

The Enduring and Controversial Legacy of the Nuremberg Trials

Jacob Klokeid

I: HISTORICAL CONTEXT	82
A. Growing Calls for Justice	82
B. Creation of the International Military Tribunal	83
C. The Proceedings, Results, and Impact	84
II: CONTROVERSY SURROUNDING THE TRIALS' LEGITIMACY ..	86
A. No Valid Legal Foundation for the Trial	87
B. Violations of Traditional Notions of Ex Post Facto and Respondeat Superior	90
C. Hypocrisy and Discrimination	93
III: PRECEDENTIAL VALUE AND IMPACT	96
A. Principle of Individual Responsibility	96
B. The European Public's Reaction to the Nuremberg Trials	98
C. The Pursuit of Justice Beyond Nuremberg	99
D. War Crimes in Yugoslavia and Rwanda	101
E. Establishment of the Nuremberg Principles and the International Criminal Court (ICC)	103
F. Human Rights Litigation in U.S. Courts	106
CONCLUSION	107

ABSTRACT

In the wake of history's most profound atrocity, the Allied powers undertook a pivotal initiative to illuminate the horrific crimes committed by Nazi Germany during the Holocaust, ensuring that both the international community and the German populace confront the chilling reality of their past. Although the various powers advocated for different ideas of retribution, the consensus was that those responsible for this atrocity should be brought to justice. This motivation influenced the International Military Tribunal at Nuremberg ("Tribunal").¹ This Tribunal, which culminated in the death sentences of twelve defendants, marked a watershed moment in international law and had a substantial impact on the principles of justice and accountability for mass atrocities.² Never before had international law been utilized to criminally prosecute state officials for conduct that was legal in their country at the time. However, with novelty comes skepticism. Many legal commentators and scholars have criticized the legal foundations of the Tribunal's authority and argue the adjudications were purely "victor's justice."³ This article examines the historical context, legal authority, and jurisdictional questions of the Tribunal, its lasting impact, and its potential further influence. This analysis aims to provide a clearer understanding of how we should perceive this pivotal moment in law and history.

1 See generally *Nürnberg Trials*, BRITANNICA (Mar. 9, 2024), <https://www.britannica.com/event/Nurnberg-trials>.

2 *Nuremberg Trial Verdicts*, U.S. HOLOCAUST MEMORIAL MUSEUM, <https://encyclopedia.ushmm.org/content/en/timeline-event/holocaust/after-1945/verdicts-international-military-tribunal> (last visited Dec. 8, 2024); see generally *Nürnberg Trials*, *supra* note 1.

3 Gary Bass, *Victor's Justice, Selfish Justice*, 69 SOC. RES. 1035, 1036 (2002).

“The Nuremberg Trial of the German war criminals was tacitly based on the recognition of the principle: criminal actions cannot be excused if committed on government orders; conscience supersedes the authority of the law of the state.”⁴

- *Albert Einstein*

“But to sum it all up, I must say that I regret nothing.”⁵

- *Adolf Eichmann*, German high official who was hanged by the State of Israel for his contribution to the Holocaust⁶

PART I: HISTORICAL CONTEXT

A. *Growing Calls for Justice*

In early 1942, representatives from several governments in exile from German-occupied Europe, including France, Norway, and Czechoslovakia, issued a declaration demanding the creation of an international court to adjudicate German war crimes.⁷ That October, President Roosevelt announced that “the ringleaders and their brutal henchmen must be named and apprehended and tried in accordance with the judicial processes of criminal law.”⁸ In 1943, the Allied powers of Great Britain, the United States, and the Soviet Union signed the Moscow Declaration, officially recognizing the ongoing mass murder of European Jews, and vowing to prosecute those responsible for the violence against civilian populations.⁹

In the waning years of the Second World War, the lingering question around the fate of the perpetrators was squarely in the minds of the Allies.¹⁰ The Soviet Union, under the direction of General Secretary Joseph Stalin, initially called for trials with predetermined outcomes, similar to the Stalinist “show-trials” of the 1930s.¹¹ Some western statesmen, such

4 Albert Einstein, *IDEAS AND OPINIONS* 35-6 (1954).

5 Adolf Eichmann, *Eichmann's Own Story*, LIFE MAG., 161 (Dec. 5, 1960).

6 *Adolf Eichmann*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/biography/Adolf-Eichmann> (last visited Nov. 3, 2024).

7 D. C. Sharma, *The Nuremberg Trials: Past and the Present*, 53 PROCEEDINGS INDIAN HIST. CONG. 586, 588 (1992).

8 *Id.*

9 *The Moscow Conference; October 1943*, THE AVALON PROJECT, <https://avalon.law.yale.edu/wwii/moscow.asp> (last accessed Oct. 6, 2024).

10 See generally Henry T. King Jr., *Robert H. Jackson and the Triumph of Justice at Nuremberg*, 35 CASE W. RES. J. INT'L L. 263 (2003).

11 Francine Hirsch, *Soviet Judgment at Nuremberg: A New History of the International Military Tribunal after World War II*, 36 HOLOCAUST AND GENOCIDE STUD. 4, 102-7 (2020).

as U.K. Prime Minister, Winston Churchill, and U.S. Secretary of Treasury, Henry Morgenthau, called for the summary execution of those responsible.¹² U.S. Secretary of State, Cordell Hull favored a court martial designed to convict and execute the defendants.¹³ In the end, it was the lone dissenting voice of U.S. Secretary of War, Henry Stimson, who prevailed.¹⁴ Stimson, motivated by the belief that the United States entered the war to bring peace, democracy, and justice, advocated for a fair trial.¹⁵ This stance was quickly supported and advanced by Supreme Court Justice Robert Jackson, who gave a speech to the American Society of International Law advocating that the trials be based on the principles of justice, in which convictions would be based on solid evidence and due process.¹⁶

B. Creation of the International Military Tribunal

Stimson, Jackson, and their contemporaries' advocacy led to the signing of the Nuremberg Charter in 1945.¹⁷ This treaty, agreed upon by all the major victorious powers (United States, Great Britain, the Soviet Union, and France), established the International Military Tribunal ("Tribunal") to conduct trials of major Axis war criminals.¹⁸ The city of Nuremberg, located in the German state of Bavaria, was selected based on pragmatic (the Palace of Justice remained relatively undamaged during the war and included a prison complex) and symbolic grounds (as it had been the site of frequent Nazi propaganda rallies) to be the location in which the trials would be hosted.¹⁹ The structure of the Tribunal was set to be a mixture of legal traditions from the various Allied Powers.²⁰ The Tribunal would have both prosecutors and defense attorneys, according

¹² *The International Military Tribunal*, PBS, <https://www.pbs.org/wgbh/american-experience/features/nuremberg-military-tribunal/>.

¹³ King Jr. *supra* note 10, at 263-64 (citing Foreign Relations of the United States Diplomatic Papers (1943) 1, at 611-12 (1963)).

¹⁴ *Id.* at 264.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.* at 265.

¹⁸ John Quigley, *London Charter*, ENCYCLOPEDIA, <https://www.encyclopedia.com/international/encyclopedias-almanacs-transcripts-and-maps/london-charter> (last visited Oct. 6, 2024).

¹⁹ *Nuremberg Trials*, HISTORY, <https://www.history.com/topics/world-war-ii/nuremberg-trials> (last updated Dec. 8, 2024) ("The city of Nuremberg (also known as Nurnberg) in the German state of Bavaria was selected as the location for the trials because its Palace of Justice was relatively undamaged by the war and included a large prison area. Additionally, Nuremberg had been the site of annual Nazi propaganda rallies; holding the postwar trials there marked the symbolic end of Hitler's government, the Third Reich.")

²⁰ *Id.* ("The format of the trial was a mix of legal traditions: There were prosecutors and defense attorneys according to British and American law, but the decisions and sentences were imposed by a tribunal (panel of judges) rather than a single judge and a jury.")

to both British and American legal systems, but the verdicts and sentences were to be imposed by a panel of judges rather than a single judge or by a jury.²¹ This panel would be composed of four judges, each chosen by one Allied Power.²²

The Nuremberg Charter enumerated, and then allowed for the prosecution of the following: (1) crimes against peace, (2) crimes against humanity, and (3) war crimes.²³ “Crimes against peace” included the “planning, preparing, initiating, or waging” of wars of aggression or wars in violation of international agreements.²⁴ “Crimes against humanity” included atrocities such as “exterminations, enslavement, [and] deportation of any civilian population.”²⁵ “War crimes” was already defined in international law when the charter was drafted as “criminal violations of the laws and customs of war.”²⁶ The Charter introduced “crimes against peace” without providing a clear definition, vaguely suggesting that the crime encompassed acts directed against other sovereign states.²⁷

C. *The Proceedings, Results, and Impact*

Several months after the surrender of Germany in May, the Tribunal began proceedings on November 20th, 1945, indicting twenty-four defendants, including politicians, industrialists, and military officers.²⁸ Justice Robert Jackson, who was appointed to be the Chief of Counsel for the United States at Nuremberg, made it clear in his opening statements

21 *Id.*

22 See *Memorium Nuremberg Trials*, THE TRIBUNAL, <https://museums.nuernberg.de/memorium-nuremberg-trials/the-nuremberg-trials/the-international-military-tribunal/the-tribunal/> (last visited Nov. 3, 2024).

23 See United Kingdom of Great Britain and Northern Ireland, United States of America, France & Union of Soviet Socialist Republics, *Charter of the International Military Tribunal – Annex to the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis*, Aug. 8, 1945, U.N. (Aug. 8, 1945) [hereinafter *London Charter*] (Article 6 enumerates the three categories of crimes); see also Hans Leonhardt, *The Nuremberg Trial: A Legal Analysis*, 11 REV. POL. 449, 449 (1949).

24 U.S. Department of State, *The Nuremberg Trial*, Office of the Historian, <https://history.state.gov/milestones/1945-1952/nuremberg> (last visited Dec. 8, 2024).

25 *Id.*

26 See Christian Tomuschat, *The Legacy of Nuremberg*, 4 J. INT’L CRIM. JUST., 834 (2006).

27 Sanji Mmasenono Moageng, *The Crime of Aggression: Following the Needs of a Changing World?*, 58 HARVARD INT’L L. J. 79 (2017) (“At the time of the proceedings in Nuremberg, there was “no agreed definition of what was meant by aggression,” and its criminalization thus led to extensive controversy. According to article 6 of the Tribunal’s Charter, the Tribunal held the power to try persons acting in the interests of states. Article II of Control Council Law No. 10, which supplemented the Charter, stated that acts of aggression were acts directed against other states.”).

28 *International Military Tribunal at Nuremberg*, UNITED STATES HOLOCAUST MEMORIAL MUSEUM, <https://encyclopedia.ushmm.org/content/en/article/international-military-tribunal-at-nuremberg> (last visited Dec. 2, 2024).

that the purpose of the trials extended beyond conviction.²⁹ The Allies' goal was to not only punish Germans guilty of horrific crimes, but also to set an international precedent to deter future aggression and to educate German civilians about the extent of Nazi atrocities to delegitimize Nazism.³⁰ During closing arguments in July of 1946, with horrors of the holocaust having been more thoroughly exposed to the world, the Chief Prosecutors for the victorious nations focused atrocities committed against the Jewish population.³¹ After nine months, the verdicts were rendered on October 1st, sentencing twelve defendants to death, three were acquitted, and the remaining sentences ranging from ten years to life in prison.³² It is worth noting that if not for the advocacy of Secretary Stimson and Justice Jackson the three acquitted defendants would have likely faced summary execution.³³ Over the next three years, twelve additional trials were held at Nuremberg for other minor officers and perpetrators; these included doctors who performed human experimentation, lawyers and judges who implemented eugenics laws, and industrialists who benefited from the unpaid labor of prisoners.³⁴

At the start of the trial, public sentiment was generally opposed to the proceedings; yet as time elapsed and the details surrounding the holocaust became wildly known, the public sentiment had shifted in the

29 Robert H. Jackson, *Opening Statement Before the International Military Tribunal* (Nov. 21, 1945), <https://www.roberthjackson.org/speech-and-writing/opening-statement-before-the-international-military-tribunal/> (“The wrongs which we seek to condemn and punish have been so calculated, so malignant, and so devastating, that civilization cannot tolerate their being ignored, because it cannot survive their being repeated.”).

30 *The Nuremberg Trial and Its Legacy*, NAT'L WWII MUSEUM, <https://www.nationalww2museum.org/war/articles/the-nuremberg-trial-and-its-legacy> (last visited Dec. 8, 2024) (“Finally, the Allied governments intended to use the IMT to educate German civilians about the true extent of Nazi atrocities and convince German citizens of their collective responsibility for their government’s crimes. This last objective was crucial to the Allied plan to discredit Nazism and denazify Germany.”).

31 See e.g. Robert H. Jackson, *Closing Statement by Robert H. Jackson*, ROBERT H. JACKSON CTR., <https://www.roberthjackson.org/nuremberg-event/closing-statement-by-robert-h-jackson> (last visited Dec. 2, 2024).

32 *The Nuremberg Trial and Its Legacy*, NAT'L WWII MUSEUM, <https://www.nationalww2museum.org/war/articles/the-nuremberg-trial-and-its-legacy> (last visited Dec. 8, 2024).

33 See Aaron Fichtelberg, *Fair Trials and International Courts: A Critical Evaluation of the Nuremberg Legacy*, 28 CRIM. JUST. ETHICS 5, 7 (2009) (discussing other world leaders like Winston Churchill and Joseph Stalin favored proceedings designed to execute the defendants rather than provide a trial-like proceeding).

34 *Nuremberg Trials*, *supra* note 19 (“These proceedings included the Doctors Trial (December 9, 1946–August 20, 1947), in which 23 defendants were accused of crimes against humanity, including medical experiments on prisoners of war. In the Judges Trial (March 5–December 4, 1947), 16 lawyers and judges were charged with furthering the Nazi plan for racial purity by implementing the eugenics laws of the Third Reich. Other subsequent trials dealt with German industrialists accused of using slave labor and plundering occupied countries; high-ranking army officers accused of atrocities against prisoners of war; and SS officers accused of violence against concentration-camp inmates.”).

Tribunal's favor.³⁵ Today, the Nuremberg Trials are regarded as marking "the true beginning of international criminal law."³⁶ The Tribunal inspired and shaped many of the international tribunals and conventions that followed it, including the 1948 Genocide Convention, the International Criminal Tribunal for Yugoslavia and Rwanda, and eventually the permanent International Criminal Court.³⁷ Despite the intentionality of the Tribunal's design, efficacy of purpose, and ongoing influence, because international criminal law was still a novel idea, many critics were skeptical of the nature of the Tribunal's authority, referring to the Tribunal's power as nothing more than a consequence of the Allies pursuing "victor's justice."³⁸

PART II: CONTROVERSY SURROUNDING THE TRIALS' LEGITIMACY

The Nuremberg Trials, though undoubtedly historically significant, faced numerous criticisms. Critics argued the trials lacked a solid legal foundation, primarily due to the retrospective application of new legal standards, violating the principle of *ex post facto*.³⁹ Moreover, the defense of *respondeat superior* liability was also disposed of to prevent German officers from shifting blame onto the German bureaucracy.⁴⁰ The composition of the International Military Tribunal raised concerns about impartiality, as some contended that the trials were primarily motivated by political interests rather than traditional notions of justice.⁴¹ There were debates over the selective nature of justice, as the Allied powers were involved in both the appointing of the prosecutors and the judges responsible for determining the verdicts.⁴² Moreover, the Tribunal's

³⁵ See Kirsten Sellars, *Imperfect Justice at Nuremberg and Tokyo*, 21 EUR. J. INT'L L. 1085, 1091 (2010).

³⁶ SERGEY SAYAPIN, *THE CRIME OF AGGRESSION IN INTERNATIONAL CRIMINAL LAW: HISTORICAL DEVELOPMENT, COMPARATIVE ANALYSIS AND PRESENT STATE* 148 (2014).

³⁷ See Whitney R. Harris, *The Influence of the Nuremberg Trial on International Criminal Law*, ROBERT H. JACKSON CTR., <https://www.roberthjackson.org/speech-and-writing/the-influence-of-the-nuremberg-trial-on-international-criminal-law> (last visited Dec. 2, 2024).

³⁸ David J. Scheffer, *Negotiators' Reliance on the Nuremberg Legacy*, COUNS. ON FOREIGN REL. (July 29, 2021), <https://www.cfr.org/article/negotiators-reliance-nuremberg-legacy>.

³⁹ See Milton R. Konvitz, *Ex Post Facto at Nuremberg*, COMMENTARY (1946), <https://www.commentary.org/articles/reader-letters/ex-post-facto-at-nuremberg/>.

⁴⁰ See George A. Finch, *The Significance of the Nuremberg Trials*, AM. BAR ASS'N 22, 23 (1946).

⁴¹ See Herbert Wechsler, *The Issues of the Nuremberg Trial*, 62 POL. SCI. Q., 11, 24-5 (1947).

⁴² Matt Pickles, *The Nuremberg War Crimes Trials: 70 Years of a Complex Legacy*, UNIV. OF OXFORD ARTS BLOG (Nov. 21, 2016), <https://www.ox.ac.uk/news/arts-blog/nuremberg-war-crimes-trials-70-years-complex-legacy> ("The judges and prosecutors were not neutral, but came from the four victorious powers – which led to such oddities as a Soviet prosecutor citing the Hitler-Stalin pact as evidence of German aggression against

selective jurisdiction, limited exclusively to the European Axis, raised concerns about the legitimacy of the trials.⁴³ Overall, these criticisms underscore the complex challenges and controversies involved when establishing accountability for war crimes and crimes against humanity in the aftermath of World War II through the Nuremberg Trials.

This section provides a general overview of the criticism leveled at the Nuremberg Trials and the International Military Tribunal as institutions and gives some context about reasons and motivations behind key structural and legal decisions made. With this background, we can better understand the underlying structural issues in the Nuremberg Trial's legacy, which persist in precedent and continue to influence future international criminal trials.

A. No Valid Legal Foundation for the Trial

Many legal and procedural questions arose after the IMT's creation.⁴⁴ Chief among them was the lack of precedent for any international trials of war crimes.⁴⁵ The only earlier instances of any similar prosecution for war crimes arose from the execution of a Confederate officer, Henry Wirz, for his mistreatment of Union prisoners and the court martial in Turkey "to punish those responsible for the Armenian genocide."⁴⁶ However, both of these trials utilized only domestic law.⁴⁷ As the actions of German officers were likely sanctioned by domestic law, the Tribunal and its creators had to find a legal basis to hold officers criminally accountable for actions under then-scant - if not wholly absent - international law.⁴⁸ Thus, the Allies deemed it necessary to create the

Poland, or a Soviet judge with ample experience of running Stalinist show trials trying to persuade his colleagues that the massacre against Polish officers in Katyn (who had been shot by the Soviets) should be added to the tally of German war crimes." (italics omitted)).

⁴³ Kirsten Sellars, *Imperfect Justice at Nuremberg and Tokyo*, 21 EUR. J. INT'L L. 1085, 1089-90 (2010).

⁴⁴ See e.g. Telford Taylor, *The Nuremberg Trials*, 55 COLUM. L. REV. 488 (1955) (analyzing the legal moorings of the Nuremberg Trials).

⁴⁵ Sharma, [supra note 7, at 587](#).

⁴⁶ *Nuremberg Trials*, HISTORY, <https://www.history.com/topics/world-war-ii/nuremberg-trials> ("There were earlier instances of prosecution for war crimes, such as the execution of Confederate army officer Henry Wirz (1823-65) for his maltreatment of Union prisoners of war during the American Civil War (1861-65); and the courts-martial held by Turkey in 1919-20 to punish those responsible for the Armenian genocide of 1915-16.").

⁴⁷ *Id.* ("However, these were trials conducted according to the laws of a single nation rather than, as in the case of the Nuremberg trials, a group of four powers...").

⁴⁸ See Yehuda Bauer, *The Holocaust At Nuremberg*, YAD VASHEM (Nov. 30, 2024), <https://www.yadvashem.org/articles/academic/the-holocaust-at-nuremberg.html> (discussing how the American prosecution team at the London meeting designed several drafts of the offenses to which the defendants would be charged for the first time in international law; also mentions how the actions of German officers were likely sanctioned by German law).

mentioned crimes in the Nuremberg Charter (crimes against the peace, crimes against humanity, war crimes, and the crime of aggression).⁴⁹

Opponents of the idea of establishing a criminal tribunal suggested, reasonably, that one ought not to be tried for vague or ill-defined crimes.⁵⁰ Traditional notions of a “just war” hardly established clear lines of demarcation of criminal and non-criminal conduct.⁵¹ Moreover, the defined crimes in the Nuremberg Charter provides no clearer a distinction.⁵² Although the legal boundaries were ambiguous, it was evident that, regardless of where those boundaries were drawn, the perpetrators of the Holocaust had unquestionably crossed them.⁵³

Associate Supreme Court Justice Robert Jackson, who served as the Chief U.S. Prosecutor at Nuremberg, addressed similar arguments in his Opening Address, stating that the accused conduct clearly violated international law. On addressing the weight of such trial, Jackson stated:

“The privilege of opening the first trial in history for crimes against the peace of the world imposes a grave responsibility. The wrongs which we seek to condemn and punish have been so calculated, so malignant, and so devastating, that civilization cannot tolerate their being ignored, because it cannot survive their being repeated. That four great nations, flushed with victory and stung with injury stay the hand of vengeance and voluntarily submit their captive enemies to the judgment of the law is one of the most significant tributes that Power has ever paid to Reason.”⁵⁴

Other scholars point to a long European tradition of restraints on warfare.⁵⁵ In medieval times, the concept of a just and unjust war already

49 See *id.* (describing how the drafters at the London meeting designed the four charges to capture and punish the full range of the Nazi atrocities).

50 See Sellars, *supra* note 35, at 1089 (describing some of the academic resistance to the enumerated charges and their definitions).

51 See Douglas C. Lovelace, Jr., *Foreword*, in *NEW DIRECTIONS IN JUST-WAR THEORY*, vii (Strategic Studies Inst., U.S. Army War Coll., July 1, 2018) (The theory insists that the only just wars are defensive ones and forbids wars of national aggrandizement. On this view, because of the right to collective self-determination, wars must not seek to remake the world order, as that would undermine state sovereignty.”).

52 See *London Charter*, *supra* note 18 (Article 6 of the London Charter lists the three crimes and their respective definitions).

53 See Willis Smith, *The Nuremberg Trials*, 32 AM. B. ASS’N J. 390, 392 (1946) (“Murder, arson, rape, enslavement, atrocities, ran rampant through the area under their domination. Can there be any contention that those acts were in accord with civilization?”).

54 Collin Makamson, “*The Grave Responsibility of Justice*”: Justice Robert H. Jackson’s Opening Statement at Nuremberg, NAT’L WWII MUSEUM (Nov. 20, 2020), <https://www.nationalww2museum.org/war/articles/robert-jackson-opening-statement-nuremberg>.

55 See generally Hans Leondardt, *The Nuremberg Trial: A Legal Analysis*, 11 REV. POL. 449 (1949).

existed, if only in theory.⁵⁶ During and after the European Enlightenment, sovereign states were held to more modern notions of *raison d'état* when conducting foreign affairs.⁵⁷ However, no international body codified these unspoken, but agreed upon rules of warfare. As American Political Scientist Quincy Wright maintained, “[p]rior to World War I international law provided no substantive and few procedural limitations upon resort to war and only certain vague qualifications upon lesser uses of force in reprisals, intervention, and defense.”⁵⁸

Outside of traditional notions of a “just war” and natural law, proponents of the Tribunal’s jurisdiction frequently attempt to find legal moorings in the Briand-Kellogg Pact of 1928. This pact enshrined the principle that wars are conducted not by states but by individuals. This was an agreement to which Germany was a signatory.⁵⁹ It was inferred that if individuals could start wars, this also meant that consequences could be enforced against responsible parties.⁶⁰ There is little doubt that, according to the language of the treaty, German officers violated its tenants; however, an issue arises around whether the treaty justifies not only *criminal* sanctions, but criminal sanctions for governmental officials in their *individual* capacity.⁶¹ It is in this two-fold novelty that the proponents of the Trial simply had no strong precedential authority to rely upon.⁶²

The Tribunal sought to anchor its authority in established international law but often relied on tenuous foundations. For instance, it invoked two unratified League of Nations documents and a Pan-American treaty to bolster its legal underpinnings.⁶³ The Tribunal also attempted to draw support from a 1927 League of Nations Treaty declaring “aggression” an international crime, another agreement Germany assented to.⁶⁴ Yet, such a treaty was not binding, and the League of Nations had already become defunct at the time of the Trials.⁶⁵

56 *Id.* at 454.

57 *Id.*

58 QUINCY WRIGHT, A STUDY OF WAR 331 (1965).

59 See David Luban, *The Legacies of Nuremberg*, 54 SOC. RSCH. 779, 797 (1987).

60 *Id.*

61 *Id.*

62 See *id.*

63 *Id.* at 797-98.

64 See John Q. Barrett, *The World’s Outlaws of War: The 1928 Kellogg-Briand Pact and Its Legacy* (Aug. 28, 2018), <https://thejacksonlist.com/wp-content/uploads/2018/08/20180828-World-Outlaws-War-1928.pdf> (“The Eighth Assembly of the League of Nations in 1927, on unanimous resolution of the representatives of 48 member nations, including Germany, declared that a war of aggression constitutes an international crime.”).

65 *Id.* at 798.

B. Violations of Traditional Notions of Ex Post Facto and Respondeat Superior

A major criticism of the Tribunal's authority revolved around the *ex post facto* nature of the charges brought against the defendants.⁶⁶ The principle of *ex post facto*, meaning "after the fact," holds that individuals ought not to be charged or punished for actions that were not considered crimes at the time they were committed.⁶⁷ The Nuremberg Trials, however, retroactively applied new criminal standards to actions that predated the enactment of the Nuremberg Charter.⁶⁸ While this approach may be justified as a response to the unprecedented scale of atrocities committed by the Nazis it raised questions about the trials' adherence to established legal principles.⁶⁹

Critics of the Nuremberg Trials claimed that the trials retroactively criminalized actions that were legal under German law, and that the Tribunal had no recognizable legal foundation to try the defendants.⁷⁰ Judge Charles Wyzanski Jr., of the United States District Court of Massachusetts, wrote that the trial violated ancient legal principle of *nullum crimen et nulla poena sine lege* ("there can be...no crime and no penalty without an antecedent law").⁷¹ He suggested that the Tribunal's authority is rooted solely in international public policy.⁷² A violation of *nullum crimen* and *ex post facto* principles, Judge Wyzanski argued, undermines the integrity of justice.⁷³ However, even Wyzanski recognized the desire, and necessity of justice; he wrote: "[i]f prevention, deterrence, retribution, nay even vengeance are ever adequate motives for punitive action, then punitive action is justified against a substantial number of Germans. But the question is: Upon what theory may that action properly be taken?"⁷⁴

Some argue that Wyzanski's argument rested upon an inappropriate conflation of natural and positive law.⁷⁵ These argument suggest that

⁶⁶ *See id.*

⁶⁷ *Id.*

⁶⁸ *Id.* at 799.

⁶⁹ *Id.* at 797.

⁷⁰ *See, e.g.*, Charles Wyzanski, Jr., *Nuremberg: A Fair Trial?*, THE ATL. MONTHLY 66-70 (Apr. 1946).

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ Positive law refers to legal rules and norms explicitly created and enforced by a governing authority, such as a legislature, court, or executive body, and derives its legitimacy from formal enactment and authority. In contrast, natural law comprises universal moral principles and inherent rights that exist independently of human-made laws, serving as a standard that enacted laws should strive to reflect and uphold. *See generally*, Harold R. McKinnon, *Natural Law and Positive Law*, 23 NOTRE DAME L. REV. 129 (1948).

nullem crimen and *ex post facto* are principles of positive law (which is to stay explicitly enacted law), whereas the prosecution ought to be viewed from a natural law perspective (which is to stay these legal principles exist beyond explicitly enacted law).⁷⁶ In this view, crimes committed by the Nazi defendants were not “new.”⁷⁷ Although certainly “genocide” was a new category of crimes defined by the charter, the specific acts of genocide committed by the Nazis would have likely been considered murder in any nation where law has been codified.⁷⁸ Further, proponents claimed the IMT’s rulings did not interfere with the underlying principles of the prohibition of *ex post facto* laws.⁷⁹ As the prohibition of *ex post facto* laws is designed to protect potential defendants from arbitrary and capricious laws in which he had no notice prior to committing the criminal actions.⁸⁰ Here, there were various treaties and agreements (Hague Conventions, Kellogg-Briand Pact, the Geneva Prisoner of War, Red Cross, and Protection of Civilians Convention) establishing an international norm.⁸¹ Further, evidence of German officers attempting to cover-up the mass atrocities at concentration camps (burning documents, the hurried burying of bodies, etc.) indicates the officers knew their conduct was at least immoral, if not criminal.⁸² Not only would it be just to prosecute one who violated these agreements, it was argued, but it would be inherently unjust to not prosecute aggressors.⁸³

The proponents of the Tribunal vehemently argued that international law is established in custom, reason, and unspoken international obligations cemented by the practice of civilized nations, and *not* in statutory law.⁸⁴ International law is a progressive system, that evolves and adapts to the world.⁸⁵ The requirement that international law be defined by statutory law, proponents argued, is thus an antiquated concept.⁸⁶ Traditional, non-statutory concepts of just and unjust wars have been a

⁷⁶ See generally *id.*

⁷⁷ Ellis Washington, *The Nuremberg Trials: The Death of the Rule of Law (in International Law)*, 49 LOYOLA L. REV. 471, 506 (2003).

⁷⁸ *Id.*

⁷⁹ *Id.* at 509.

⁸⁰ *Id.*

⁸¹ *Id.* at 484.

⁸² See *How the Nazis Tried to Cover-Up Their Crimes at Auschwitz*, HISTORY.COM (2023) <https://www.history.com/news/how-the-nazis-tried-to-cover-up-their-crimes-at-auschwitz>.

⁸³ Washington, *supra* note 77, at 478 (“The broad, generalized and objective principles of natural law will be more than enough to convince any reasonable person of the Nazi defendants’ guilt and the requisite imperative for any legitimate legal system that justice, and the law upholding it, be rooted in the inseparability of legality and morality”).

⁸⁴ See Mary Jean Lopardo, *Nuremberg Trials and International Law*, 8 UNI. BALTIMORE L. F. 2, 34-7 (1978).

⁸⁵ *Id.* at 35.

⁸⁶ *Id.*

recurring theme in European literature for centuries.⁸⁷ Notably, in the fifth century, St. Augustine argued that wars of aggression are inherently unjust, while only defensive wars can be morally justified.⁸⁸ These theories were further explored by St. Thomas Aquinas in *Summa Theologica*, in the thirteenth century, in which he states that a war is just if (1) the ruler is legitimate, (2) the purpose is just, and (3) peace be the subject of the war.⁸⁹ Hugo Grotius, considered the father of international law, similarly followed this concept, and defined a just war as one waged only upon “right *reason*.”⁹⁰ It is through this philosophy, proponents argued, that the Nuremberg Trial had authority despite a lack of a clearly defined international statute.⁹¹ It was also this philosophy which defeated arguments of superior liability as a complete defense.⁹² Prosecutors during the trial argued that traditional notions of reason and morality dictate a higher obedience to natural law than to orders by superior officers.⁹³ Often, the actions perpetrated were so abhorrent that the mere fact they were instructed by superior officers does not exculpate the subordinate of guilt.⁹⁴

Further, the Tribunal’s treatment of individual responsibility for officers of the state, it is suggested, conflicts with traditional notions of *respondeat superior*.⁹⁵ Article 8 of the Nuremberg Charter states: “The fact that the Defendant acted pursuant to order of his Government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment if the Tribunal determines that justice so requires.”⁹⁶ The Tribunal, in practice, often rejected such arguments, believing that officers faced no imminent real and inevitable danger if they had refused to carry out Hitler’s, Himmler’s or Eichmann’s orders.⁹⁷ In the case of Field Marshal Keitel, Chief of the High Command of the Armed Forces, testified before the Tribunal that he received an order for the liquidation of thousands of civilians during the retreat of German

87 *Id.*

88 *Id.* (“To make war on your neighbor, and thence to proceed to other, and through mere lust of dominion to crush and subdue people who do you no harm, what else is this to be called than robbery on a grand scale.”).

89 *Id.* (Aquinas asserted, “custom has the force of a law, abolishes law and is the interpreter of law.” Compare that to the beliefs of the Fuhrer, who declared “I shall shrink from nothing... No so called international law, no agreements will prevent me from making use of any advantage that offers.”).

90 *Id.* (“The dictate of right reason which points out that a given act because of its opposition to or conformity with man’s rational nature, is either morally wrong or morally necessary, and accordingly forbidden or commanded by God, the author of nature.”).

91 *See id.*

92 *See id.* at 37.

93 *Id.*

94 *Id.*

95 *See id.*

96 *Id.*

97 *Id.* at 36-7.

forces from the East.⁹⁸ Keitel pled that his actions ought to be excused as he merely acted upon the orders of his superiors.⁹⁹ The Tribunal rejected Keitel's argument, and later sentenced him to death by hanging.¹⁰⁰ The Tribunal dismissed similar arguments, asserting that officers still possessed agency to decide to follow or defy the order for the mass extermination of civilians, hostages, commandos, and resistance fighters.¹⁰¹

Numerous critics argued that the prosecution of high-ranking government officials represented an unprecedented legal doctrine, lacking support in both established law and customary international practice.¹⁰² Allied prosecutors, however, pointed to examples in history of heads-of-state being held accountable for their actions.¹⁰³ Frederick the Great was held accountable and had to answer to the Imperial Crown for the alleged breach of peace for his invasion of Saxony in 1756.¹⁰⁴ Napoleon Bonaparte was exiled to St. Helena by the Imperial Crown of France as an enemy and a disturber of the peace.¹⁰⁵ Further, they argued it would be inherently unjust to punish the entire country for the actions of certain heads of state.¹⁰⁶ While it could be argued that the German people were partially responsible for their election and support of the Nazi regime, it would violate basic concepts of fairness and justice to punish the German public and not punish the Nazi officers for the Holocaust.¹⁰⁷

C. Hypocrisy and Discrimination

One of the most prominent critiques of the Nuremberg Trials is the assertion that they were not as "fair" as the Tribunal attempted to appear.¹⁰⁸ The judges and prosecutors were chosen by the victorious nations, there was no jury to determine guilt or innocence, and prosecutions were directed at individuals, often to fit larger geopolitical goals.¹⁰⁹

98 TESTIMONY OF WILHELM KEITEL, Nuremberg Trial Proceedings Vol. 10, *The Avalon Project* (Apr. 6, 1946), <https://avalon.law.yale.edu/imt/04-06-46.asp> (transcript of Marshal Keitel's testimony on April 6th, 1946 and his admission of signing orders to not treat "human life" to the same degree in Soviet territory.)

99 *See id.* ("I have stated here that I was a loyal and obedient soldier of my Fuehrer. And I do not think that there are generals in Russia who do not give Marshal Stalin implicit obedience.").

100 Lopardo, *supra* note 84, at 34.

101 *Id.* at 36-37.

102 *See* Washington, *supra* note 77, at 490 ("Critics of the Nuremberg Trials contend that the trials retroactively criminalized actions that under German law had been legal, and the disobedience of such was punishable by death.").

103 Lopardo, *supra* note 84, at 36.

104 *Id.*

105 *Id.*

106 *Id.*

107 *See id.*

108 *See* Hirsch, *supra* note 11, at 275.

109 *See id.* at 5.

For example, a Soviet prosecutor that used the existence of the Hitler-Stalin Pact against Joachim von Ribbentrop, the German Foreign Minister, as evidence of planned German aggression against Poland.¹¹⁰ Or consider the fact that the Soviet Judge Ion Nikitchenko (who was chosen because of his reputation of adjudicating Stalinist show-trials) argued the Soviet massacre of Polish officers in Katyn should be considered a German war crime.¹¹¹ Perhaps the Soviet's mixed messaging about the trial is not surprising as it was Stalin at the Tehran Conference in 1943 who made a toast to having 50,000-100,000 Germans summarily executed, and eventually sent Andrei Vishinsky, the prosecutor of the Moscow Show-Trials, to be the Soviet's prosecutorial representative.¹¹²

The hypocrisy was not limited to the Soviets, however, as the Nuremberg Charter of August 8, 1945 strictly limited the Tribunal's jurisdiction to war crimes committed by the Axis Powers.¹¹³ This limitation on jurisdiction, some suggest, resulted from the belief that the United States was concerned the Nuremberg precedent could be extended to the system of racial segregation and "Jim Crow" laws as a crime against humanity.¹¹⁴ The Soviet Union also was concerned that a Tribunal with a wider jurisdiction could adjudicate the nation's actions, such as the mass execution of Polish officers, or policies of mass deportations in Baltic States.¹¹⁵ Allied prosecutions were tailored to prevent defendants from drawing parallels between Axis and Allied conduct.¹¹⁶ For example, scholars believe no German was charged for the intentional bombing of civilian populations ("terror bombardment") because both the United Kingdom and the United States used the practice of strategic bombardment of civilians, like the bombings of Dresden.¹¹⁷ Charges against

110 *See id.* at 84, 88.

111 *See id.* at 250-71.

112 Gary Bass, *Victor's Justice, Selfish Justice*, 69 SOC. RSCH. 1035, 1039 (2002).

113 *See* GUILLAUME MOURALIS, LE MOMENT NUREMBERG: LE PROCÈS INTERNATIONAL, LES LAWYERS ET LA QUESTION RACIALE [THE NUREMBERG MOMENT: THE INTERNATIONAL TRIAL, THE LAWYERS AND THE RACIAL QUESTION] 102-4, 115, 130 (2019).

114 *Id.* at 102.

115 *See* Hirsch, *supra* note 11, at 9-10 (describing how the Soviets, like many of the other Allied powers, circumscribed the Tribunal's jurisdiction to avoid scrutiny of their own policies on an international stage, but ultimately failed to prevent this scrutiny); *see also* Tadeusz Wolsza, *The Katyn Massacre: Its Chronology, Scale, Victims and Unpunished Perpetrators, Polish History*, <https://polishhistory.pl/the-katyn-massacre-its-chronology-scale-victims-and-unpunished-perpetrators> (last visited Dec. 1, 2024); *see also* Aurélie Campana, *The Soviet Massive Deportations – A Chronology*, MASS VIOLENCE & RESISTANCE – RSCH. NETWORK (Nov. 5, 2007), <https://www.sciencespo.fr/mass-violence-war-massacre-resistance/en/document/soviet-massive-deportations-chronology.html>.

116 *See id.*

117 *See* Richard A. Wilson, *Nuremberg War Crimes Trials 70 Years On: A Complex Legacy*, THE CONVERSATION (Nov. 25, 2015), <https://theconversation.com/nuremberg-war-crimes-trials-70-years-on-a-complex-legacy-50503> ("No Nazi was charged with terror bombardment since the use of strategic bombardment against civilians had been a pillar of the British and US war efforts."); "Bombing of Dresden," ENCYCLOPAEDIA

German Admiral Dönitz were dropped after it was raised that the crime of failing to pick up enemy survivors of submarine attacks was also a policy used by U.S. forces in the Pacific theater under Admiral Nimitz.¹¹⁸ Moreover, Article 6 of London Charter prevented the admission of potential Allied war crimes, as such evidence was deemed irrelevant due to the court's limited jurisdiction.¹¹⁹ Further, some critics highlighted the lack of prosecution against the Italians as indicative of the unequal adjudication of justice.¹²⁰

Further, the Nuremberg Charter implicitly denied defendants the ability to claim the *tu quoque* defense (known as the “appeal to hypocrisy” defense), which asks for exoneration on the principle that the Allies had committed similar actions.¹²¹ Defense attorneys equated the Nazi concentration camps to Allied detention facilities and the deportation of Jews to the expulsion of East Germans.¹²² The Allies' handpicked judges rejected these arguments.¹²³ Defense attorney Alfred Seidl attempted to invoke the secret protocol of the German-Soviet pact and debate the legitimacy of the Treaty of Versailles, to little persuasive effect.¹²⁴ Six defendants charged with the invasion of Norway argued that the purpose of the invasion was to prevent a British invasion.¹²⁵ It is important to note, however, that while the *tu quoque* defense could not absolve the German defendants of their guilt, its presentation during the widely broadcasted trial had the potential to generate negative publicity for the Allied powers.¹²⁶

BRITANNICA, <https://www.britannica.com/event/bombing-of-Dresden> (last visited Dec. 1, 2024) (“The raids became a symbol of the ‘terror bombing’ campaign against Germany, which was one of the most controversial Allied actions of the war.”).

118 TRIAL OF THE MAJOR WAR CRIMES. BEFORE THE INT’L MIL. TRIBUNAL IMT 559, 561 (1948) (finding Dönitz guilty on two counts but noting that “the sentence of Dönitz [was] not assessed on the ground of his breaches of the international law of submarine warfare”).

119 Hirsch, *supra* note 11, at 70; *see London Charter, supra* note 23.

120 Washington, *supra* note 77, at 490.

121 *See* KIM CHRISTIAN PRIEMEL, THE BETRAYAL: THE NUREMBERG TRIALS AND GERMAN DIVERGENCE 131 (2016); *see London Charter, supra* note 23 (Article 6 outlined the crimes within the Tribunal's jurisdiction as crimes committed by the Axis Powers, and Article 8 stated that following orders was not a valid defense).

122 Priemel, *supra* note 121, at 131.

123 *Id.*

124 *Id.*

125 *See* Kirsten Sellars, ‘Crimes Against Peace’ and International Law, CAMBRIDGE UNI. PRESS, 84, 149-50 (2013).

126 *See The Nuremberg Trial and Its Legacy*, THE NATIONAL WWII MUSEUM (Nov. 18, 2021), <https://www.nationalww2museum.org/war/articles/the-nuremberg-trial-and-its-legacy> (“The London Agreement mandated that news of the tribunal be published and broadcast throughout Germany, going so far as to make provisions for German prisoners to receive news of the trial proceedings.”).

PART III: PRECEDENTIAL VALUE AND IMPACT

Regardless of the many legal and philosophical objections around the Nuremberg Trials, one cannot deny the effect it had on public perception, international and domestic law.¹²⁷ This section provides an overview of how the Nuremberg Trials influenced and affected both law and public opinion.

A. Principle of Individual Responsibility

The most stunning novelty of Nuremberg was, perhaps, the criminal prosecution of individuals acting on behalf of the state.¹²⁸ Prior to World War II, individuals were typically not subject to legal responsibility under international criminal law.¹²⁹ Whether someone was prosecuted for a violation of the laws of war was traditionally decided by domestic legislatures and courts.¹³⁰ Nuremberg established a precedent for individuals being held responsible for breaches of international obligations.¹³¹ It was Article 7 of the Nuremberg Charter that asserted this tenant: “The official position of defendants, whether as Heads of State or responsible officials in Government departments, shall not be considered as freeing them from responsibility or mitigating punishment.”¹³² Moreover, Article 8 declared, “[t]he fact that the Defendant acted pursuant to order of his Government or of a superior shall not free him from responsibility.”¹³³ Practically speaking, this was a necessary step not just for holding governmental actors accountable at Nuremberg, but also for the future establishment of any regulations for the international community.¹³⁴ Without this, individuals responsible for atrocities could hide behind the immunity of the state.¹³⁵ Justice Jackson, defending the principle of

¹²⁷ See generally Sharma, *supra* note 7.

¹²⁸ *Id.*

¹²⁹ Ellis Washington, *The Nuremberg Trials: The Death of the Rule of Law (in International Law)*, 49 LOY. L. REV. 471, 484 (2003) (in footnote 35, discussing that while there were international agreements prohibiting certain methods of war, there was no judicial mechanism to enforce nor punish alleged perpetrators).

¹³⁰ See *The Nuremberg Trial and Its Legacy*, NATIONAL WWII MUSEUM, <https://www.nationalww2museum.org/war/articles/the-nuremberg-trial-and-its-legacy> (last visited Dec. 2, 2024) (stating that Nuremberg marked the first instance in which the international community chose to prosecute individuals outside the jurisdiction of domestic courts).

¹³¹ See *Id.* (“The IMT was the first time that international treaties concluded among states were used to prosecute individuals.”).

¹³² *London Charter*, *supra* note 18.

¹³³ *Id.*

¹³⁴ F. B. Schick, *The Nuremberg Trial and the International Law of the Future*, 41 AM. J. INT’L L. 770, 788–91 (1947) (describing how the principle of holding governmental actors accountable during the Nuremberg Trials was also a foundational element for future international legal norms).

¹³⁵ Luban, *supra* note 59, at 783.

individual responsibility, noted that allowing defendants to raise the act-of-state and superior-orders doctrines taken together would imply that no one other than a country's singular head of state could be held responsible for the crimes of the holocaust.¹³⁶ Such a result, especially applied to the most horrific crimes like those at Auschwitz, would be a "moral absurdity."¹³⁷

The principle of individual responsibility carries with it implications beyond state actors.¹³⁸ Consider the prosecution of Gustav Krupp, a German industrialist, at the subsequent trials of Nuremberg.¹³⁹ Krupp operated one of the main manufacturers in the heavy arms industry in German throughout both world wars, and worked closely with the Nazi Party from the late 30s through to the conclusion of the war.¹⁴⁰ Gustav Krupp was indicted along with state actors for his use of forced labor in Eastern Europe during the war.¹⁴¹ In a more complex modern society, power and influence are not completely held by those in high government offices, but also those in the media and industry, like Krupp.¹⁴²

Some legal scholars, such as Dr. von Knieriem, believe that a tribunal holding individuals responsible for international crimes is inherently incompatible with international law.¹⁴³ Knieriem states that international law does not address the individual, but rather only states; and thus international law cannot punish those it does not pertain to.¹⁴⁴ This inherent structural conflict between state and international bodies is exemplified by a scenario where a German official is ordered to perform an act deemed criminal under international law, while refusal to comply would

136 *Id.*

137 *Id.*

138 *See, e.g., Gustave Krupp von Bohlen und Halbach*, UNITED STATES HOLOCAUST MEMORIAL MUSEUM, <https://encyclopedia.ushmm.org/content/en/article/gustav-krupp-von-bohlen-und-halbach> ("Gustav Krupp von Bohlen und Halbach (1870–1950) was a leading German industrialist and chairman of the Reich Association of Industry. His position accorded him vast economic benefits. As a result of Krupp's influential standing, his firm was offered facilities in eastern Europe and made extensive use of forced labor during the war.").

139 THE KRUPP TRIAL, *Jean and Alexander Heard Libraries, Vanderbilt University*, <https://krupp.library.vanderbilt.edu/trial> (last visited Nov. 3, 2024) ("Krupp had become an enormous steel and armament manufacturer headquartered in Essen.").

140 *See* THE KRUPP TRIAL, *Jean and Alexander Heard Libraries, Vanderbilt University*, <https://krupp.library.vanderbilt.edu/trial> (last visited Nov. 3, 2024) ("During both world wars, Krupp was Germany's main supplier of weapons, from bullets and anti-aircraft guns, to tanks and U-boats.").

141 WILLIAM MANCHESTER, *THE ARMS OF KRUPP* 172, 175, 290 (1968) (Prosecutions against Krupp were later paused due to his slowly failing health, and his inability to stand trial).

142 Nicholas Doman, *Political Consequences of the Nuremberg Trial*, 246 ANNALS AM. ACAD. POL. & S. SCI. 81, 82 (1946).

143 Nicholas Doman, *The Nuremberg Trials Revisited*, 47 AM. BAR. ASS'N J. 260, 262 (1961).

144 *Id.*

render him a criminal under German law.¹⁴⁵ Dr. von Knieriem suggests that such a backward incentive structure is the result of international law that exceeds its proper bounds.¹⁴⁶ However, at bottom this inherent conflict does not doom the entire endeavor, but raises an ultimate question: does the desire to prevent future atrocities through international criminal sanctions outweigh the inherent dilemma it creates?

B. The European Public's Reaction to the Nuremberg Trials

One of the Allies' purposes of the trial was to administer justice publicly, as a signal of the international community's devotion to hold the perpetrators of the Holocaust responsible.¹⁴⁷ The media attention and public perception around the proceedings varied vastly.¹⁴⁸ In France, for example, the acquittal of Rudolf Hess, a leading Nazi political leader, as to war crimes and crimes against humanity was met with outrage, especially those who had fought in the resistance in German-occupied France.¹⁴⁹ Meanwhile, United Kingdom's interest in the trials, although widely reported, waned quickly and wasn't sustained as the trials continued.¹⁵⁰

Particularly interesting was the German citizens' reaction to the trials. Most Germans at the time were likely preoccupied with finding adequate sustenance and shelter, rather than focusing on the trial.¹⁵¹ Remarkably, in a 1946 poll, roughly 78 percent of Germans thought the trial was fair; but dropped dramatically to 38 percent by 1950, 30 percent

145 *Id.*

146 *Id.*

147 Michael R. Marrus, *The Holocaust at Nuremberg*, YAD VASHEM, <https://www.yadvashem.org/articles/academic/the-holocaust-at-nuremberg.html> (last visited Dec. 1, 2024) (“The Trial of the Major War Criminals at Nuremberg in 1945–46, a spectacular media event of the day, presented the first comprehensive definition and documentation to a non-Jewish audience of the persecution and massacre of European Jewry during World War II. . .”).

148 *See e.g.*, JÖRG ECHTERNKAMP, *POSTWAR SOLDIERS: HISTORICAL CONTROVERSIES AND WEST GERMAN DEMOCRATIZATION, 1945–1955*, 167 (Noah Harley trans., 2020).

149 Matthias Gem. . . hlich, *NOTRE COMBAT POUR LA PAIX: LA FRANCE ET LE PROCÈS DE NUREMBERG (1945–1946)* [Our fight for peace: France and the Nuremberg trial (1945–1946)], 507–25 (2019).

150 Caroline Sharples, *Holocaust on Trial: Mass Observation and British Media Responses to the Nuremberg Tribunal, 1945–1946*, in *BRITAIN AND THE HOLOCAUST: REMEMBERING AND REPRESENTING WAR AND GENOCIDE* 31–50 (Caroline Sharples, Olaf Jensen eds., 2013).

151 Michael R. Marrus, *The Holocaust at Nuremberg*, YAD VASHEM, <https://www.yadvashem.org/articles/academic/the-holocaust-at-nuremberg.html> (last visited Dec. 1, 2024) (“The Germans themselves were reluctant, in the early years after the war, to confront the implications of the trial. They preferred instead to focus on the needs of the moment—rebuilding their shattered cities, rebuilding their lives.”).

believing the trials to be unfair.¹⁵² Scholars suggest that this shift likely resulted from a shift in post-war German culture, as many began to see the trials as showpieces.¹⁵³ Many German churches were also hostile to the trial proceedings, as the Catholic and Protestant Churches were outspoken proponents of amnesty.¹⁵⁴ In the years following, as Germany slowly began to regain sovereignty, pardoning these convicted war criminals gained wide support.¹⁵⁵ The U.S. satisfied this desire and began the early releases of some of those convicted in 1949, with many other convictions being overturned in 1951, and the last three convicted prisoners of the *Einsatzgruppen* trial all being released in 1958.¹⁵⁶ The vocal opposition of German churches, the already diminished public trust in the trials, and the release of many convicted individuals collectively reinforced the German public's belief that the convictions were largely illegitimate.¹⁵⁷ The United States Army refused to publish the trial record in German, out of fear that it would undermine the fight against communism, but their decision backfired, only further raising suspicion against the trials.¹⁵⁸ It is for all the foregoing reasons that historians and political commentators have regarded the goal to educate the German people about the atrocities of the war an overall failure.¹⁵⁹

C. The Pursuit of Justice Beyond Nuremberg

The International Military Tribunal for the Far East (“Tokyo Trial”) borrowed many of its legal ideas and precedent from Nuremberg, including the identical four charges.¹⁶⁰ The Truman administration also sought to shore up the legal legacy of the International Military Tribunal in Nuremberg, and believed the Tokyo Trial would strengthen Nuremberg’s

152 Annette Weinke, DIE NÜRNBERGER PROZESSE [The Nuremberg trials] 99 (2006) (detailing that in a 1946 poll, 78 percent of Germans viewed the trial as fair, yet four years later that percentage fallen to 38, with 30 percent regarding it as unfair.).

153 Echternkamp, *supra* note 148, at 169.

154 Jerome S. Legge, Jr., *Resisting a War Crimes Trial: The Malmédy Massacre, the German Churches, and the U.S. Army Counterintelligence Corps*, 26 HOLOCAUST & GENOCIDE STUD. 229, 234-39 (2012).

155 Weinke, *supra* note 152, at 105.

156 *Id.* at 105-11 (discussing clemency, early releases, and final commutations of sentences for war criminals in postwar Germany).

157 *See generally id.*

158 *See* KEVIN JON HELLER, THE NUREMBERG MILITARY TRIBUNALS AND THE ORIGINS OF INTERNATIONAL CRIMINAL LAW 372-73 (2011) (describing how the Army pulled the plug on the project to publish the trial proceedings out of a concern that doing so would “complicate” an effort to fight communism, and instead allowed the proceedings to “sink into oblivion.”).

159 *See id.* at 371 (suggesting that the “didactic” goal, in other words education of the public, of Nuremberg was a “spectacular failure.”).

160 Priemel, *supra* note 121, at 412.

credibility.¹⁶¹ Similarly, the International Military Tribunal for the Far East faced criticisms for imposing “victor’s justice,” the inherent hypocrisy of the use of the atomic bomb being outside the court’s jurisdiction, and concerns over the ambiguity of the enumerated crimes.¹⁶² Even one of the presiding judges, India’s Judge Radhabinod Pal, wrote a scathing dissent, arguing the Tribunal’s existence was the result of imperial power politics.¹⁶³ This criticism was highlighted by the United States’ refusal to prosecute the Emperor and other Japanese elites out of fear of popular unrest.¹⁶⁴ In the end, sixteen defendants in the Tokyo Trials were sentenced to life imprisonment based on their involvement in China, Korea, Pearl Harbor, and other war operations; three of these defendants would eventually die incarcerated, and the other thirteen would be paroled between 1952 and 1958.¹⁶⁵

It is worth a brief mention of other attempts to bring German officers to justice, beyond the Nuremberg Trials. The following two cases serve as exemplars of the efforts to bring German officers to justice. Dinko Sakic was the commandant of the Jasenovac concentration camp in Croatia and was responsible for the murder of 2,000 people.¹⁶⁶ After the war, he fled to Argentina where he lived for 50 years, until 1998 when he was extradited to Croatia and received a 20-year prison sentence. John Demjanjuk was a camp guard at Trawniki, Majdanek, Sobibor, and Flossenburg and was an accessory to the murder of at least twenty-eight thousand individuals.¹⁶⁷ Demjanjuk arrived in the United States in 1952,

161 See U.S. Dep’t of State, *Milestones: 1945–1952: The Nuremberg Trials and Their Legacy*, Office of the Historian, <https://history.state.gov/milestones/1945-1952/nuremberg> (discussing the Truman administration’s efforts to reinforce the legacy of the Nuremberg Trials through the Tokyo Trial).

162 Timothy Brook, *The Tokyo Judgment and the Rape of Nanking*, 60 J. ASIAN STUDIES 673, 677, 684–97 (2001) (detailing how Justice Radhabinod Pal argued that the exclusion of Western colonialism and the use of the atomic bomb in Hiroshima and Nagasaki illustrated the failure “of the Tribunal to provide anything other than the opportunity for the victors to retaliate.” Further, Justice Roling also stated “in Japan we were all aware of the bombings and the burnings of Tokyo and Yokohama and other big cities. It was horrible that we went there for the purpose of vindicating the laws of war, and yet saw every day how the Allies had violated them dreadfully.”).

163 Priemel, *supra* note 121, at 412.

164 See *id.*

165 SANDRA WILSON ET. AL., *JAPANESE WAR CRIMINALS: THE POLITICS OF JUSTICE AFTER THE SECOND WORLD WAR*, 199–121 (2017) (The book examines additional war crimes trials for lower-level officials conducted by Australia, China, France, the Netherlands, the Philippines, the Soviet Union, and the United Kingdom. China’s tribunals prosecuted over 500 Japanese, leading to nearly 150 executions. The Soviet Union’s Khabarovsk Trials convicted members of Japan’s bacteriological warfare unit, though some received U.S. immunity in exchange for germ warfare data from human experimentation.)

166 Harriet Sherwood, *‘They’re Old But They’re Still Guilty’: Last Nazi Hunter In a Race Against Time*, GUARDIAN (Apr. 11, 2021, 2:30 AM), <https://www.theguardian.com/world/2021/apr/11/theyre-old-but-theyre-still-guilty-last-nazi-hunter-in-a-race-against-time>.

167 LAWRENCE DOUGLAS, *THE RIGHT WRONG MAN: JOHN DEMJANJUK AND THE LAST GREAT NAZI WAR CRIMES TRIAL* 126 (2016).

and moved to the Cleveland suburb of Seven Hills, Ohio, where he became a diesel engine mechanic for Ford.¹⁶⁸ Following years of private investigation, Israel's extradition request for Demjanjuk was granted, and he was deported in 1986.¹⁶⁹ An Israeli district court found Demjanjuk guilty of all charges and sentenced to death, however the conviction was overruled by the Israeli Supreme Court based on WWII-era written statements released during the fall of the Soviet Union.¹⁷⁰ Demjanjuk's acquittal and return to the United States was met with outrage in Israel.¹⁷¹ In 2009 Demjanjuk was extradited to Germany where he "was convicted of being an accessory to the murder of" 28,060 Jews at Sobibor.¹⁷² Demjanjuk was sentenced to 5 years in prison but died in a home for the elderly while waiting on an appeal.¹⁷³ Sakic and Demjanjuk represent the German elites the Allies sought to delegitimize and punish at Nuremberg but nonetheless evaded Allied control, but each with a very different fate. These are just two of potentially thousands of Nazi war criminals who evaded justice for decades.¹⁷⁴

D. War Crimes in Yugoslavia and Rwanda

The Nuremberg Trials served as a model for future international Tribunals.¹⁷⁵ They established the principle that individuals could be found responsible for war crimes, and crimes against humanity, even if those actions were legal domestically.¹⁷⁶ For decades, Cold War tensions

¹⁶⁸ *John Demjanjuk: Timeline of His Life*, CLEVELAND JEWISH NEWS (Mar. 22, 2012), https://www.clevelandjewishnews.com/article_245c2a22-742c-11e1-a3fa-0019bb2963f4.html.

¹⁶⁹ *Israeli Court Sets Demjanjuk Free*, BBC NEWS (July 29, 1993), http://news.bbc.co.uk/onthisday/hi/dates/stories/july/29/newsid_4561000/4561917.stm.

¹⁷⁰ Chris Hedges, *ACQUITTAL IN JERUSALEM; Israel Court Sets Demjanjuk Free, But He Is Now Without a Country*, N.Y. TIMES (July 30, 1993), <https://www.nytimes.com/1993/07/30/world/acquittal-jerusalem-israel-court-sets-demjanjuk-free-but-he-now-without-country.html> ("The verdict ends a 16-year legal battle by the retired Cleveland auto worker and his family, who had put most of their meager resources into Mr. Demjanjuk's defense ever since he was first accused of being Ivan the Terrible. Even though the Israel's highest court said he was now a free man, Mr. Demjanjuk was to remain in protective custody in his prison cell until his deportation.").

¹⁷¹ *Id.*

¹⁷² JOHN DEMJANJUK GUILTY OF NAZI DEATH CAMP MURDERS, BBC NEWS (May 12, 2011), <https://www.bbc.com/news/world-europe-12321549>.

¹⁷³ *Nazi Camp Guard Demjanjuk Dies*, BBC NEWS (Mar. 17, 2012), <https://www.bbc.com/news/world-europe-17414127> ("An estimated 250,000 people died in the gas chambers at Sobibor. Demjanjuk was convicted of being an accessory to the murder of the 28,060 people who were killed there while he was a guard.").

¹⁷⁴ Phil Gibbons, *14 Ruthless Nazi War Criminals Who Escaped Justice*, RANKER (Apr. 3, 2020), <https://www.ranker.com/list/nazi-war-criminals-who-escaped-justice/philgibbons> ("Following WWII, numerous high-profile Nazi war criminals were apprehended and some were executed. However, thousands of other notorious Nazis not only escaped justice, but also never faced charges.").

¹⁷⁵ See generally Sharma, *supra* note 7, at 590.

¹⁷⁶ *Id.* at 588.

effectively paused the trial of war crimes until the collapse of the Soviet Union in the late nineteenth century when the first international Tribunal since Nuremberg prosecuted individuals for war crimes, crimes against humanity, and genocide with the establishment of the International Criminal Tribunal for the former Yugoslavia (ICTY).¹⁷⁷ During the Yugoslav Wars, Bosnian Serb forces slayed more than 8,000 Bosniaks (Bosnian Muslims), and forced tens of thousands of civilians to relocate, creating the worst episode of ethnic cleansing and mass murder within Europe since the Holocaust.¹⁷⁸ The United Nations reacted by passing Resolution 827 creating the ICTY, and granted it jurisdiction over four crimes committed during Yugoslav Wars (these crimes mirrored those established by the Nuremberg Charter of August 8th, 1945).¹⁷⁹ Near the conclusion of the Tribunal's tenure, eleven years and 166 indictments later, the ICTY published a list of five accomplishments of the Tribunal, the fourth of which affirmed the criminal concepts not practiced since the Nuremberg Trials.¹⁸⁰

Shortly after the establishment of the ICTY, the International Criminal Tribunal for Rwanda (ICTR) was created in 1994, which prosecuted those responsible for the Rwandan genocide.¹⁸¹ Like the ICTY, the United Nations created the Tribunal in Resolution 955, in order to prosecute high-ranking individuals for the massive human rights violation in Africa, resulting in the deaths of an estimated 500,000 people.¹⁸²

177 Nuremberg Trials, HISTORY (Aug. 20, 2024), <https://www.history.com/topics/world-war-ii/nuremberg-trials> ("In addition, the International Military Tribunal supplied a useful precedent for the trials of Japanese war criminals in Tokyo (1946-48); the 1961 trial of Nazi leader Adolf Eichmann (1906-62); and the establishment of Tribunals for war crimes committed in the former Yugoslavia (1993) and in Rwanda (1994)."); see also International Criminal Justice Since Nuremberg, UNITED STATES HOLOCAUST MEMORIAL MUSEUM, <https://www.ushmm.org/genocide-prevention/simon-skjodt-center/work/ferencz-international-justice-initiative/transitional-justice/international-criminal-justice-since-nuremberg> (last visited Dec. 8, 2024) ("Nuremberg was little more than a beginning. Its progress was paralyzed by cold-war antagonisms.") (internal quotation omitted).

178 Srebrenica Genocide, BRITANNICA (Sept. 18, 2024), <https://www.britannica.com/event/Srebrenica-genocide>.

179 S.C. Res. 827 (1993).

180 *Achievements*, U.N. CRIM. TRIBUNAL FOR THE FORMER YUGOSLAVIA, <https://www.icty.org/en/about/Tribunal/achievements>; see *UN Hails Conviction of Mladic, the 'Epitome of Evil,' a Momentous Victory for Justice*, UN NEWS (Nov. 22, 2017), <https://web.archive.org/web/20210731100924/https://news.un.org/en/story/2017/11/636942-un-hails-conviction-mladic-epitome-evil-momentous-victory-justice#.WhadpdLiXIU> [archived] (lists the notable conviction of Serb General Radislav Krstic in 2001, ex-Bosnian Serb leader Radovan Karadzic convicted of genocide, and General Ratko Mladic who was sentenced to life in prison.).

181 *International Criminal Tribunal for Rwanda*, ENCYCLOPEDIA, <https://www.encyclopedia.com/international/encyclopedias-almanacs-transcripts-and-maps/international-criminal-tribunal-rwanda>.

182 *Id.* ("The United Nations (UN) Security Council created the International Criminal Tribunal for Rwanda (ICTR) in November 1994 to investigate and, when an apparent

Similarly, the Tribunal had jurisdiction over the crimes of genocide, crimes against humanity and war crimes.¹⁸³ Accordingly, immunity for heads of state was denied, and crimes against humanity and genocide were treated as distinct offenses.¹⁸⁴ As a result of similarities in practice, principle, creation and goals, the International Criminal Tribunal for the former Yugoslavia and Rwanda have been directly tied to precedent of Nuremberg.¹⁸⁵

E. Establishment of the Nuremberg Principles and the International Criminal Court (ICC)

In the eyes of participants, the Nuremberg Trials served as the foundation for future international accountability.¹⁸⁶ As one of the Tribunal's Judges John Parker stated, "It is not too much to hope that what we have done may have laid the foundation for the building of a permanent court with a code defining crimes of an international character and providing for their punishment."¹⁸⁷ After the war, the international community recognized the necessity of an international Tribunal to prosecute the worst atrocities where domestic governments were either complicit or powerless to prosecute those responsible.¹⁸⁸ The United Nations established ad hoc Tribunals in response to the aforementioned horrors in Yugoslavia and Rwanda.¹⁸⁹ These Tribunals, while breathing new life into Nuremberg's legacy, failed to live up to its true potential. These ad hoc Tribunals were limited in geographic and temporal scope.¹⁹⁰ They could not account for future conduct, nor could they punish crimes committed elsewhere.¹⁹¹ Furthermore, the creation of similar tribunals in the future would be reliant upon the political will of the international community,

case exists, prosecute a select number of political, military, and civic officials for their involvement in the Rwandan genocide that took place from April to July 1994. An estimated 500,000 Rwandans, overwhelmingly Tutsi, were killed during this period.").

¹⁸³ S.C. Res. 955 (1994).

¹⁸⁴ *Statute of the International Criminal Tribunal for Rwanda*, art. 6(2), United Nations Audiovisual Library of International Law, https://legal.un.org/avl/pdf/ha/ictr_EF.pdf (last visited Dec. 2, 2024) ("The official position of any accused person, whether as Head of state or government or as a responsible government official, shall not relieve such person of criminal responsibility nor mitigate punishment."); See *Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-T, HUMAN RTS. WATCH, <https://www.hrw.org/reports/2004/ij/ictr/3.htm> (last visited Dec. 2, 2024) (providing separate analyses for charges of genocide and crimes against humanity, underscoring their distinct legal elements).

¹⁸⁵ Philippe Kirsch, *Applying the Principles of Nuremberg in the ICC*, INTERNATIONAL CRIMINAL COURT 4 (2006).

¹⁸⁶ *Id.* at 3-4.

¹⁸⁷ *Id.* at 3.

¹⁸⁸ *Id.*

¹⁸⁹ *Id.* at 4.

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

and thus would be the exception and not the rule.¹⁹² These limitations became apparent, and the international community recognized the need for a permanent tribunal to adjudicate international crimes to effectively deter future atrocities.¹⁹³

The ICC was negotiated and established in 1998 by 160 states under the Rome Statute.¹⁹⁴ The ICC's creation directly mirrors that of the Nuremberg Trials.¹⁹⁵ The International Military Tribunal at Nuremberg had jurisdiction to hear crimes against humanity, war crimes, and crimes against the peace; so too did the ICC (however, the ICC's charter refers to "crimes against the peace" instead as "the crime of aggression").¹⁹⁶ The ICC Statute enshrines Nuremberg's precedent on individual responsibility, preventing one's governmental position from being a shield against criminal sanctions.¹⁹⁷ Moreover, the ICC Statute builds considerably upon Nuremberg's legacy by adding more detailed definitions and criminal elements than those enumerated at Nuremberg or in the more modern ad hoc Tribunals.¹⁹⁸ ICC was also given jurisdiction over the crime of genocide, recognized since its adoption at the Genocide Convention in 1948, and crimes of sexual violence.¹⁹⁹ Many commentators, including legal historian Kirsten Sellars, believe that the interpretation of those categories of crimes in Nuremberg informed the understanding of the same crimes some six decades later.²⁰⁰

To avoid the questions around Nuremberg's legal underpinnings, the ICC Statute limited the court's jurisdiction and function in many regards.²⁰¹ Firstly, the ICC's jurisdiction only extends to those who ratify the statute and the court's jurisdiction cannot be foisted upon an

192 *Id.*

193 *Id.* ("A permanent, truly international criminal court is necessary for the punishment of international crimes. Equally important, only a permanent, readily available court can most effectively deter future crimes.").

194 *Id.*

195 *Id.* ("The ICC builds on the two core principles of Nuremberg – the need for accountability for serious crimes and the importance of fair trials.").

196 *Id.*

197 *Id.* at 5.

198 *Id.* ("[T]he definitions in the ICC Statute and the supplementary Elements of Crimes are far more detailed than the definitions in the Nuremberg Charter or the statutes of the recent ad hoc Tribunals.").

199 *Id.*

200 *See* Kirsten Sellars, 'Crimes Against Peace' and International Law, CAMBRIDGE UNI. PRESS 84, 290-92 (2013) (examining what the International Criminal Court can learn from the Nuremberg and Tokyo trials, including where the exercise of the ICC's authority can raise concerns over selective justice or retroactivity).

201 *Id.* at 291.

unwilling state, thus the ICC is not a court of universal jurisdiction.²⁰² Today, 124 countries are State Parties to the Rome Statute of the International Criminal Court.²⁰³ Secondly, the ICC's adjudications cannot be considered *ex post facto*, as the Rome Statute and its supplemental texts, including the Rules of Procedure and Evidence and the Elements of Crimes, were negotiated and broadly agreed upon by the signatory states.²⁰⁴

Additionally, it is worth highlighting another distinct logistical difference between the ICC and Nuremberg: Nuremberg existed in the ideal environment to prosecute criminal defendants.²⁰⁵ Many of the alleged perpetrators were already in custody.²⁰⁶ Further, the hostile governments had been defeated and their documents captured.²⁰⁷ Conversely, the efficacy of the ICC suffers from attempting to adjudicate during times of active conflict due to logistical and security challenges.²⁰⁸ As an example, one could look to the ICC's challenges to effectuate judgment in the ongoing Darfur genocide.²⁰⁹ The ICC issued warrants of arrest for various members of the Lord's Resistance Army, including the leader, Joseph Kony, for alleged crimes against humanity.²¹⁰ The ICC is forced to operate under the fog of war where information is insufficient.²¹¹ Additionally, the ICC has no enforcement mechanism nor any institutional information-gathering powers.²¹² The ICC, while a separate entity, is

202 *Understanding the International Criminal Court*, Int'l Crim. Ct., <https://www.icc-cpi.int/sites/default/files/Publications/understanding-the-icc.pdf> (last visited Dec. 2, 2024).

203 *States Parties to the Rome Statute, Assembly of States Parties*, Int'l Crim. Ct., <https://asp.icc-cpi.int/states-parties> (last visited Dec. 2, 2024).

204 *See Rome Statute of the International Criminal Court*, July 17, 1998, 2187 U.N.T.S. 90, <https://www.icc-cpi.int/sites/default/files/2024-05/Rome-Statute-eng.pdf>; *Rules of Procedure and Evidence*, Int'l Crim. Ct., ICC-ASP/1/3, pt. II.A (2002), <https://www.icc-cpi.int/sites/default/files/Publications/Rules-of-Procedure-and-Evidence.pdf>; *Elements of Crimes*, Int'l Crim. Ct., ICC-ASP/1/3, pt. II.B (2002), https://legal.un.org/icc/asp/1stsession/report/english/part_ii_b_e.pdf.

205 *See* Philippe Kirsch, *Applying the Principles of Nuremberg in the ICC*, 6 WASH. U. GLOBAL STUD. L. REV. 501, 508 (2007).

206 *See generally Criminals Captured: The Stories of Finding Seven Nazis*, HISTORY COLLECTION, <https://historycollection.com/criminals-captured-stories-finding-seven-nazis/> (last visited Dec. 2, 2024).

207 *See id.*

208 *See id.* (discussing that the ICC often is active in situations of ongoing conflict where crimes continue to be committed, complicating the protection of witnesses and victims).

209 *Darfur*, U.S. HOLOCAUST MEMORIAL MUSEUM (Dec. 21, 2023), <https://encyclopedia.ushmm.org/content/en/article/darfur>.

210 *The Prosecutor v. Joseph Kony*, INT'L CRIM. CT., <https://www.icc-cpi.int/uganda/kony> (last visited Dec. 8, 2024) (detailing that Joseph Kony is suspected of thirty-six counts of war crimes and crimes against humanity for his action northern Uganda).

211 Kirsch, *supra* note 185.

212 *Id.*

dependent on the cooperation of States to prosecute defendants and effectuate judgments.²¹³

The ICC's adoption and implementation of Nuremberg's principles had secondary influences in a series of international agreements that extend beyond the scope of this article, including the Genocide Convention, the Geneva Conventions on the Laws of War, and the Universal Declaration of Human Rights.²¹⁴ Nuremberg also firmly established the meaning of "genocide" in international law parlance.²¹⁵

F. Human Rights Litigation in U.S. Courts

In 2005, Palestinian families filed suit against Caterpillar, Inc. under the Alien Tort Statute ("ATS")²¹⁶ for aiding and abetting the Israel Defense Force ("IDF") in its alleged commission of war crimes, accusing Caterpillar of providing the IDF with bulldozers used to demolish civilian homes which resulted in injury and death.²¹⁷ In their complaint, the plaintiffs referred to the Nuremberg Trials and the Tribunals' prosecution of German industrialists, many of whom were previously convicted of aiding and abetting the Nazis in their atrocities.²¹⁸ Similarly, other plaintiffs have relied on the Nuremberg industrialist cases to support their claims of aiding and abetting relative to the apartheid regime in South Africa.²¹⁹ In particular, the plaintiffs alleged that the defendants were participants in the apartheid when they created deplorable

213 *Id.*

214 Weinke, *supra* note 152; *Nuremberg Trials*, HISTORY, <https://www.history.com/topics/world-war-ii/nuremberg-trials> ("The findings at Nuremberg led directly to the United Nations Genocide Convention (1948) and Universal Declaration of Human Rights (1948), as well as the Geneva Convention on the Laws and Customs of War (1949).")

215 During the Nuremberg trials, all the Allied prosecutors (except the United States) made frequent mention of the term "genocide" throughout the trial and in their closing arguments, an idea that had recently been invented by the Polish-Jewish jurist Raphael Lemkin in his book, *Axis Rule in Occupied Europe*. Priemel, *supra* note 51, at 62, 120. The etymology of genocide derives from the Greek work *genos* (race, tribe), with the Latin suffix *-cide* (killing). Raphael Lemkin, *Axis Rule in Occupied Europe: Laws of Occupation, Analysis of Government, Proposals for Redress*, in *LAWBOOK EXCHANGE* 79 (2008). Since Nuremberg, the term genocide has been adopted in other international criminal prosecutions. Most notably, the International Criminal Tribunal for the Former Yugoslavia adjudicated the killings committed by Serb forces as an act of genocide, and the International Court of Justice upheld the ICTY's earlier finding in the *Bosnian Genocide Case*. Arthur Max, *Court: Serbia Failed to Prevent Genocide*, S.F. CHRON. (Feb. 26, 2007), <https://archive.ph/20070810091849/www.sfgate.com/cgi-bin/article.cgi?f=/n/a/2007/02/26/international/i033600S38.DTL&type=politics> [archived].

216 28 U.S.C.A. § 1350.

217 *Corrie v. Caterpillar, Inc.*, 403 F. Supp. 2d 1019, 1022-23 (W.D. Wash. 2005), *aff'd*, 503 F.3d 974 (9th Cir. 2007) (affirmed on political question basis).

218 Plaintiffs' Brief in Opposition to Defendant's Motion to Dismiss at 16, *Corrie v. Caterpillar, Inc.*, No. C05-5192-FDB (W.D. Wash. Aug. 15, 2005).

219 *In re: S. African Apartheid Litig.*, 346 F. Supp. 2d 538 (S.D.N.Y. 2004).

working conditions and profited from cheap labor.²²⁰ The plaintiff's argued, "[j]ust as Nazi industrialists faced international tribunals for their complicity in Nazi forced labor regimes, corporations that actively cooperated with the apartheid regime and its discriminatory and repressive practices may be found liable under the ATS."²²¹ While the efficacy of these arguments is not well known, their prevalence in recent human rights litigation still underscores the enduring influence of Nuremberg's precedent on domestic law.²²² In three instances, domestic courts found these arguments notable, and in two of those cases, it directly referenced the Nuremberg Trials in its holdings.²²³

CONCLUSION

As discussed, the Nuremberg Trials were controversial even among those who wanted to see Nazi officials punished. During one of the trials, Chief Justice of the Supreme Court, Harlan Stone, characterized the proceedings in private correspondence as a "sanctimonious [] fraud" and a "high-grade lynching party."²²⁴ Associate Supreme Court Justice, William Douglas, likewise, said the Allied powers "substituted power for principle" at Nuremberg.²²⁵ Yet, many observers considered the trial a monumental step forward in the realm of international law which directly influenced the United Nations Genocide Convention in 1948, the Universal Declaration of Human Rights, and the Geneva Convention on the Laws and Customs of War in 1949.²²⁶

²²⁰ Brief for Plaintiffs-Appellants at 13, *In re S. African Apartheid Litig.*, No. 05-2326 (2d Cir. Aug. 22, 2005).

²²¹ *Id.* at *19.

²²² See *e.g.* *Bowoto v. Chevron Corp.*, No. C 99-02506 SI, 2006 WL 2455752, at *3-4 (N.D. Cal., 2006); *Presbyterian Church of Sudan v. Talisman Energy, Inc.* (Presbyterian Church II), 374 F. Supp. 2d 331, 333-34 (S.D.N.Y. 2005); *In re Agent Orange Prod. Liab. Litig. (Agent Orange)*, 373 F. Supp. 2d 7, 56-58 (E.D.N.Y. 2005); *Presbyterian Church of Sudan v. Talisman Energy, Inc.* (Presbyterian Church I), 244 F. Supp. 2d 289, 315 (S.D.N.Y. 2003).

²²³ See *Bowoto*, 2006 WL 2455752, at *3-4; *Presbyterian Church II*, 374 F. Supp. 2d at 333-34; *Agent Orange*, 373 F. Supp. 2d at 56-58; *Presbyterian Church I*, 244 F. Supp. 2d at 315.

²²⁴ See John Q. Barrett, *High-Grade Lynching: Harlan Fiske Stone's December 1945 Condemnation of the Nuremberg Trial*, THE JACKSON LIST (Dec. 4, 2020), <https://thejacksonlist.com/wp-content/uploads/2020/12/20201204-Jackson-List-High-Grade-Lynching.pdf> (citing Letter from Harlan F. Stone to Sterling Carr (Dec. 4, 1945) (typed, unsigned carbon copy), in Harlan Fiske Stone Papers, Library of Congress, Manuscript Division, Washington, D.C., Box 9).

²²⁵ *The Nuremberg Trials*, FAMOUS TRIALS, <https://famous-trials.com/nuremberg/1901-home> (last visited Dec. 2, 2024).

²²⁶ See Whitney, *supra* note 37; *The Nuremberg Trials and How They Influenced International Criminal Law*, Duquesne Univ. Sch. of L., JURIS BLOG, <https://sites.law.duq.edu/juris/2023/11/06/the-nuremberg-trials-and-how-they-influenced-international-criminal-law> (last visited Dec. 2, 2024).

As is the case with most hotly contested historical events, the truth probably lies somewhere in the middle. There is little doubt that the Nuremberg Trials, which garnered much media attention and started many scholarly debates, inspired future international cooperation in the law and was one of the founding moments in the establishment of the International Criminal Court.

Yet, the legal moorings of the IMT's authority can hardly justify criminal proceedings. Defendants had to combat charges of crimes created for the direct purpose of prosecuting them. The judges, including one with a reputation for show trials, had every incentive to hand out guilty verdicts. The accusation of "victor's justice" becomes almost irrefutable when comparing the atrocities of the Germans and Soviets. In the Eastern European theatre of the war, the Soviets had a reputation for treating prisoners of war, their own civilians, and civilians in occupied territories horrifically.²²⁷ Yet, instead of standing as defendants, the Soviets sat as judges and prosecutors.

It is also worth noting that despite its unstable legal foundation, the Nuremberg Trial was probably a desirable conclusion to the war. Historically, after triumph in war or revolution, the victors choose the fate of their now defeated foes. What makes Nuremberg remarkable is how restrained the victors were in exercising that power. Instead of adopting Stalinist-style extrajudicial executions, the defendants were afforded a full trial with their crimes defined, had the protections of due process with fair sentencing or possibility of acquittal, and, at the very least, one last chance to talk publicly with the world.²²⁸

In summation, the Nuremberg Trials left an enduring and controversial legacy. The trials established the first international war crimes tribunal in history and was critical in the bringing prominent German officials to justice. Although some legal innovations were controversial at the time, they are now regarded as a milestone toward the establishment of various *ad hoc* tribunals, and the eventual creation of a permanent international court. Nuremberg helped define and establish precedence for crimes against humanity, genocide, and war crimes. The Nuremberg Trials left a complex and lasting impact on international law, individual accountability, and the pursuit of justice for war crimes, and it remains a critical chapter in our understanding of the necessity of establishing legal mechanisms impose consequences for mass atrocities.

²²⁷ See e.g. S.P. MacKenzie, *The Treatment of Prisoners of War in World War II*, 66 J. MOD. HIST. 487, 504 (1994) (detailing details how the war in the East involved extensive ideological and racial prejudices that led to systematic atrocities against prisoners and civilians).

²²⁸ Bass, *supra* note 112.