colleagues, analyzed how the isolationist, ocean-protected United States, with neutrality laws keeping it from involvement in the European conflict, could provide military assistance to the U.K., which by late June 1940 stood alone against the Nazis. The new Prime Minister, Winston Churchill, implored Roosevelt to provide WW I-era destroyers. Jackson's August 1940 legal opinion authorized his client, President Roosevelt, to provide that assistance,³ which played a role in securing the North Atlantic and British survival. That opinion, plus subsequent U.S. legal analyses of Lend-Lease legislation and prominent public speeches by Jackson and others, advanced the view that Nazi aggression violated international law.⁴ Jackson's thinking in this regard was advanced by University of Cambridge legal theorist Hersch Lauterpacht, who later became a member of the British prosecution team at Nuremberg.

In November 1943, Allied nation foreign ministers met in Moscow. By this point, although brutal fighting stretched ahead, it had become clear that the Allies would prevail—they would win the war. Their thinking thus included what they would do with the vanquished. At a high level of generality, they committed, in the names of Churchill, Roosevelt and Stalin, that “the major criminals whose offences have no particular geographical location . . . will be punished by a joint decision of the Governments of the Allies.” At Yalta in February 1945, the final “Big Three” meeting, the leaders reiterated that their foreign ministers would continue to work together on how they would handle “major war

3. 39 Op. Att'y Gen. 484 (1940).

4. See ROBERT H. JACKSON, *THAT MAN: AN INSIDER'S PORTRAIT OF FRANKLIN D. ROOSEVELT* 103 (2003) (John Q. Barrett, ed.).

criminals" following war victory and dismemberment and occupation of Germany.

6. Allied Victory

That process of legal accountability and condemnation could not, of course, get ahead of the war reality. Nazism first had to be defeated militarily, and it was. On May 7, 1945, at Reims, Nazi Germany surrendered. Germany as a sovereign state ceased to exist and the Allies occupied its former territory. Then legal thinking and plans could begin to become operational.

7. The International Military Tribunal ("IMT")

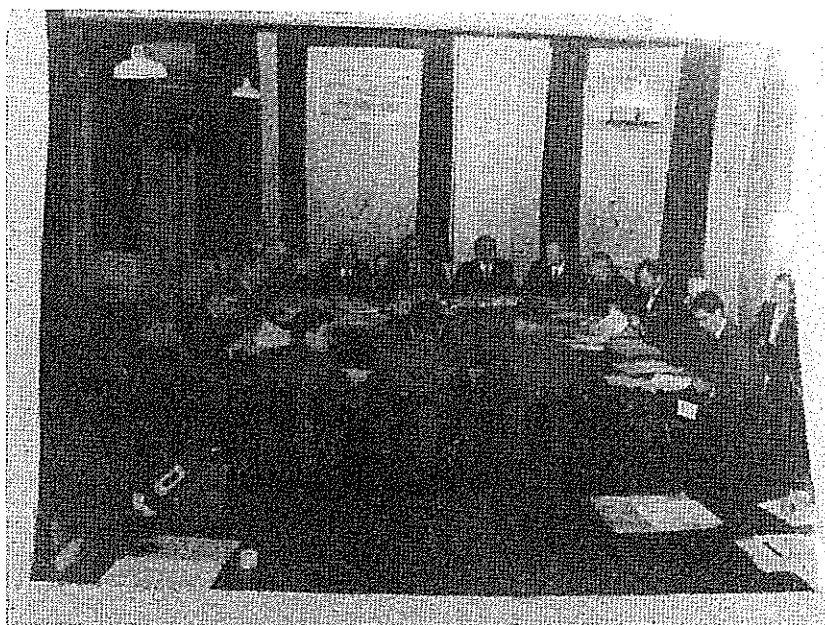
By spring 1945, Robert H. Jackson, age fifty-three, had been a U.S. Supreme Court justice for almost four years. President Harry S. Truman, then two weeks in office, decided to deliver on the Roosevelt commitment, made with Churchill and Stalin, to hold the leading Nazi perpetrators legally accountable. President Truman recruited Justice Jackson, whom he knew and admired, and whom Truman, his advisers, and the country regarded as a leading U.S. legal talent and figure of public stature, to head the American process of delivering on the Allied commitment. Truman, by picking Jackson, hoped to, and in the end he did, influence the British, Soviets, and French to implement and staff this commitment comparably.



May 2, 1945: Justice Robert H. Jackson, at the Supreme Court of the United States.

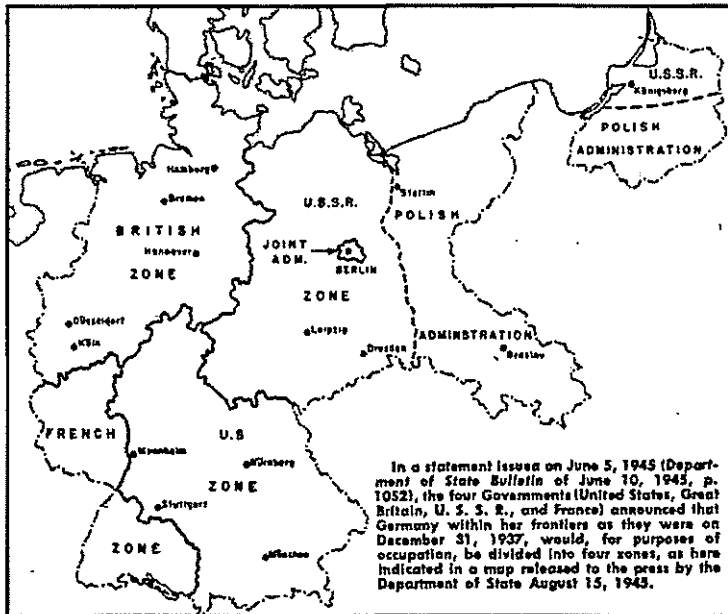
In late April 1945, Jackson was led to believe that this assignment would be something of a turnkey endeavor—that the evidence was assembled, that the international trial plan was in place, that trials were ready to go, and that this would be the trial of Adolf Hitler and the core of his inner circle. Of course none of that materialized.

What was required first, and what occurred during summer 1945 in London, was difficult multinational negotiation. It occurred in Church House at Westminster Abbey. The four national delegation leaders met in conference, working to harmonize their disparate legal systems and their very different views of what it meant to be committed to trying their principal Nazi prisoners as war criminals.



July 1945: A London Conference session, at Church House, Westminster Abbey.

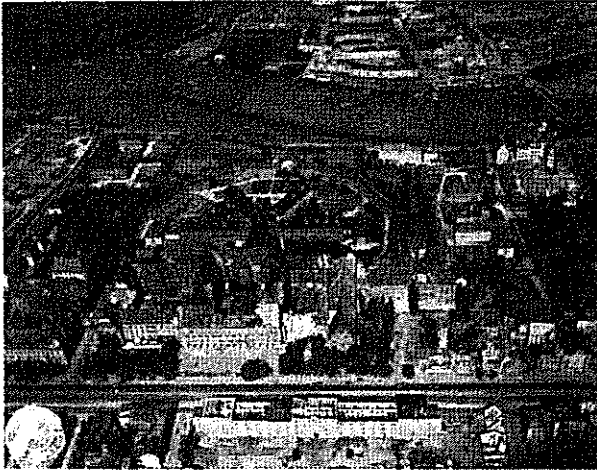
In this time period, there was no longer a sovereign Germany. It had surrendered unconditionally to the Allied nations, which jointly oversaw military occupation zones controlled by each of the four powers.



1945 Allied zones of occupation, following Nazi Germany's surrender
 (www.ibiblio.org/hyperwar/Dip/AxisInDefeat/Defeat-3.html.)

The American zone, formerly southeastern Germany, included the city of *Nürnberg*. It had been bombed heavily by British and Americans forces during the war.⁵ But outside Nuremberg's old city, on the *Fürtherstraße* (i.e., toward the neighboring city, *Fürth*), was a largely intact courthouse, the Palace of Justice, connected to a large prison. At U.S. Army urging, Justice Jackson plus his British and French counterparts agreed that it should be the trial site.

5. For a recent account of the March 30, 1944, U.K. bombing raid on Nuremberg, portraying air crew members' and their families' experiences during World War II and some survivors in old age, see JOHN NICHOL, *THE RED LINE: THE GRIPPING STORY OF THE RAF'S BLOODIEST RAID ON HITLER'S GERMANY* (London: Harper Collins, 2013).



1945: The Palace of Justice, Nuremberg.

The U.S.S.R. was the final nation to join the Allied trial plan. At the July 1945 “Big Three” conference in Potsdam, the leaders—now Stalin, Truman, and newly-elected U.K. Prime Minister Clement Attlee—again considered war criminals among many other topics. The leaders agreed that “[w]ar criminals and those who have participated in planning or carrying out Nazi enterprises involving or resulting in atrocities or war crimes shall be arrested and brought to judgment.”

The reaffirmation that the U.S.S.R. would remain in the project carried the London Conference to its successful conclusion. On August 8, 1945, Jackson and his Allied counterparts signed the London Agreement and Charter. The Agreement created the world’s first international criminal court, the International Military Tribunal (“IMT”)—so named because it was an institution of military occupation government in the land that had been Germany. The IMT had jurisdiction over four crimes: (1) conspiracy, common plan, and agreement; (2) the waging of aggression war, or breach of the peace; (3) war crimes, and (4) crimes against humanity. The London Agreement defined a system of due process. The defendants would receive written charges, defense counsel of choice, time to prepare for trial, discovery of prosecution evidence, and compulsory process to assemble defense witnesses. The IMT, an independent judiciary, would conduct a public trial. It would admit relevant evidence, broadly construed. It would hold the prosecutors to a burden of proof beyond a reasonable doubt.

The London Agreement also defined limits on the trial and on defendants’ rights. Defense arguments of *tu quoque*—“you too”; no

clean hands—were ruled out of bounds. Head of state immunity, a historical prerogative, was declared null and void. Following orders was declared inadmissible as a defense, although it could be relevant in mitigation of punishment.



August 8, 1945: Justice Jackson, for the U.S., signs the London Agreement.

Following the London Conference, prosecutors drafted a comprehensive indictment. On October 18, 1945, the IMT convened in Berlin to receive it. The Indictment charged twenty-four individuals and six Nazi organizations with various crimes. One defendant was Hans Frank, the former Gauleiter of Poland and the Nazi-occupied General Government. Frank had presided in Krakow, in the Wawel castle near Jagielloinian University; he was, as Justice Jackson stated the next month in his opening statement at Nuremberg, “a lawyer by profession I say with shame.” The Indictment contained the word “genocide,” coined by Polish lawyer Raphael Lemkin, a consultant and advisor to the Jackson staff, who fought hard for his word to be used.⁶ In one particular, the Indictment charged that Nazis in September 1941 had killed “11,000 Polish officers who were prisoners of war . . . in the Katyn Forest near Smolensk.”

The international trial opened on November 20,

6. See John Q. Barrett, Raphael Lemkin and ‘Genocide’ at Nuremberg, 1945-1946, in *THE GENOCIDE CONVENTION SIXTY YEARS AFTER ITS ADOPTION* (Christoph Safferling & Eckart Conze, eds.) (The Hague: T.M.C. Asser Press, 2010).

1945. Interestingly, what had been by then Jagiellonian University's motto for over six hundred years, *plus ratio quam vis*—"more reason than power," or "mind over power"—was echoed in the first paragraph of Robert Jackson's opening statement at Nuremberg. In that opening, perhaps the most eloquent, powerful courtroom address the world has ever heard, Jackson described the trial as "one of the most significant tributes that power ever has paid to reason." He was stating candidly that in that moment, Allied power was the power to finish brutally, to execute, to exterminate, whatever quantity of Nazis the Allies wished to dispatch. He was noting that the Allies were restraining themselves in the name of rule of law, with the procedures and commitments outlined in the London Agreement.

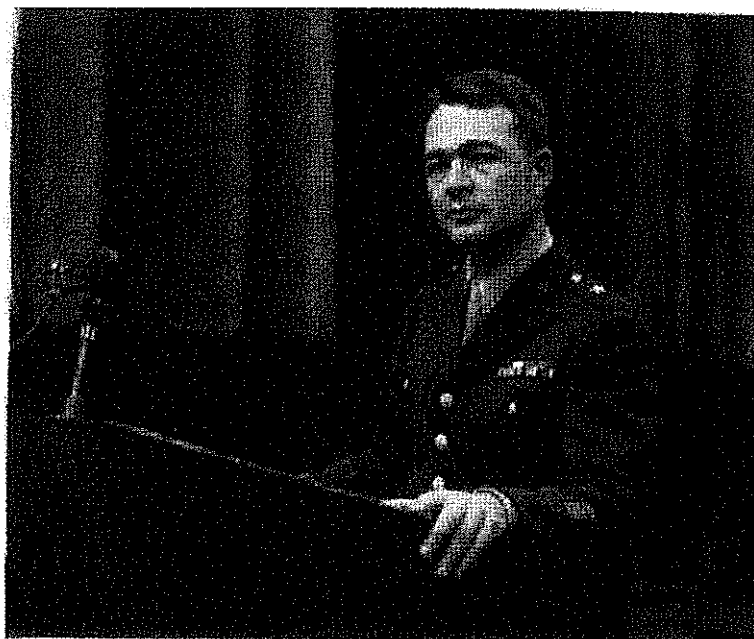
The international Nuremberg trial proceeded over the course of the next year with each nation presenting part of the case, then with defense cases, and then with cases against and defending the Nazi organizations. It was largely a documentary trial, including film evidence of concentration camps as they were liberated and film evidence of the Nazis in power. The trial also included powerful testimony from victims. Each defendant had a full chance to defend himself.

At the end of September 1946, the Nuremberg tribunal delivered its judgments. As to legality, international law prescribed the conduct charged—these were crimes against the international order. As to individuals, nineteen were convicted and three were acquitted. Twelve of the guilty were sentenced to death and seven were sentenced to terms of years. Three organizations were convicted and three were found to be noncriminal. The Katyn Forest particular was not mentioned—it formed no part of the Nuremberg judgment.

8. The U.S. Nuremberg Military Tribunals ("NMTs")

The Cold War, deepening during 1946, insured that there was no second international trial. Instead, following the conclusion of the IMT in October 1946, the Americans, who still occupied Nuremberg, conducted twelve "subsequent proceedings" there between late 1946 and spring 1949. Brigadier General Telford Taylor, previously a senior member of Jackson's U.S. team before the IMT, served as chief prosecutor. He and his teams prosecuted 177 additional individuals. Each case concerned persons who had worked together in an important sector of the Third Reich. These cases thus came to be known by short names of either a leading defendant or the occupational sector: *The Medical Case*; *The Milch Case*; *The Justice Case* (later portrayed in the

film "Judgment at Nuremberg"); *The Pohl Case*; *The Flick Case*; *The I.G. Farben Case*; *The Hostage Case*; *The Reich Main Security Office (RuSHA) Case*; *The Einsatzgruppen Case*; *The Krupp Case*; *The Ministries Case*; and *The High Command Case*.



Circa 1946: General Telford Taylor at the podium, Palace of Justice, Nuremberg. After this relatively small number of persons was prosecuted (and not every defendant was convicted), the Nuremberg Trial process came to an end.

9. Legal Legacy

Nuremberg came about through law, yes, and through Allied will, commitment and power. The legal product, the principles enunciated and followed at Nuremberg, became, after a Cold War interregnum of fifty years, the modern fundamentals of international criminal justice and related national justice systems. The International Criminal Court in The Hague is a descendant of the Nuremberg trials. They are precedent. Their legal landscape gives new, positive meaning to the phrase "Nuremberg Laws."

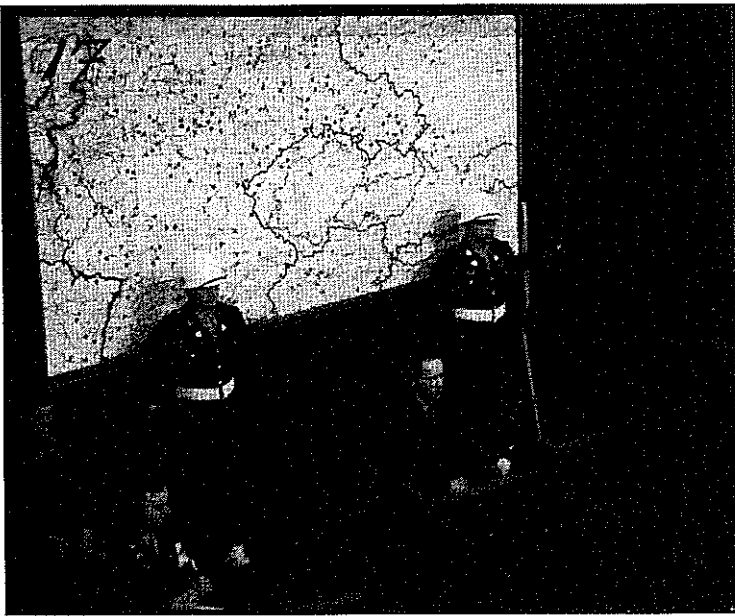
10. Human Rights Legacy

The Nuremberg trials, especially the international trial, were war trials. The principal crime that was prosecuted at Nuremberg was waging aggressive war. The other substantive crimes, both war crimes

and crimes against humanity, occurred, especially as the IMT adjudicated them, in the context of that war framework, and in the time period of Germany's military aggression (1939 and forward).

The Nuremberg trials also were, however, educational enterprises. During these proceedings, the trials created global public knowledge of enormous human rights crimes. The trials produced a vast documentary record that showed—proved—the enormity of the Holocaust.

The trials obtained testimony from Holocaust victims, witnesses, and perpetrators. Rudolf Hoess, for example, was an IMT trial witness. He had been the commandant of Auschwitz. He was called to testify for defendant Ernst Kaltenbrunner, to testify that he (Hoess) had never seen Kaltenbrunner at Auschwitz. On cross-examination, Hoess testified—with, sickly, what history now knows to be exaggeration—that he as Auschwitz commandant supervised the extermination of more than a million people, mostly Jews.



April 15, 1946: Rudolf Hoess testifying at Nuremberg.

The Nuremberg trial transcript and exhibits, published for accountability and for history's continuing study, record the world's dawning comprehension of Nazi concentration camps in the west and, in the east, the Nazis' extermination camp system.

The Nuremberg trials did not commence as a Holocaust project, but they produced, for that time and for us, Holocaust knowledge based

in the factual record.

That knowledge became the basis for human rights consciousness, codification, and enforcement that has followed, including the Geneva Conventions, the Genocide Convention, and the work of international criminal tribunals.

That knowledge became a basis for us to march forward together, as lawyers, as scholars, as teachers, as students, as fellow human beings.

That knowledge became the basis for, annually, in Poland, the March of the Living.

VIDEO REMARKS BY AMBASSADOR SAMANTHA POWER

Remarks by Ambassador Samantha Power, U.S. Permanent Representative to the United Nations, on "Reflections on Nuremberg: Memory, Accountability, and the Consequences of Inaction" Via Video to the Nuremberg Symposium & International March of the Living, May 4, 2016

Richard D. Heideman: Last year at the March of the Living, we were honored to welcome [the] US Ambassador to the United Nations Human Rights Council, Ambassador Keith Harper the first Native American of ambassadorial rank at the United Nations. And today we are especially honored to receive remarks from Ambassador Samantha Power, the US ambassador to the United Nations. For those of you who were able to join us last evening, we viewed the Watchers of the Sky to which I commend each of you and recommend you use it, learn it, and teach it. Ambassador Power presented, during that movie last evening, a compelling narrative, as did others such as Professor Ocampo who will also be with us today. By video Ambassador Samantha Power.

Ambassador Samantha Power: Let me begin by thanking the March of the Living and the Raoul Wallenberg Centre for Human Rights for giving me the honor of speaking with you today, and—more importantly—for organizing this really important conference and the deeply impactful ritual of the annual March of the Living. I wish I had been able to join you in person. I wish I could have marched by your side.

I would also like to extend my deepest gratitude to the survivors who are present. To simply have survived what you did—as we say around this time of year—would have been enough. Yet to retrace the horrors that you and your loved ones were forced to endure—and to share them with others, so that future generations will be inspired to prevent people from experiencing what you did—it is truly awe-

inspiring, and we are hugely grateful.

On February 27, 1946—the sixty-ninth day of the Nuremberg Tribunal—prosecutors called Abraham Sutzkever to the witness stand. A thirty-three-year-old poet who had lived in Vilna throughout the Nazi occupation, Sutzkever was the first Jew and survivor to testify at Nuremberg.

Twice, the presiding judge asked Sutzkever to sit as he spoke before the tribunal; and twice Sutzkever refused, instead choosing to stand throughout his testimony. As Sutzkever would later write, “I spoke standing up, as if I were reciting the Kaddish for those who had died.” He had many to mourn. In December 1941, only weeks after the Nazi authorities in Vilna had issued orders that, “Jewish women must not bear children,” Sutzkever’s wife had just given birth to a boy. The baby was hidden, along with others, in a side room in a hospital. But when the SS conducted a surprise inspection, the sound of crying led them to the newborns, and they killed the babies on the spot. When Sutzkever arrived at the hospital hours later, he would later tell the judge at Nuremberg, he found the body of his baby boy, “still warm.”

His mother was also killed—but unlike his baby boy, Sutzkever never saw her body. One day when he went to visit her in the ghetto, she was simply gone. He would not learn her fate until the day the Nazis dropped off a carload of old shoes in the ghetto, what they saw as “a present” to the residents. The shoes, they were told, belonged to Jews who had been executed. Sutzkever found his mother’s shoes in that pile.

Of course, it was not only Sutzkever’s family who suffered. In Nuremberg, he told of other horrors he had witnessed, such as the time on July 17, 1941, when he saw the *sonderkommandos* round up a large group of Jewish men, telling them to remove their belts and walk single-file toward the prison, with their hands above their heads. When men went to pull up their pants so that they could walk, the Nazis shot them. He saw at least a hundred bodies along the road that day. “Blood streamed through the street as if a red rain had fallen,” Sutzkever told the tribunal. Of the estimated eighty thousand Jews who had lived in Vilna at the beginning of the occupation, Sutzkever estimated, less than a thousand survived.

As we reflect on the legacy of Nuremberg seventy years after Sutzkever gave his epic testimony, it is as important as ever to recommit ourselves to the lessons learned—both from the historic tribunal itself, and from the hateful ideology and atrocities that made Nuremberg’s creation necessary.

The first lesson is the critical importance of preserving—and

retelling—accounts like Sutskever's, particularly for younger generations removed from the Holocaust. Individual testimonies like his—and the ones shared every year by the survivors who join the March of the Living—have the power to puncture the layer of abstraction that can surround the Shoah—a crime so massive as to, at times, feel unknowable. By giving us a window into the overwhelming anguish experienced by a single individual, these accounts make more tangible the immeasurable suffering and evil that the Holocaust represents.

The second lesson is the absolute imperative of seeking justice for mass atrocities. The idea behind the Nuremberg Tribunal—that the international community has a stake in holding accountable those who commit such unthinkable crimes—undergirds many of the norms and institutions that we have helped create since the Second World War. But those norms and institutions have value only if they are put into practice—which means continuing to investigate and prosecute the perpetrators of gross violations of human rights. Not only the Radovan Karadzics and Hissene Habres of the world, whose crimes were committed in decades past, crucial as justice is in those instances—but also the Assads and Kim Jong Uns of the world, who are overseeing as we speak the massacring and forced starvation of their own people, in real time.

The third lesson is that we can't allow ourselves to be bystanders when we see early warning signs of mass atrocities. Genocides don't arise spontaneously—their masterminds telegraph them, systematically laying the foundation for their murderous ends. That is the lesson of the deplorable race laws adopted in Nuremberg in 1935, of *Kristallnacht* in 1938, and of so many of the other steps the Nazis took that signaled their horrific intent. Yet the world looked on. We must not allow ourselves to do the same. Because we know all too well the consequences of inaction—which Sutskever captured in a haunting poem he wrote in 1942, while living under the Nazi occupation. The poem is about a wagon, as he wrote, "filled with throbbing shoes," clattering through the streets of the ghetto, not unlike the one that brought Sutskever the devastating news of his mother's killing. Let me just read a few lines from that poem:

*The shoes—familiar, spreading,
I recognize them all. . .
Tell me the truth, oh shoes,
Where the disappeared feet?
The feet of pumps so shoddy,
With buttondrops like dew —*

*Where is the little body?
Where is the woman, too?
All children's shoes – but where
Are the children's feet?*

By hearing the accounts of survivors and retracing their steps—as the March of the Living does—we feel, for just a moment, the infinite loss represented by all of those empty shoes. We, like Suskever, “recognize them all.” We feel what it would be like if those shoes belonged to our own sons and daughters, our sisters and brothers, our mothers and fathers. And we are more determined than ever to helping ensure that no one should have to ask, “Where the disappeared feet?”

I thank you.

VIDEO REMARKS BY THE RIGHT HONOURABLE JUSTIN TRUDEAU, PRIME
MINISTER OF CANADA

Canadian Prime Minister Justin Trudeau: Hello everyone. *Bonjour tout le monde*. Today we commemorate the eightieth anniversary of the Nuremberg Laws and the seventieth anniversary of the Nuremberg Trials.

The Nuremberg laws removed the citizenship rights of German Jews. Many of them, as well as their families, lived in Germany for decades. These laws were at the base of discrimination and allowed for the massacre of six million Jews in Europe and elsewhere.

Today we recall the world's muted reaction [to] the Nuremberg Laws. We now know that silence is never an option when humanity is threatened. We vow never to forget the Holocaust and its bitter lessons. We will always remember the victims of hate, anti-Semitism, racism, and xenophobia. We will never forget.

We also mark another milestone today—the seventieth anniversary of the Nuremberg Trials of the Nazi leadership. By allowing our century's arch villains to have a fair trial, we exposed their crimes to the world before a court of law and established legal principles that guide us still today.

These are the two memories of Nuremberg—one of hate, one of justice. Let us be guided by the lessons we have learned from both.

Even if I cannot be at the March of the Living in person, please know that I march alongside you down the three-kilometer path from Auschwitz to Birkenau, because we are all witnesses. It is our sacred obligation to remember the past and our eternal duty to ensure the future.

Merci.



Rutgers Team Addresses Police-Community Security Issues in Brussels

From Paris to Brussels, Copenhagen to Orlando, and most recently in Manchester and London, an explosive surge in violent extremist and terrorist attacks is targeting civil society, public venues and religious groups. The threat of mass casualty attacks has reached unprecedented levels across the globe.

In response to this emergent threat, a team of international experts from Rutgers University has today completed the second of two intensive sessions focusing on police-community relations in particularly sensitive districts of Brussels.

"As events this week have demonstrated, the time for broad pronouncements and abstract guidance has long passed," said Rutgers Professor John J. Farmer, Jr., former New Jersey Attorney General and Senior Counsel to the 9/11 Commission.

"The most effective way forward is to take action at the street level to protect vulnerable populations by strengthening their ties with law enforcement and making our communities more resilient," Farmer said.

Funded through the generosity of Paul Miller, an alumnus of Rutgers University and Rutgers Law School, the Rutgers team has been working in Brussels and elsewhere in Europe and the United States since 2015, attempting to identify and, in this case, develop and implement reliable practices for protecting vulnerable populations. Recognizing the value of the Rutgers team's work, Belgian officials invited the Rutgers team in the wake of the March 2016 attacks to work shoulder-to-shoulder with law enforcement and the Brussels community to develop a program to strengthen the relationship between the community and the police.

"The Rutgers team was here, on the ground, both before and after the attacks," said Belgian Federal Police Commissioner Saad Amrani. "They have combined extraordinary experience and expertise with a commitment to adapt any proposed approaches to our individual circumstances."

"In a word, they listen," said Jonathan Biermann, Head of Crisis Management for the Jewish Community in Brussels. "They have come here not to impose a top-down solution, but to learn and adapt. Their credibility in the Brussels community, as a consequence, is peerless."

"The new reality of violent extremism requires an unprecedented level of engagement between police and community," said Sean Griffin, former Europol Counterterrorism Coordinator, who is serving as a senior advisor for the Rutgers team.

The Rutgers team conducted over twenty hours of videotaped interviews with civilians and law enforcement in the aftermath of last year's terrorist attacks in Brussels. "These interviews are first-hand, primary source evidence of the impact of violent extremism on citizens, communities, and

police," Farmer said. "They highlight the need for a new form of community policing and a renewed commitment to public education about suspicious activity and self-protection."

The team has built its training curricula around these first-hand accounts, and around the results of a "Practitioners' Good Practices Exchange" Rutgers co-sponsored in November 2016 in partnership with The Egmont Royal Institute for International Relations, the Belgian Ministry of Home Affairs, and the Union des Anciens Etudiants de l'Université Libre de Bruxelles.

The working sessions were conducted this week in two districts in Brussels: the Sablon, a neighborhood noted for its many shops and the Great Synagogue of Europe and the site of the attack on the Jewish Museum in May 2014, and in Molenbeek, a largely Muslim community that has attracted much unwanted attention after the world learned of the Molenbeek origins and of several attackers in the November 2015 attacks in Paris and the attacks four months later in Brussels.

"The issues we have been confronting in Brussels resonate in communities throughout Europe, the United States, and beyond," said Paul Goldenberg, a senior advisor for the Rutgers team who has worked extensively on hate crime prevention in the United States and Europe for over twenty years. "This unprecedented initiative is a best practice that can be adapted to other communities and law enforcement."

CONTACT: [\[enter info\]](#)

Article 1. The Institute of National Remembrance – Commission for the Prosecution of Crimes against the Polish Nation Act of 18 December 1998 (Polish Journal of Laws of 2016, item 1575) is hereby amended as follows:

1) Article 1:

a) item 1a) shall read:

“a) Nazi crimes, communist crimes, crimes committed by Ukrainian nationalists and members of Ukrainian units collaborating with the Third Reich, and other felonies that constitute crimes against peace, crimes against humanity or war crimes, committed against persons of Polish nationality or Polish citizens of other nationalities between 8 November 1917 and 31 July 1990.

b) item 2 shall be followed by item 2a, reading:

“2a) protecting the reputation of the Republic of Poland and the Polish Nation;”;

2) Article 2 shall be followed by Article 2a, reading:

“Article 2a. Within the meaning of the Act, crimes committed by Ukrainian nationalists and members of Ukrainian units collaborating with the Third Reich constitute acts committed by Ukrainian nationalists between 1925 and 1950 which involved the use of violence, terror or other human rights violations against individuals or population groups. Participating in the extermination of the Jewish population and genocide of citizens of the Second Polish Republic in Volhynia and Eastern Malopolska [Lesser Poland] also constitute a crime committed by Ukrainian nationalists and members of Ukrainian units collaborating with the Third Reich.”;

3) Article 45a shall read:

“Article 45a. Investigations concerning crimes referred to in Articles 54–55a are initiated by a prosecutor of a branch commission.”;

4) Article 53n is hereby repealed;

5) section 6b shall be followed by section 6c, reading:

“Section 6c

Protecting the reputation of the Republic of Poland and the Polish Nation

Article 53o. Protecting the reputation of the Republic of Poland and the Polish Nation shall be governed by the provisions of the Civil Code Act of 23 April 1964 (Polish Journal of Laws of 2016, items 380, 585 and 1579) on the protection of personal rights. A court action aimed at protecting the Republic of Poland’s or the Polish Nation’s reputation may be brought by a non-governmental organisation within the remit of its statutory activities. Any resulting compensation or damages shall be awarded to the State Treasury.

Article 53p. A court action aimed at protecting the Republic of Poland’s or the Polish Nation’s reputation may also be brought by the Institute of National Remembrance. In such cases, the Institute of National Remembrance shall have the capacity to be a party to court proceedings.

Article 53q. The provisions of Article 53o and Article 53p shall apply irrespective of the governing law.”;

6) Article 55 shall be followed with Articles 55a and 55b, reading:

“Article 55a. 1. Whoever claims, publicly and contrary to the facts, that the Polish Nation or the Republic of Poland is responsible or co-responsible for Nazi crimes committed by the Third Reich, as specified in Article 6 of the Charter of the International Military Tribunal enclosed to the International agreement for the prosecution and punishment of the major war criminals of the European Axis, signed in London on 8 August 1945 (Polish Journal of Laws of 1947, item 367), or for other felonies that constitute crimes against peace, crimes against humanity or war crimes, or whoever otherwise grossly diminishes the responsibility of the true perpetrators of said crimes – shall be liable to a fine or imprisonment for up to 3 years. The sentence shall be made public.

2. If the act specified in clause 1 is committed unintentionally, the perpetrator shall be liable to a fine or a restriction of liberty.

3. No offence is committed if the criminal act specified in clauses 1 and 2 is committed in the course of the one’s artistic or academic activity.

Article 55b. Irrespective of the regulations in force at the location of committing the criminal act, this Act shall apply to Polish and foreign citizens in the event of committing the offences referred to in Articles 55 and 55a.”

*Reprinted from the Times of Israel

Preface

The boxes in William Denson's basement were covered with dust. A few had tipped over during a flood some years back, spilling their contents onto the gray concrete floor. Those that had escaped damage sat on sagging wooden shelves. Huschi, Denson's widow, waited a year after his death before she could bring herself to visit her late husband's basement den.

In those boxes were documents dating back half a century. Some were intact. Others crumbled as Huschi removed them. It took weeks of sorting for her to realize the scope of what she had discovered: thousands of pages of trial transcripts, miles of microfilm, stacks of photographs and newspaper clippings, death's-head insignias, bulging packets of letters from SS officers and victims of Nazi horror, handwritten notes and summations—in all, more than thirty thousand pages and artifacts from one of the most significant yet least known series of war crimes trials in history.

The folders and hand-bound scrapbooks tell the story of the Dachau trials, in which Hitler's henchmen from Dachau, Mauthausen, Flossen-burg, and Buchenwald concentration camps were brought to justice. The trials, led by Denson, age thirty-two, exposed concentration camp administrators for what they were: murderers, torturers, and traffickers in human skin. More important, the trials affirmed that civilization is built on universal standards of human behavior—standards that hold a place apart from and above any nation's legal or military agenda.

By the end of the Dachau trials in August 1948, William Denson had prosecuted more Nazis than any other lawyer in the entire postwar period: 177 guards and officers. All were found guilty. Ninety-seven were sentenced to death, fifty-four to life imprisonment, and the rest to terms of hard labor. The proceedings also nearly ended the life and career of chief prosecutor William Denson.

We lived more or less in the same neighborhood—his office was only ten minutes from my home—but I never had the pleasure of knowing this remarkable man. In interviews videotaped by the Shoah Foundation, the Washington Holocaust Memorial Museum, and other organizations, Denson comes across the way family and friends describe him: keenly intelligent, mannerly, amicable. He stood almost six feet tall, lean, boyish features never quite disappearing in old age. When he spoke his drawl flowed smooth and slow, like the streams he fished as a boy in Alabama. What makes his story so striking is the contrast between the humanity of the man and the inhumanity of the world he took on. The U.S. Army sent Denson to Germany to prosecute abominations so cruel and vast that no law had ever been created to cover them. No vocabulary existed to describe what Nazi officers and men awaiting trial at Dachau had done to their victims. Denson was a country lawyer assigned to prosecute war crimes that the courts of civilized nations had never before confronted.

For twenty-one months, Denson labored in the shadow of headline-making trials taking place sixty-five miles to the north in Nuremberg, where the International Military Tribunal was prosecuting a handful of top Nazi officials. The venue for that trial was the majestic Palace of Justice, with two hundred members of the international press in attendance. Denson's work, meanwhile, unfolded in almost complete obscurity in a small courtroom cobbled together from workshop tables and folding chairs. Yet something more important than notoriety or grandeur separated the Dachau trials from the Nuremberg trials. At Nuremberg the accused were Nazi policymakers: chieftains who drafted and supported Hitler's battle plans as well as his "Final Solution," the systematic annihilation of European Jewry. Hitler's chieftains, however, never lifted a gun. It was at Dachau, sixty-five miles south, on the grounds of the former concentration camp, that men stood trial for personally aiding, abetting, and performing torture and murder compelled not by government policies but by their own disregard for human life.

Denson's assignment was to demonstrate that the accused at Dachau were personally responsible for atrocities committed against other human beings. He had to disprove arguments by Buchenwald commandant Hermann Pister that executions of Russian prisoners of war were carried out under legally justifiable "superior orders." He had to counter excuses by Dr. Klaus Carl Schilling that lethal experiments in Mauthausen to find a cure for malaria were conducted "in the interests of humanity." He had to reveal Ilse Koch for what she was: not the obedient wife of a camp commandant, but a sexual sadist who collected human skins and had prisoners killed for daring to look at her. The U.S. Army put Denson in the middle of these horrors and told him to win convictions—and to do it quickly.

The young lawyer, away from America for the first time, confronted formidable obstacles. Of great concern was the accusation that any convictions he might win would amount to nothing more than "victor's justice." The term denoted executions handed down by courts that were guided more by vengeance than due process, and it hovered darkly over the Dachau trials, threatening to destroy not only the validity of guilty verdicts but the credibility of those who, like himself, sought to defend the integrity and effectiveness of international law. In war, the accusation implied, victors will always be in the right, the defeated always culpable of crimes for which they must pay. Many who understood the depth of the Holocaust tragedy felt that executing Hitler's henchmen without trial was a perfectly legitimate punishment. Why dignify Nazi killers by providing them with trials? The murder of six million Jews and millions of other victims merited a swifter, more effective kind of response. To insist on proving in a courtroom what had so obviously been done was not to serve justice but to make a mockery of it. Allowing Nazis to stand trial, these voices argued, also meant risking that many might go free.

Denson disagreed and went to great lengths preparing his cases according to recognized rules of law, winning as many enemies as admirers. Trials meant to end quickly dragged on as he and his team of investigators interrogated hundreds of potential defendants and witnesses. What the Judge Advocate's Office hoped would take two months took nearly two years. The work was further complicated by defense accusations that many of the accused had been coerced into signing their confessions—a charge that plagued the trials from start to finish and led to an investigation that only partially exonerated the American interrogators.

Denson's dedication to his task took a personal as well as professional toll. His first wife, a New York socialite who had never adjusted to the life of a stay-at-home bride, left him halfway through the trials. His health deteriorated as constant exposure to descriptions of Nazi atrocities robbed him of his appetite and wore away at his body. By the end of his third trial he had lost nearly fifty pounds, his hands trembled, and he suffered a collapse. After less than two weeks' recovery time, Denson rallied enough strength to lead a fourth and final trial: guards and officers from Buchenwald concentration camp.

Denson achieved 100 percent convictions, but the glory and success that might have been his reward never came. With the rise of the Cold War, U.S. priorities shifted from punishing Germans to winning Germany's support in the fight against the Soviet Union, and one by one the sentences of Nazis found guilty at Dachau were either commuted or completely reversed. Among those who received this clemency was Ilse Koch, a beautiful, sadistic woman known as the "Bitch of Buchenwald." The clandestine reduction of her sentence to a mere four years was discovered by the press and publicly condemned as a scandalous betrayal of justice.

At first Denson vehemently fought the commutation and spoke openly of his objection to how army review boards had assessed his work. When even a Senate subcommittee supporting his cause failed to get the decision reversed, he stopped, put it all behind him, and did not speak again of Dachau for nearly half a century.

Genocide, however, did not stop, and Denson's silence over the Dachau trials preyed on his conscience. Reluctantly at first, with encouragement from friends and with a growing sense of purpose, he began speaking of his experiences. Over the next fifty years, he resurrected documents from attics and archives around the country—an exercise that led to the basement cache that Huschi Denson showed me a year after her husband's death.

Denson died in 1998 at the age of eighty-six. His last wish was that the story of the Dachau trials be told, not for his own aggrandizement but to educate future generations that no one is genetically exempt from inhuman behavior, and that the sacrifice for avoiding such tragedy again is a vigilant defense of human rights.



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THE NUREMBERG ROLES OF JUSTICE ROBERT H. JACKSON

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The Nuremberg Roles of Justice Robert H. Jackson

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Abstract:

During 1945-1946, U.S. Supreme Court Justice Robert H. Jackson served, by appointment of President Truman, as U.S. chief prosecutor at Nuremberg of the principal surviving Nazi war criminals. This article, based on a lecture at Washington University's conference on the 60th anniversary of that trial before the International Military Tribunal (IMT), introduces Jackson the person and the public figure. It then considers some of the facets and roles that the Nuremberg trial year was in and for Jackson: the project's importance; relevant background; ambition; self-sacrifice; commitment to law; innocence and optimism; constant recalibration; eloquent, effective voice; international diplomacy; the London Agreement and IMT Charter; dream (and nightmare) staffing; the Nuremberg indictment; life and work in Allied-occupied former Germany; building and prosecuting the case; effective trial work; vengeance foresworn; seeing the job through; and victory.

Keywords: Justice Robert H. Jackson; Nuremberg; International Military Tribunal; Nazi war crimes.

THE NUREMBERG ROLES OF JUSTICE ROBERT H. JACKSON

JOHN Q. BARRETT*

It is an honor to be at this conference, and especially on this panel, with heroes. “Heroes” is not too strong a word. My friends Whitney Harris, Henry King and Benjamin Ferencz, who are present here, and other senior Nuremberg prosecutors such as Justice Benjamin Kaplan and Professor Bernard Meltzer who are not at this conference, are among my own heroes, but that is a personal point. Their general, permanent significance includes the fact that they are heroes of the law for what they did sixty years ago and have done ever since to develop the law and legacy of Nuremberg.

I will redefine my topic a little bit. The program of this Nuremberg conference states that I will be speaking about “The Crucial Role of Robert H. Jackson.” In fact, there were multiple Jackson roles at Nuremberg—many, many roles and moments were encompassed in the undertaking that has come to be so significant historically that the primary, global meaning of the word “Nuremberg” today is, and probably always will be, the 1945–46 international trial of the principal surviving Nazi criminals.¹

Justice Jackson’s Nuremberg was over 15 months of full time involvement in an unprecedented, post-World War, two continent, five major world capital,² wreckage-strewn, military occupied, twenty-plus nation, alliance-based, alliance fraying, four language, multi-million page, prisoner-inundated, debris- and body- and victim-surrounded, cold, hungry and unsafe, Nazi-fearing, Germany-fearing, World War III-fearing, fact

* Professor of Law, St. John’s University School of Law, New York City, and Elizabeth S. Lenna Fellow, Robert H. Jackson Center, Jamestown, New York (www.roberthjackson.org). This article grows out of my September 30, 2006, lecture at Washington University’s “Judgment at Nuremberg” conference. I am very grateful to Professors Leila Sadat, John Haley, Larry May and their Washington University faculty colleagues; to the University’s Whitney R. Harris Institute for Global Legal Studies, especially Linda McClain; and to the co-sponsoring institutions for their work on this extraordinary conference and commemoration. I thank my friends Whitney and Anna Harris for their special, generous and inspiring friendship. I also thank Professor Alice Kaplan for information about her father, Nuremberg prosecutor Sidney J. Kaplan; Professor Carol Needham for accurate St. Louis University data; and Richard C. Spatola for excellent research assistance.

1. One demonstration of this reality was Professor Cherif Bassiouni’s powerful intonation, at the start of these conference proceedings, of the word “Nuremberg” in multiple languages and national accents.

2. I refer to Washington, London, Moscow, Paris and Berlin. Perhaps Rome also belongs on this list.

finding, institution creating, law building, crime defining, criminal guilt proving, punishment imposing and historical record publishing human endeavor. Given all of that, to understand “Nuremberg”—Jackson’s Nuremberg roles and the 1945–46 proceedings before the International Military Tribunal (“IMT”)—really requires one to look at Nuremberg not merely as a sixty-year-old finished product, preserved in the London conference record,³ in forty-two volumes of trial transcripts,⁴ in ten volumes of trial briefs, documentary exhibits and interrogation transcripts,⁵ and in the IMT’s judgment,⁶ all of which sit on library shelves throughout the world and much of which is available in virtual form on the Internet.⁷ History should see and remember Nuremberg from the front end: as it unfolded, and as Justice Jackson unfolded it; as something that was far from easy or foregone; and as something that in many ways could have turned out very differently.

This sense of the contingency of Nuremberg is captured in many moments. One that I like very much is a paragraph that United States Coast Guard Reserve Commander Sidney J. Kaplan, a senior attorney on Justice Jackson’s United States prosecutorial staff, wrote from Nuremberg to his wife Lena, who then was at their home in Minneapolis with their one-year-old daughter, Hattie, on the evening of Monday, November 19, 1945:

Lena dearest,

Here we are on the eve of the opening of the second most important trial in the history of the world (No. 1: the trial of Jesus Christ). Tomorrow morning the trial opens. And believe me, the prosecution is utterly, completely, hopelessly, unprepared. Jackson

3. See UNITED STATES DEPARTMENT OF STATE, INTERNATIONAL CONFERENCE ON MILITARY TRIALS, LONDON, 1945 (PUBLICATION 3080, RELEASED FEB. 1949).

4. See TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL, NUREMBERG, 14 November 1945–1 October 1946, vols. I–XLII (1947–49) available at <http://www.yale.edu/lawweb/avalon/imt/imt.htm#proc> (known informally as “the blue series” or “the blue set”).

5. See OFFICE OF UNITED STATES CHIEF OF COUNSEL FOR PROSECUTION OF AXIS CRIMINALITY, NAZI CONSPIRACY AND AGGRESSION, vols. I–VIII, Supp. A and Supp. B (1946–48) available at <http://www.yale.edu/lawweb/avalon/imt/imt.htm#docs> (known informally as “the red series” or “the red set”).

6. See OFFICE OF UNITED STATES CHIEF OF COUNSEL FOR PROSECUTION OF AXIS CRIMINALITY, NAZI CONSPIRACY AND AGGRESSION, OPINION AND JUDGMENT (1947) available at <http://www.historiography.project.com/nca/index.html>.

7. See, e.g., Yale Law School’s Avalon Project, available at www.yale.edu/lawweb/avalon/imt/imt.htm.

*will deliver a sensational opening statement—and from that point on we're in the soup.*⁸

Nuremberg was about that soup, and about flailing in it, and about managing to swim well enough not to drown in it, and thus about accomplishing what we are here commemorating today. Nuremberg was all of the dimensions that I have mentioned, including many, many people, and it is an honor to be with some of them here at Washington University School of Law. At the top, however, Nuremberg was Robert H. Jackson—its course, its accomplishments and thus its legacy bear too distinctly the qualities and imprint of Jackson himself as Nuremberg's distinctly gifted, and distinctly human, architect, chief prosecutor and leading figure to overlook this personal identification. (Someone else, to be sure, could have been assigned to do the job that became Jackson's job and his "Nuremberg," but frankly, in historical hindsight, I am hard pressed to think who among his contemporaries in the United States government or private bar had his combination of stature and skill, and whose performance thus might have allowed us to be here commemorating anything like the Nuremberg we know historically.) Accordingly, this lecture will cover, in an utterly summary fashion I assure you, the background of Robert H. Jackson and then the story of "Nuremberg," which is Jackson's Nuremberg.

I. JACKSON

Robert H. Jackson's life is an American story like few others. He was born in 1892 in a family farmhouse in northwestern Pennsylvania.⁹ He spent his early years with animals, on horseback, in fields and woods, and on mountains. His education came in small town public schools in southwestern New York State, in his own reading, debating and public speaking, and in the friendships, mentoring and explicit tutoring that he received from special teachers who knew and loved words, theory, literature, economics, law, government and history. Jackson's higher education included no college education whatsoever and only one year of law school.¹⁰ He became a lawyer, after training primarily as an apprentice

8. Sidney J. Kaplan to Leonore (Lena) Kaplan, Nov. 19, 1945. *See generally* ALICE KAPLAN, *FRENCH LESSONS: A MEMOIR* (1993) (written by their younger daughter).

9. John Q. Barrett, *Albany in the Life Trajectory of Robert H. Jackson*, 68 ALBANY L. REV. 513 (2005).

10. Jackson's Early Life and Career, available at <http://www.roberthjackson.org/Man/theman2-1-1/>.

in a two-man law office in Jamestown, New York, in 1913 when he was twenty-one years old.¹¹ Jackson then spent twenty years in private practice based in western New York State, rising to become an accomplished trial and appellate lawyer,¹² a city lawyer, a corporate lawyer and counselor, a member of the American Law Institute, and, in 1934, national chairman of the American Bar Association's Conference of Bar Association Delegates, a predecessor of today's ABA House of Delegates.¹³

Robert Jackson's life included, in addition to the law, involvements in local, state and national Democratic Party politics.¹⁴ When Jackson was eighteen or nineteen, he met Frank Roosevelt, a freshman state senator from Dutchess County, New York, who himself was twenty-eight or twenty-nine years old.¹⁵ At that time (1911), neither one of them could have imagined the heights that the other would reach. Of course it was this Roosevelt, who in those early years had a politically potent surname but not very much else suggesting destiny, who later became "Franklin," and the governor of New York, and in 1933 the president of the United States, and in Jackson's life the crucial political benefactor, promoter and personal friend.¹⁶ In 1934, President Roosevelt brought Jackson to Washington, where he was nominated and confirmed to serve in a series of prominent, increasingly senior executive branch positions: in 1934, as Counsel of the Bureau of Internal Revenue in the Treasury Department;¹⁷ in 1936, as Assistant Attorney General heading the Tax Division in the Department of Justice;¹⁸ in 1937, as Assistant Attorney General heading the Antitrust Division;¹⁹ in 1938, as Solicitor General of the United

11. Barrett, *supra* note 9, at 513.

12. John Q. Barrett, *Robert H. Jackson's Oral Arguments before the New York Court of Appeals*, 3 HIST. SOC'Y. OF THE CTS. OF THE ST. OF N.Y. NEWSL. 3 (Spring/Summer 2005).

13. See Robert Hartley, *Eighteenth Annual Meeting of Conference of Bar Association Delegates*, 19 AM. BAR ASSN. J. 669, 676 (1933) (reporting Jackson's ascent to the chairmanship); *Bar's Aid Pledged in War on Crime*, N.Y. TIMES, Aug. 29, 1933, at 15 (same). In August 1936, the American Bar Association changed its structure, abolishing the twenty year old Conference of Bar Association Delegates and creating a new, more powerful and more democratically representative House of Delegates to be its successor. See E. Smythe Gambrell, *Conference of Bar Association Delegates Ends Work—Names In Its Book of Gold*, 22 AM. BAR ASSN. J. 721 (1936); William L. Ransom, *Questions and Objections to the Pending Plan Answered*, 22 AM. BAR ASSN. J. 452, 457 (1936).

14. Jackson's Government Service, available at <http://www.roberthjackson.org/Man/theman2-2-2/>.

15. See Jackson's Early Life and Career, *supra* note 10.

16. See generally ROBERT H. JACKSON, THAT MAN: AN INSIDER'S PORTRAIT OF FRANKLIN D. ROOSEVELT (John Q. Barrett ed., 2003).

17. See Jackson's Government Service, *supra* note 14.

18. *Id.*

19. *Id.*

States;²⁰ in 1940, as Attorney General of the United States;²¹ and in the summer of 1941, as an Associate Justice of the Supreme Court of the United States.²²

Although few résumés report a comparable ascent in public life, Jackson's government job titles actually understate the substance of his work. He was, ahead of each of those titles, a figure in the inner, inner circles of Roosevelt's New Deal, an eloquent and successful lawyer and leader in high profile battles, a leading voice and, in time, a national headline name. In 1935, for example, Jackson led the successful civil tax fraud prosecution of Andrew W. Mellon, the former Secretary of the Treasury.²³ As Solicitor General beginning in 1938, Jackson built a stellar—really an unsurpassed—record and reputation while winning, in a Supreme Court that had changed course, the constitutionality of the New Deal.²⁴ Jackson became a prominent visitor and speaker in cities and venues across the country and a renowned national radio voice. He was known generally as FDR's trusted, supremely capable, if perhaps a bit radical, young lieutenant. Jackson at times was understood to be, and discussed widely as, FDR's favorite to succeed him as president when his second term would conclude in January 1941. Indeed, Jackson probably would have been the New Dealers' presidential torch bearer in 1940—whether the Democratic Party barons and convention delegates would have nominated Jackson is a separate, and harder, issue for speculation—had FDR decided not to seek a third term.

In the summer of 1941, Jackson became an associate justice and the Supreme Court's distinctively dazzling writer. During the next years, it was widely believed and reported that President Roosevelt intended to make Jackson the next chief justice of the United States. In 1945 and into 1946, it was believed by many, including Jackson's friend Harry Truman, who had become the new president that spring, that Jackson was the person uniquely qualified to be president of the United States and perhaps was still heading for that destination even as he served as the president's appointed chief prosecutor at Nuremberg.²⁵

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

24. See generally E. Barrett Prettyman, Jr., *Robert H. Jackson: "Solicitor General for Life,"* in JOURNAL OF SUPREME COURT HISTORY: 1992 Yearbook of the Supreme Court Historical Society 75; (The Supreme Court Historical Society 1992); Victoria A. Graffeo, *Robert H. Jackson: His Years as a Public Servant "Learned in the Law,"* 68 ALBANY L. REV. 539, 542–45 (2005).

25. See GERALD T. DUNNE, HUGO BLACK AND THE JUDICIAL REVOLUTION 226–26 & 453 n.3 (Simon and Schuster 1977) (describing President Truman's spring 1946 statement to his aide Clark

II. JACKSON'S NUREMBERG

The foregoing summary is a glimpse of Robert H. Jackson, the person and the public figure. Jackson met his moment, and he earned a large measure of his significant place in history, in the year-plus that he devoted to the Nuremberg Trials that included, in him and for him, many complex, defining facets:

First, Jackson personified Nuremberg's importance. The decision to send him to prosecute Nazi war criminals was a Roosevelt concept that became a Truman decision. With no slight intended to our host Washington University's former law dean and later Jackson's Supreme Court colleague Justice Wiley B. Rutledge, whose portrait looks down from the wall of the Anheuser-Busch Hall courtroom in which these conference proceedings are occurring, Jackson in the spring of 1945 was not merely one of nine Supreme Court justices. He was, even among his colleagues on one of the most talented Supreme Courts ever, a figure of distinctly high national and international reputation and experience. As a matter of branding, President Truman's decision to appoint Jackson to prosecute Nazi war criminals was a strong statement indicating how seriously the United States took the prosecutions. It prompted the British, the Soviets and the French to appoint counterpart chief counsel of capability, high rank and sufficient authority to represent their nations.

Second, Jackson also brought relevant experience to the task. His past included not merely the varied and relevant work of litigator, senior government official, foreign traveler and, in spots, international diplomat, but work in policy positions, especially during his eighteen months as Attorney General when the United States was preparing for and moving toward military involvement in the European war. His experience as Attorney General included literally the theoretical foundation of what was to become the core criminal law concept of Nuremberg: that Germany and its leaders had waged an illegal war of aggression. That perspective, with a thorough supporting analysis, was the basis of the Jackson-approved legal theory for President Roosevelt's assistance to Great Britain, beginning in late summer 1940, by providing United States destroyers, our neutrality laws and other domestic legal restrictions notwithstanding.²⁶ The same factual and legal analysis led to Lend-Lease legislation and assistance to Great Britain and then to the Soviet Union beginning in 1941. Jackson's

Clifford that Justice Jackson, who then was serving as chief U.S. prosecutor at Nuremberg, was the "one man . . . whose experience and talents seemed to make him presidential timber").

26. See JACKSON, *supra* note 16, at 81–103.

March 1941 speech to the lawyers of the Western hemisphere, delivered in Havana, Cuba, after he and FDR had gone over it together on a presidential yacht offshore, is in many respects the first draft of the London Agreement and IMT Charter of August 1945 and the Nuremberg indictment that soon followed.²⁷

A third aspect of Jackson's Nuremberg was personal ambition—he wanted this job. In a sense it was his war service. He went on the Supreme Court in July 1941 and, within months, Japan's attack on Pearl Harbor changed everything. Jackson volunteered to leave the Court repeatedly, but the President told him to stay put—in FDR's view, Jackson was not a warrior and he was being groomed through judicial service for his later elevation to chief justice, and each of those reasons argued against bringing him back from the Court into the executive branch during the war years. The President also recognized, however, as he saw from an early date the possible legal tasks that would follow the War, that Jackson was "particularly qualified" to do them²⁸—and, in 1945, that promised work became Nuremberg. The presidential assignment to prosecute Nazis also was, for Jackson, a trial separation from the Supreme Court. He was unhappy there in 1944 and early 1945, primarily because some of his colleagues had turned out to be not the principled, apolitical types he thought justices should be. President Truman's request that Jackson prosecute leading Nazis while on leave from the Court thus offered him not only a vital and challenging task but, in some senses, a welcome professional respite. (During the course of the trial, Truman repeatedly declined Jackson's offers to resign from the Supreme Court, so his leave never turned into a permanent departure.)

Jackson's Nuremberg also involved, however, self-sacrifice. He got to be the man of Nuremberg, to be sure, but he knew it would cost him dearly. Jackson recognized that leaving North America and the identity of judicial office to take on an enormously complex international diplomatic and legal project that could fail probably would cost him the chief justiceship, and in 1946 it did. Jackson also viewed the decision to prosecute the Nazis as requiring him never to seek political office thereafter, and he made that serious choice without hesitation. He also

27. This speech, which the U.S. Ambassador to Cuba read to the Inter-American Bar Association for Jackson because rough seas prevented him from traveling from FDR's yacht to Havana to deliver it in person, was published widely. See, e.g., Robert H. Jackson, Address before the Inter-Am. Bar Ass'n: International Order, 27 A.B.A. J. 275 (1941); Address of Robert H. Jackson, Attorney General of the United States, International Bar Association, Havana, Cuba, 35 AM. J. INT'L L. 348 (1941).

28. JACKSON, *supra* note 16, at 107.

thought that the workload and hardships of this assignment might shorten his life, and probably they did.

Jackson's Nuremberg assignment personified a commitment to the path of law, not force. As he sketched it early on, the Allies at the end of the war had three options in dealing with the defeated Nazis. At one extreme, the victors had power to line up and shoot as many of the vanquished as they preferred. At the other extreme, the victors could accept salutes from the defeated and watch them retreat into their territory. Between these two extremes came Nuremberg: an effort, for the first time, to bring law, at the level of actual enforcement and individual accountability, to the wreckage of war. Jackson believed in this law path and defined it as his condition for taking the job. He got the job on these terms because lawful individual accountability was President Truman's vision as well.

Jackson's Nuremberg also was characterized, particularly at the start, by innocence and foolish optimism: he thought that this could be a summer job. To be fair, he was recruited on representations (which turned out to be false) that there were assembled cases ready to prosecute. The calendar indicates, strikingly, which "cases" those were—President Truman announced Jackson's appointment on May 2, 1945, but when their private conversations about this task actually began eight days earlier, the prospective lead defendant was Adolf Hitler, perhaps to be joined in the dock by Benito Mussolini, Josef Goebbels, Martin Bormann, Heinrich Himmler and Hermann Goering. They were the perpetrators who Jackson thought he could prosecute in an international trial, start to finish, between May and the first Monday in October of 1945.

Another defining aspect of Jackson's Nuremberg thus was recalibration, almost on a daily basis. The initial vision of prosecuting Hitler and a few other select, premier culpable defendants was succeeded by a plan to prosecute figures who were in many senses secondary. The Nuremberg defendants tried before the IMT were chosen because they represented slices of Nazi Germany—each individual defendant was chosen for prosecution because he represented a sector of Nazi power, and the defendant organizations that were prosecuted were pursued in the belief that establishing in a first trial the guilt of these entities would, through such verdicts, permit efficient subsequent prosecutions of culpable organization members. Prosecutor staff documents put actual, and somewhat mind-boggling, numbers on this proposed undertaking. In one such document, dating from January 1946, the number at the first tier of potential culpability was one: the Fuehrer. The second tier, Reich leadership, jumped to 1,000. Gauleiters and staff numbered 4,000 more. Circle leaders were an additional 21,000. Group leaders were 2,000 more.

Then came cell leaders, numbering almost 60,000 others, followed by block leaders numbering more than 300,000 others. Those persons, totaling 463,048, were the criminals to be prosecuted. And who would be spared prosecution? The spared would include 400,000 lesser members of the Nazi Party leadership, about 4,000,000 Party members, and more than 40 million additional Party voters, along with the surviving segments of the 30 million others who had been German citizens in 1939—a total of about 79 million Germans would not be prosecuted.²⁹ This all was determined, fitfully and over months and years, to be foolishness—massive prosecution never happened.

Another aspect of Jackson's Nuremberg was his voice, which articulated eloquently and effectively the legal vision, the factual record and the prosecutorial position. Jackson's Nuremberg trial work is remembered most widely for his opening and closing statements, which deserve separate mention below. His public articulation of Nuremberg itself actually began in June 1945 when he wrote and released a report to the President that was the blueprint for everything that followed. This report was a beautiful, sparkling document that came from Jackson's mind and pen. It was published in newspapers across the United States and caused a flood of lawyers to seek jobs from Jackson. It also, more substantively, did much to bring the British on board with the United States' vision going into negotiations with their French and Soviet allies.

Jackson's job, no turnkey operation, turned out to require, at the start, almost two months of intense international diplomacy. At London, the Allied nations conferred, drafted, debated and struggled to agree on a substantive plan to prosecute Nazi war criminals, but after weeks, coming from quite different legal systems and political perspectives, they remained far from agreement. In late July 1945, Jackson traveled from London to Potsdam in Allied-occupied Germany, just outside of Berlin, where he joined high level meetings with United States decision makers who were there for the "Big Three" conference (and who, in these meetings at least, interestingly included Secretary of State James F.

29. A chart containing these data, which was prepared in January 1946 by or under the supervision of Major Warren Farr, a lawyer on Jackson's staff, is preserved in Jackson's personal files (the so-called "Lindenstrasse Files") in the National Archives and Records Administration ("NARA"), Entry 52, Box 5, College Park, MD, in a folder that he hand-captioned "Facts as to Organizational Criminality." *See generally* Memorandum from Maj. Warren F. Farr to Justice Robert H. Jackson, (Jan. 4, 1945 [sic—1946]) (distinguishing the total number of Germans who might have been treated as implicated in the conspiracy that then was being prosecuted as Count One before the IMT from the number of Germans who actually were being prosecuted as part of the NSDAP Leadership Corps, and reporting to Jackson that an illustrative chart—the document cited here and described in the text—was being prepared).

Byrnes, Assistant Secretary of War John J. McCloy, senior legal adviser Charles Fahy and various generals, but not President Truman). They reiterated to Jackson the blank check nature of his power as United States chief of counsel for the prosecution of Nazi war criminals: he had discretion to insist on any legal arrangements he thought necessary, even if his uncompromising positions could blow up the London conference should the French and Soviets not recede from disagreeing. Such a breakdown would have forced each nation to prosecute the particular German war criminals it had in its own custody and, in effect, might well have marked the end of the Allies more generally. Jackson, thus armed and also burdened with authority and complete discretion, returned from Potsdam to London, delivered various ultimata and, within days, obtained Allied agreement to key United States positions on procedures he thought central to a lawful trial process.

The August 8, 1945, London Agreement and Charter are the next facet of Jackson's Nuremberg. The Charter is a seminal document of modern international law: it defines crimes, creates the independent judiciary of the IMT and establishes the due process of the Nuremberg trial, including its commitments to proceeding in public, to a prosecution burden of proof, and to defendants' rights to counsel and defense resources.

Jackson's Nuremberg tasks also included staffing the incredibly talented group of lawyers and other personnel with whom he surrounded himself during this project. They included his own son William Eldred Jackson, age twenty-six, who served as his father's executive assistant. The staff early on recruited a Los Angeles lawyer and Naval officer, Whitney Robson Harris, who was with the OSS in London, very talented and in possession of evidence of German war crimes.³⁰ The United States team at Nuremberg included a young lawyer from St. Louis, Edgar G. Boedeker.³¹ It did not include Mark Eagleton, another St. Louis lawyer whose family name has remained prominent—Jackson declined to add Eagleton to his staff, notwithstanding Missouri political leader, presidential friend, Democratic National Committee chairman and

30. *See generally* John Q. Barrett, Postscript: Justice Robert H. Jackson on "My dear Whit," Lectures (Spring 2002) (Whitney R. Harris Institute for Global Legal Studies) (on file at the Washington University School of Law, St. Louis, MO).

31. Edgar George Boedeker, a St. Louis native, graduated from St. Louis University School of Law in 1937. During World War II and after, he served in the Judge Advocate General's Department of the U.S. Army. At Nuremberg, Captain Boedeker was part of a JAG team within the U.S. legal staff that prepared evidence for presentation to the Tribunal. He later served in the Missouri House of Representatives, was in private law practice and served as the city attorney of Clayton, Missouri. *See Edgar G. Boedeker, Longtime Clayton City Attorney*, ST. LOUIS POST-DISPATCH, Aug. 8, 2001, at B4 (reporting his death at age 85).

Postmaster General Robert Hannegan getting former Supreme Court Justice James Byrnes to set up a meeting about Eagleton (who even was willing to work *pro bono*), because Jackson was convinced that Hannegan was looking only to advance Eagleton's political career.³² Jackson's Nuremberg team also had many excellent lawyers who did not stay for the duration of the trial—some were civilians who had signed on for a fixed period, and they left after fulfilling those commitments; others who were in active military service left Nuremberg when they had earned enough “points” to be discharged. Jackson, by contrast, had signed on for the international trial job and saw it through—as he once put it, he was not eligible to earn the points to leave early.

Jackson's Nuremberg included the Allied nation indictments in October 1945 of twenty-four individuals and six Nazi organizations. The indictment's principal draftsman was United States lawyer Benjamin Kaplan; he returned to the U.S. from Nuremberg in December 1945, resumed private legal practice in New York and subsequently became an eminent professor and scholar at Harvard Law School and a distinguished jurist on the Massachusetts Supreme Judicial Court. One of the lawyers with whom he worked closely was Bernard Meltzer, who also prepared evidence of German concentration camps, presented in January 1946 the trial case against defendant Walther Funk, and later that year commenced his long career as a distinguished law professor at the University of Chicago. Other international and criminal law giants who played consulting roles in the indictment process included Professor Hersch Lauterpacht of Cambridge University and Professor Sheldon Glueck of Harvard Law School.

Jackson's Nuremberg also included the reality of living in and being a senior official in Allied-occupied Germany. He and his staff worked with

32. In the early 1950s, Jackson recalled that Hannegan had pushed for Mark Eagleton's appointment as Jackson's chief assistant because the prestige would help Eagleton, who was an important Hannegan political ally. See *THE REMINISCENCES OF ROBERT H. JACKSON* (Harlan B. Phillips ed., 1955) (available at Columbia Univ., Oral History Research Office); see also Robert H. Jackson diary entry, May 10, 1945 (available in Robert H. Jackson Papers, Library of Congress, Manuscript Division, Washington, D.C. (“RHJL”), Box 95) (describing Byrnes's telephone call about Hannegan's desire to meet with Jackson to urge him to put Eagleton on Jackson's staff); Letter from Robert H. Jackson to Mark D. Eagleton, May 14, 1945 (available in RHJL, Box 105, Folder 12) (acknowledging Hannegan's communication of Eagleton's offer to help Jackson but explaining that he is relying chiefly on government personnel who have been involved in working on war crimes materials); Letter from Mark D. Eagleton to Robert H. Jackson, May 21, 1945 (available in *id.*) (acknowledging Jackson's letter and setting forth his extensive civil litigation experience and explaining his desire to serve); Letter from Secretary [Ruth M. Sternberg] to Mark D. Eagleton, May 25, 1945 (available in *id.*) (acknowledging his May 21st letter, received in Jackson's Supreme Court chambers while he was on his first trip to Europe as U.S. Chief of Counsel).

the occupation government on numerous issues, including so-called denazification. Jackson also had close working relationships and friendships with the Supreme Allied Commander, General Dwight D. Eisenhower, with his successor General Joseph T. McNarney, with Judge Advocate General Edward C. Betts, and with General Lucius D. Clay of the occupation government, among others. In Germany, Jackson also met and worked closely with Colonel Charles Fairman, who was serving in the Judge Advocate General Division on leave from his position as a political science professor at Stanford University, headed General Betts's international law branch in Frankfurt and supervised responsibility for war criminal prosecutions throughout the occupation theater.³³ (Later, during two years (1953–55) that fell between his tenure at Stanford and his tenure on the faculty at Harvard Law School, Fairman was the Nagel Professor of Constitutional Law here at Washington University in St. Louis. He was an extremely significant figure in the development of United States constitutional law, thinking and scholarship.³⁴) Jackson's trial endeavor was one part of the occupation land and population problems that the United States was grappling with following Nazi Germany's unconditional surrender, and he was enmeshed to some degree in every aspect of the occupation.

33. See, e.g., Letter from Charles Fairman to Chief Justice Harlan Fiske Stone, Mar. 1, 1946 (available in Harlan Fiske Stone Papers, Library of Congress, Manuscript Division, Washington, D.C., Box 12):

Before I left Germany, it was my privilege on numerous occasions to meet your wandering Brother [Justice Jackson]. I had many opportunities to observe what a very large contribution he had made to the operation of getting the war crimes trials started. I think particularly of his leadership and the influence of his character in the unbelievably difficult business of obtaining common action, quite aside from any technical legal matters.

See also Letter from Robert H. Jackson to Charles Fairman, Mar. 13, 1950, reprinted in WILLIAM M. WIECEK, XII HISTORY OF THE SUPREME COURT OF THE UNITED STATES: THE BIRTH OF THE MODERN CONSTITUTION: THE UNITED STATES SUPREME COURT, 1941–1953, 713–15 (2006) (writing, in a letter about the constitutionality of racial segregation in schools in the United States, that “[y]ou [Fairman] and I [Jackson] have seen the terrible consequences of racial hatred in Germany” and thus “can have no sympathy with racial conceits which underlie segregation policies,” and noting that “[y]ou and I have seen that nothing promotes fascism as surely as a real and widespread popular fear of communism and ‘radicalism’”).

34. See, e.g., Charles Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights: The Original Understanding*, 2 STAN. L. REV. 5 (1949); CHARLES FAIRMAN, HISTORY OF THE SUPREME COURT OF THE UNITED STATES: RECONSTRUCTION AND REUNION, 1864–88, vol. 6 (1971); CHARLES FAIRMAN, HISTORY OF THE SUPREME COURT OF THE UNITED STATES: RECONSTRUCTION AND REUNION, 1864–88, vol. 7 (1987); CHARLES FAIRMAN, HISTORY OF THE SUPREME COURT OF THE UNITED STATES: FIVE JUSTICES AND THE ELECTORAL COMMISSION OF 1877 (Supp. 1988). Following Jackson's death in October 1954, Fairman wrote an assessment and tribute that focused on Jackson's Supreme Court work. Charles Fairman, *Associate Justice of the Supreme Court*, 55 COLUM. L. REV. 445 (1955).

The building and presenting of the prosecution case was another central aspect of Jackson's Nuremberg. During the spring and summer of 1945, he made the fundamental decision that the case would be built primarily on captured German documents, not on memory and honesty-dependent testimony obtained by making deals with cooperating witnesses. The documentary approach made for a longer, duller trial and thus some press irritation and related external criticism, but it resulted in a record that was in the trial, and that is in history, unimpeachable. And of course what we know of Nazi depredations, both the crimes of individual perpetrators and the history of that regime, is based in that Nuremberg trial record.

Jackson's Nuremberg also included his trial voice, which led the advocacy and was consistently, if not perfectly, effective. His November 21, 1945, opening argument and his July 26, 1946, summation were spell-binding in the courtroom and will always be remembered in history. Jackson also gave on February 28, 1946, an extensive and impressive, if today less-remembered, argument to the Tribunal on the criminality of the Nazi organizations that were being prosecuted and the legal theory of those cases. He cross-examined three defendants: Hermann Goering, with some low moments but also more effectiveness than the popular memory believes; Hjalmar Schacht, building a record that shines harsh light on his ultimate acquittal by the Tribunal; and Albert Speer, who Jackson may at times have treated too gently but at others questioned in ways that produced historically devastating admissions. Jackson also personally, and effectively, cross-examined leading defense witnesses, including former German air force General Karl Bodenschatz, former Field Marshal Erhard Milch, former German air force Colonel Bernd von Brauchitsch, former Prussian State Ministry secretary Paul Koerner and former German diplomat and intelligence officer Hans Bernd Gisevius, and Jackson outside of the courtroom interrogated and also supervised and tracked his staff's interrogations of many former Nazis who were in Allied custody.³⁵

Jackson's Nuremberg also included, at its core, a determination not to be about vengeance. The record obviously shows prosecutor Jackson working aggressively for many months to build cases, get them to trial and win convictions. It does not, however, include any Jackson argument for particular punishment for any defendant—he left those assessments and determinations to the Tribunal. Jackson believed personally that these defendants deserved enormous punishments and he, who personally

35. The memoir of Jackson's Interrogation Division chief interpreter, who participated in many of these interrogations, is RICHARD W. SONNENFELDT, *WITNESS TO NUREMBERG* (Arcade Publishing 2006).

opposed the death penalty, felt no qualms about the executions of ten criminals (nor Goering's suicide) following their Nuremberg convictions. But Jackson, in not arguing punishment, was taking seriously the role distinctions—his own responsibilities as a trial prosecutor, and the Tribunal's independence—that were part of his core concept of Nuremberg's legality.

Jackson's Nuremberg involved, finally, seeing it through. He saw it through in the sense that he remained throughout the trial and then summed up on July 26, 1946, the evidence against the individual defendants. He then, in August 1946, came home to Washington and remained there into mid-September, preparing for the impending start of the new Supreme Court Term that would include extra work carried over from the 8-justice previous term that Jackson had missed entirely. But Jackson also saw Nuremberg through in the sense that he returned himself to face judgment day.

Jackson returned to Nuremberg, for the last time, on Saturday, September 28, 1946. He returned with a delegation of trusted friends and former colleagues, including some whom he had with regret effectively fired in earlier stages of the prosecution project. When they arrived, they found that "Jackson's" house (a private home, at Lindenstrasse 33 in Dambach, Fürth, which the United States occupation Army had seized from a German family in 1945 and held for a number of years) had been passed on since late July to his deputy, General Telford Taylor, who would be heading up the United States-only trials that would follow the IMT trial and constitute a second phase of Nuremberg. This meant that Jackson was, in a light sense, homeless. He went with his party to the large "VIP house" that the Allies were using, but it was largely filled with other VIPs who had arrived earlier; Jackson and his group found beds under its eaves, up in the attic.

On September 30, 1946—sixty years ago—Jackson and his group traveled to the Palace of Justice. They sat through the Tribunal's reading of its judgment, which must have been both gripping and, as it filled that full day and continued into the next, excruciating. On September 30th, Jackson heard the judgments on the legal validity of the crimes charged and the verdicts on the defendant organizations. On October 1st, he heard in the morning the verdicts on the individual defendants and, in the afternoon, the sentences imposed on the nineteen of twenty-two defendants who that morning had been found guilty. What Jackson heard in those judgments was corroborating vindication of his core thoughts and efforts during the preceding seventeen-month process: the crimes proven; the guilt established; and the acquittals that, although they stung in the

moment, came to embody in his later reflections very tangible proof of the fairness of the Nuremberg process.

III. A JUDGMENT

And so what are we to make of Justice Robert H. Jackson's Nuremberg, which also was and is the Nuremberg of all who played constructive roles in the international trial sixty years ago?

They won.

The Nuremberg Trials: Recommended Resources

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International March of the Living
Robert H. Jackson Continuing Legal Education Program
Krakow, Poland
April 13, 2018

Regarding the International Military Tribunal (1945-1946):

Whitney R. Harris, Tyranny on Trial: The Trial of the Major German War Criminals at the End of World War II at Nuremberg, Germany, 1945-1946 (Dallas: Southern Methodist University Press, 1954; revised ed. 1999).

Robert E. Conot, Justice at Nuremberg (New York: Carroll & Graf Publishers, Inc., 1984).

Telford Taylor, The Anatomy of the Nuremberg Trials (New York: Alfred A. Knopf, 1992).

Joseph E. Persico, Nuremberg: Infamy on Trial (New York: Viking/Penguin 1994, paperback 1995)

Ann Tusa & John Tusa, The Nuremberg Trial (London: BBC Books, 1995).

Bruce Stave & Michele Palmer with Leslie Frank, Witnesses to Nuremberg: An Oral History of the American Participants at the War Crimes Trials (New York: Twayne Publishers, 1998).

Drexel A. Sprecher, Inside the Nuremberg Trial: A Prosecutor's Comprehensive Account (Lanham, MD: University Press of American, 1999) (2 vols.)

The film "Nuremberg" (2000), www.imdb.com/title/tt0208629/.

John Q. Barrett, "The Nuremberg Roles of Justice Robert H. Jackson," 6 Washington University Global Studies Law Review 511 (2007), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1769826.

Perspectives on the Nuremberg Trial (Guénaél Mettraux, ed., Oxford University Press, 2008)

Kim Christian Priemel, The Betrayal: The Nuremberg Trials and German Divergence (Oxford University Press, 2016)

John Q. Barrett, “The Nuremberg Trials: A Summary Introduction,” 39 Loyola of Los Angeles International & Comparative Law Review 336 (Winter 2017) (part of a Special Edition: The Nuremberg Laws and the Nuremberg Trials, *available at* <http://digitalcommons.lmu.edu/ilr/>).

Michael R. Marrus, The Nuremberg War Crimes Trial 1945-46: A Brief History with Documents (Bedford Series in History and Culture) (Boston & New York: Bedford/St. Martin's paperback, 2d ed., 2018).

Regarding the United States Nuremberg Military Tribunals (1946-1949):

The film “Judgment at Nuremberg” (1961), www.imdb.com/title/tt0055031/.

Kevin Jon Heller, The Nuremberg Military Tribunals and the Origins of International Criminal Law (Oxford University Press 2011, paperback 2012).

Writings by Justice Robert H. Jackson:

The Case Against the Nazi War Criminals (New York: Alfred A. Knopf, 1946), which includes his opening statement at Nuremberg (November 1945), the London Agreement (August 1945) and the Nuremberg Indictment (October 1945).

The Nürnberg Case (Knopf, 1947), which includes his first report to President Truman (June 1945), the London Agreement, Jackson’s opening statement, his legal argument on the criminal charges against indicted Nazi organizations (February 1946), Jackson’s closing address at the trial (July 1946) and excerpts from four of his cross-examinations (of defendants Hermann Goering, Hjalmar Schacht and Albert Speer and defense witness Erhard Milch) during the trial.

That Man: An Insider’s Portrait of Franklin D. Roosevelt (John Q. Barrett, ed., Oxford University Press 2003, paperback 2004).

The Robert H. Jackson Center

www.roberthjackson.org – searchable website includes bibliographies and many Jackson articles and speeches.

The Jackson List, by John Q. Barrett

<http://thejacksonlist.com/> -- searchable website includes many dozens of short essays pertaining to Nuremberg.

Pursuing Balkans War Criminals; and the Hunt for Osama bin Laden in Afghanistan after 9/11

Michael Hurley

former CIA officer

Director for the Balkans, National Security Council Staff, the White
House

Senior Counsel and Team Leader, the 9/11 Commission

Senior Adviser on Counterterrorism, U.S. Department of State

Authorities

- Where does CIA's authority to pursue war criminals come from?
 - Not the U.S. Constitution (no CIA at our nation's founding)
 - CIA's general authority comes from federal statutes, specifically, Title 50 of the U.S. Code.
 - Distinguish from Title 10 of the U.S. Code (provides statutory basis for authority of the U.S. military)

Authorities continued

- Both CIA and the U.S military were operating in the Balkans during the Balkans wars in the 1990s.
- And later in Afghanistan and world wide following the 9/11 attacks.

Authorities continued

- Specific authority in each case, pursuing war criminals in the Balkans and pursuing Osama bin Laden and his al Qaeda lieutenants in Afghanistan and other countries came pursuant to separate 'presidential findings.'
- A word about presidential findings:
 - They authorize CIA covert action
 - Managed by the National Security Council
(what is the National Security Council? hint, it's not a place, it's a specific group of people)
 - Briefed to select congressional leaders

Covert Action

- Any time there is a good book about U.S. covert action, read it! Highly secret programs. Many have failed, some have been huge successes.
- There was a presidential finding authorizing CIA to pursue Balkans war criminals.
- Specific presidential finding to pursue Osama bin Laden and his gang

Balkans War Crimes

- From the start of the Balkan Wars of the 1990s terrible war crimes, crimes against humanity, and genocide (coining of the odious euphemism 'ethnic cleansing') took place on a scale not seen since WWII.
- Uniquely, and perhaps for the first time, much of it was captured on video. Leaders of Croatia, Bosnia, and Republika Srpska exhorted their ethnic followers to commit atrocities.

Balkans War Crimes continued

- The West responds:
 - establishment of ICTY, with judges and prosecutors drawn from around the world.
 - NATO nations commit resources and personnel; special forces from six countries participated in the hunt (the biggest special operations deployment anywhere in the world before 9/11); intelligence agencies from many countries shared information and cooperated in the manhunt.
 - USG and allies made capturing and bringing to justice war criminals a high priority
 - USG has an ambassador on war crimes issues; DOJ's Department of Special Investigations.
 - NSC staff had a legal expert on war crimes.
(With respect to Never Again, that expert traveled with Elie Wiesel to Macedonia to see the camps)
 - Pentagon devoted armed forces, forensic experts

Balkans War Crimes continued

- Biggest names were Slobodan Milosevic, President of Serbia; Radovan Karadzic, President of the Republika Srpska; Ratko Mladic, commander of Republika Srpska forces; dozens of others.

The Crimes

- Artillery shelling of civilian populations
- Mass murder
- Sanctioned mass rape
- Torture
- Wholesale slaughter of non-combatants
- Forced removal of entire populations

Authority to Pursue Balkans War Criminals

- Memorandum of Notification signed by President Bill Clinton authorized CIA to capture Balkans War Criminals to face justice at the ICTY in The Hague.
- MISSION: Track down, Arrest, and Bring to Court.

Personal Anecdotes

- Worked policy issues during two stints on the NSC staff as Director for the Balkans
- Directly involved in operations on the ground in Bosnia in '95 and '96; and in Kosovo in '99 and 2000
- 1995 was first time I ever saw drones in action; used to gather intel on war criminals
- After hostilities, after Dayton Peace Accords, and later in Kosovo after international KFOR entered as peace keepers, war criminals went dark.

Personal Anecdotes continued

- How do you find them? It took years.
- Developing sources, paying sources.
- Doing it all covertly.
- Describe a capture operation
- Amount of detailed intel required to even mount an operation (the famous check lists!)
- People remained loyal to their leaders, hid them.

Personal Anecdotes continued

- Coming up with new strategies to find the war criminals.
- Rewards
- Publicity.
- Try to get them moving from hiding, go to new places, hoping they'd show themselves.
- Know of two people who were asked to come back to NSC staff; agreed to do so only after receiving promises that the then Administration would make bringing these war criminals to justice one of its highest priorities.

Did We Get the Balkans War Criminals?

- “[the] pursuit itself was a historic achievement. It took a very long time, but by 2011 all 161 people on the ICTY list of indictees faced justice one way or another.”
- “More than half the suspects were tracked down and captured. Others gave themselves up . . .”
- “The effort to bring them to justice was long, uneven, and mired with mistakes, but it ultimately emerged as the most successful manhunt in history and an extraordinary testament to the tenacity of a remarkable small group of people.”

These quotes are from a book that I will recommend in just a moment.

Targeting War Criminals in Afghanistan and around the World post-9/11

- On September 17, 2001 (only 6 days after the 9/11 attacks!) President George W. Bush signed an order authorizing CIA to kill or capture al Qaeda militants around the globe.
- These broad and exceptional authorities would give CIA the broadest and most lethal authority in its history.
- This broad grant is still in effect and forms the basis of CIA's counterterrorism efforts, even as the threat has shifted from al Qaeda to ISIS and others.

What it Was Like Pursuing War Criminals in Afghanistan, Pakistan, and Elsewhere

- First task when the U.S. entered Afghanistan, and first CIA team was on the ground within two weeks of the 9/11 attacks.
- Overthrow Taliban
- Highest priority of every team was High Value Targets (HVTs), the biggest fish were bin Laden and his deputy the Egyptian physician Ayman al-Zawahiri.
- Develop intel on location
- Work with military to mount an operation
- Call on special U.S. task force at Bagram Airbase.

How We Did It

- Develop sources on the ground.
- No time to vet.
- Paid off sources with cash, US \$.
- Literally duffle bags of millions of dollars were flown to each CIA outpost every couple of weeks.
- Bought information
- An all-out effort

Specific Examples in Afghanistan

- Teamed with Delta Force, SEAL Team 6, British SAS and SBS, Australian SAS.
- Unconventional travel methods: camel, horseback, ATVs; Russian high-altitude helos (unsafe)
- Problems: reliability of information; sorting through bogus information; working with warlords.
 - fake Zawahiri intel—supposedly lying in a hospital room. Had to spin up task force. False alarm. Happened frequently.
- Illustrated by tragedy at Khowst, CIA *Chapman Base*, December 2009: 7 CIA officers killed by a car bomb. Hoping to get information from an agent they thought they controlled, in reality, this person, a Jordanian doctor, who claimed to be able to lead them to Zawahiri, was working with al Qaeda. Hope of nailing such an important figure carried significant risks.
- Do all this while fighting. e.g. *Operation Anaconda* and the deaths of the first day of 7 Navy SEALs at *Robert's Ridge*.

Culminating in the Killing of bin Laden in May 2011

- A Hollywood version of the operation is the 2012 film Zero Dark Thirty.
- For those wishing to delve deeper than Hollywood, there are two books on my recommended reading list that are quite good.

Recommended Reading:

- The Butcher's Trail: How the Search for Balkans War Criminals Became the World's Most Successful Manhunt
Julian Borger (Other Press, 2016)
- The 9/11 Commission Report
(Norton, 2004)
- Ghost Wars: The Secret History of the CIA, Afghanistan, and Bin Laden, From the Soviet Invasion to September 10, 2001
Steve Coll, (Penguin Press, 2004)

Recommended Reading:

- Directorate S
Steve Coll (Penguin Press, 2018)
- The Finish: The Killing of Osama bin Laden
Mark Bowden (Atlantic Monthly Press, 2012)
- Manhunt: The Ten-Year Search for Bin Laden
Peter Bergen (Crown, 2012)
- The Terror Presidency
Jack Goldsmith (Norton, 2007)

Fiction

- Testimony
Scott Turow (Grand Central, 2017)