

**THE NUREMBERG MILITARY TRIBUNALS:
A SHORT HISTORY***FRED L. BORCH III[†]

I. Introduction

Good morning, one and all. Thank you very much, sir, for those kind remarks. Today, I am going to give you some context for understanding what happened seventy-five years ago. The International Military Tribunal (IMT) and the twelve subsequent proceedings are the foundation for modern international law. You really cannot overstate that and as we go through my talk, I think you will see why.

Before I start, I want to share a couple of things with you. First of all, why are we having this symposium? Well, because it is a good idea, of course. But credit really goes to Major Travis Covey, as it was originally his idea. Thanks also to Lieutenant Colonel Justin Marchese and to Major Keoni Medici. I am really grateful to them for putting this together, and I think you will find it enjoyable, even if we are only spending a couple of hours to talk about something that went on from 1945 to 1949.

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We will start with the background of the IMT (i.e., why it convened, where it was, what the charges were), then I am going to talk about the IMT itself, which was held from 20 November 1945 to 31 August 1946,¹ and then the twelve subsequent proceedings. One thing you should take away immediately from my remarks is that there was not just one trial at Nuremberg but, in fact, thirteen trials. The first one, the IMT, is the one that is most familiar to you—the one you learned about in law school or the one you have seen on television documentaries, but there also were twelve subsequent proceedings.

One of the first questions that came up as it became apparent that the Allies were going to win the war was, “What should we do with these Nazis?” There were many senior Government officials who said that the guilt of these men was so black that a trial was not necessary and that they should be executed.² This was actually seriously considered, but it was decided that a trial was a better course of action. I am going to explain why that came about.

Before I do that, let me talk about Nazi war crimes in terms of a pyramid, which will give you context for the rest of my talk. At the very top of the pyramid is the IMT that happened at Nuremberg from November 1945 through 1946; that trial is only the trial of the major war criminals.

The second level of the pyramid—right below the IMT—is the twelve subsequent proceedings. The twelve subsequent proceedings that we are going to talk about are the ones that were tried by the U.S. Government in the American sector under Control Council Law No. 10.³ The French, the British, and the Russians also tried subsequent proceedings in their occupation zones. There was actually more out there than we are going to talk about; we are only going to talk about the American subsequent proceedings. Who is tried at these? The major war criminals were tried at

¹ United States v. Göring, 1 Trial of the Major War Criminals Before the International Military Tribunal, Judgment, at 172 (Oct. 1, 1946).

² TELFORD TAYLOR, THE ANATOMY OF THE NUREMBERG TRIALS 29 (1992); ANN TUSA & JOHN TUSA, THE NUREMBERG TRIAL 61–62 (2010).

³ Control Council Law No. 10, art. III, *reprinted in* 1 LEGAL DIV., OFF. OF MIL. GOV'T FOR GER., ENACTMENTS AND APPROVED PAPERS OF THE CONTROL COUNCIL AND COORDINATING COMMITTEE 306 (1945).

the IMT, so I like to say the not-so-major war criminals were tried at the twelve subsequent proceedings.

The third level of the pyramid—below the IMT and the twelve subsequent proceedings—is the military commissions tried at Dachau, mostly by Army Judge Advocate General Department attorneys and their assistants.⁴ Those prosecuted at these tribunals were the trigger-pullers, the guards at concentration camps, and the SS men who murdered American Soldiers and others at Malmedy.⁵

The fourth level of the pyramid is the trials held by other nations for crimes committed during the occupation of their countries. In Belgium, the Netherlands, Yugoslavia, even Russia, where they had Nazi war criminals in custody, they tried cases.⁶

Last of all, at the base of the pyramid were trials conducted by German authorities in German civilian courts.⁷ Every so often, you pick up a newspaper or hear on television, radio, or your source of news that the Germans are trying someone for war crimes in German court.⁸ Usually, it is someone who served as a concentration camp guard or committed some other war crime; they are now in their 80s or 90s, but they are being prosecuted.

The IMT is important because it was the first time in history that an international court decided that there was individual criminal liability.⁹ I cannot overstate how important it is that this is the first time that we have individual criminal liability. In the past, international law had always accepted that if someone is acting on behalf of the state or under obedience

⁴ *E.g.*, United States v. Skorzeny, Case No. 6-100 (U.S. Mil. Gov't Ct. Sept. 9, 1947).

⁵ *E.g.*, United States v. Bersin, Case No. 6-24 (U.S. Mil. Gov't Ct. July 16, 1946).

⁶ Devin O. Pendas, *Seeking Justice, Finding Law: Nazi Trials in Postwar Europe*, 81 J. MOD. HIST. 347, 354 (2009) (stating that more than 95,000 Germans and Austrians were convicted of Nazi war crimes in Eastern and Western European courts).

⁷ *Id.* (“The Germans themselves convicted nearly 20,000 people of Nazi crimes—6,495 in the courts of the Western Occupation Zones/Federal Republic and at least 12,776 in the Soviet Occupation Zone/German Democratic Republic.” (citations omitted)).

⁸ *E.g.*, Melissa Eddy, *Ex-Nazi Guard Convicted in One of Germany's Last Holocaust Trials*, N.Y. TIMES, July 24, 2020, at A12.

⁹ *Birth of International Criminal Law*, NUREMBERG MUN. MUSEUMS, <https://museums.nuernberg.de/memorium-nuremberg-trials/the-legacy-of-nuremberg/birth-of-international-criminal-law> (last visited May 27, 2021).

to orders, then there is no individual responsibility.¹⁰ Nuremberg changed all of that. There is no more hiding behind an act of state to escape responsibility for your war crimes.

The second thing that is really important is that the IMT established firmly that crimes against humanity are a part of the law of armed conflict (LOAC).¹¹ What are crimes against humanity? Inhumane acts against civilian populations (e.g., the murder of millions of Jews, Gypsies, and other people who the Nazis thought were not deserving of due process or life).¹² Prior to this time, there was no such understanding that a crime against humanity—having committed horrific acts against civilian populations—was part of the LOAC. But Nuremberg established forever that it is, and this is really important for us as lawyers.

The third and last piece that is important about Nuremberg is that the IMT was the death knell for this idea that if I am acting pursuant to superior orders, I get a “get out of jail free” card. It is no longer an absolute defense, though it was prior to the trials.¹³

II. Creation of the International Military Tribunal

Why have an international criminal court? Why not just take these Nazis out and execute them? Believe it or not, the idea of an international forum did not come from the Americans, the British, or the French. It came from the Soviets. Joseph Stalin decided that a trial would be a great idea because he thought he would get something like the Moscow Trials of 1936 to

¹⁰ Indeed, this was a common view among nations at the time. *See, e.g.*, U.S. DEP’T OF ARMY, FIELD MANUAL 27-10, RULES OF LAND WARFARE para. 347 (1 Oct. 1940) (“Individuals of the armed forces will not be punished for these offenses in case they are committed under the orders or sanction of their government or commanders.”).

¹¹ *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 May 27, 2021).

¹² *See infra* note 30.

¹³ *E.g.*, U.S. DEP’T OF ARMY, FIELD MANUAL 27-10, THE LAW OF LAND WARFARE para. 509a (18 July 1956) (C1, 15 July 1976) (“The fact that the law of war has been violated pursuant to an order of a superior authority, whether military or civil, does not deprive the act in question of its character of a war crime, nor does it constitute a defense in the trial of an accused individual, unless he did not know and could not reasonably have been expected to know that the act ordered was unlawful.”).

1938.¹⁴ When Stalin purged the Communist Party of those he thought were disloyal to him, he had “show trials” in Moscow—scripted trials where it was not really in doubt that the people are going to be found guilty and later taken out and shot.¹⁵ In this case, Stalin thought, “If I do this in Berlin,” and that is where Stalin wanted to have the IMT, “the Soviet Union will be revealed as the victim of World War II and the Germans will be revealed as the evil menace to the world that they really are.”¹⁶ It was Stalin’s idea to have some sort of a public trial, and that was the genesis for the IMT.

The irony was that the trial did not quite turn out the way Stalin thought it would. Once the French, British, and Americans got involved and started putting together the charter to create the IMT, they insisted on due process for the defendants. For those of you who have done reading on the topic, you know that although there are some complaints about victors’ justice, no one has ever argued—at least no one who is a responsible scholar—that the IMT was not fair. In fact, the proceedings were full and fair.

As Colonel McGarry said, the trials were created by executive agreements¹⁷ and the charter.¹⁸ These were signed by the four major powers, the Soviets, the British, the French, and the United States, on 8 August 1945.¹⁹ That date should certainly be significant to you because of what was happening on the Pacific on 8 August.²⁰ In any case, this is the charter that creates the court. The Allies proclaimed that they were acting on behalf of the United Nations, and this is the birth of the idea that after World War

¹⁴ Francine Hirsch, *The Soviets at Nuremberg: International Law, Propaganda, and the Making of the Postwar Order*, 113 AM. HIST. REV. 701, 703 (2008).

¹⁵ See generally GEORGE H. HODOS, *SHOW TRIALS: STALINIST PURGES IN EASTERN EUROPE, 1948–1954* (1987).

¹⁶ See Hirsch, *supra* note 14.

¹⁷ Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 280.

¹⁸ Charter of the International Military Tribunal, in Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 280.

¹⁹ *Id.*

²⁰ On 8 August 1945, two days after the United States dropped its first atomic bomb on Hiroshima, Japan, a B-29 bomber dropped a second bomb on Nagasaki, Japan. The Soviet Union declared war on Japan that same day. PROCLAMATION CALLING FOR THE SURRENDER OF JAPAN, APPROVED BY THE HEADS OF GOVERNMENT OF THE UNITED STATES, CHINA, AND THE UNITED KINGDOM, reprinted in 2 HIST. OFF., U.S. DEP’T OF STATE, FOREIGN RELATIONS OF THE UNITED STATES: CONFERENCE OF BERLIN (POTSDAM) 1945, at 1474, 1474 n.1 (1960).

II, the world was going to adhere to the rule of law and have a robust international legal structure.

The question was where the IMT should be held. The Soviets wanted to have the trials in Berlin, and the reason they wanted Berlin was its historical significance as the capital of Germany, which makes sense. Who was in control in Berlin? The Soviets. But what was the problem with going to Berlin for the trial? There was not much left. Even if you wanted to have a trial in Berlin, you could not because the city was in ruins in August 1945.

However, Nuremberg, which also has historical and symbolic significance—remember that many Nazi party rallies are held there—was in pretty good shape. The Court of Justice was actually standing. And who was in control of Nuremberg? What zone was that in? Yes, you would be right. We were there. That was the chief reason that Nuremberg was chosen: it actually had an intact courtroom, where everything can be put together and because the Americans were in control of that geographic area.²¹

III. Selection of Defendants

Who was going to be tried? There literally were thousands and thousands of Germans who could be tried for war crimes,²² but the idea was to try the major war criminals.²³ None of the twenty-two defendants tried there were ever trigger-pullers actually carrying out nefarious acts on behalf of the Nazis, but they were all important members of the Nazi state.²⁴ Hermann Göring, for example, the Reichsmarschall, was the number two guy who was supposed to actually follow Hitler, if Hitler were to be killed.²⁵

²¹ *Choice of Nuremberg as the Venue for the Trials*, NUREMBERG MUN. MUSEUMS, <https://museums.nuernberg.de/memorial-nuremberg-trials/permanent-exhibition/courtroom-600/choice-of-nuremberg> (last visited May 27, 2021).

²² See, e.g., Elmer Plischke, *Denazification Law and Procedure*, 41 AM. J. INT'L L. 807, 825–26 (1947) (estimating over three million chargeable cases in Germany, which “would mean a hearing for every five inhabitants in our Occupation Zone”).

²³ Donald Bloxham, *From the International Military Tribunal to the Subsequent Nuremberg Proceedings: The American Confrontation with Nazi Criminality Revisited*, 98 HIST. 567, 572 (2013) (“The defendants comprised most of the surviving highest leaders of the Third Reich, but were also selected as representative of the broad spectrum of interests and political, military and economic institutions held to have contributed to and benefited from the conspiracy.”).

²⁴ *Id.*

²⁵ IAN KERSHAW, *HITLER: A BIOGRAPHY* 624 (2008).

Joachim von Ribbentrop was the foreign minister who sat down with Stalin, signed the non-aggression pact between Germany and the Soviet Union and, really, I think, made World War II possible.²⁶ Albert Speer, of course, was the industrialist, the planner, the architect. I am not going to go through all of them, but there are twenty-two defendants, and they were the major war criminals.

IV. What Law Would Apply?

A really interesting point in the IMT for those of us who are attorneys or interested in the law is that the Allies had to decide what law would apply at the tribunal. Some planners said, “Well, let’s just say that we will use international law.” But if you think back to 1945, what was there in the way of international law other than custom? You had the Hague Conventions and you had the Geneva Conventions, but other than that, there was not a whole lot out there. Ultimately, the Allies decided that it would be too dangerous just to leave it up to the judges to decide what the law was, so the Allies decided what the law was. Consequently, all that the four judges had to do was apply the facts to the law enunciated in the charter that created the IMT, and if the facts met the requirements of the law, then the Nazi defendants were guilty.²⁷

With this in mind, Article 6 of the IMT charter declared the crimes that existed in international law.²⁸ “Crimes against peace” was the idea that the Nazis had waged aggressive war. It is not really all that clear, even today, what that means but, in general, if you violated a treaty by attacking a friendly country, violated neutrality, or otherwise waged an aggressive war, that was a crime against peace.²⁹ “Crimes against humanity” were defined as inhumane acts against civilian populations (e.g., murdering civilians, murdering Jews, running special squads in Ukraine and Russia to round

²⁶ *German-Soviet Pact*, U.S. HOLOCAUST MEM’L MUSEUM, <https://encyclopedia.ushmm.org/content/en/article/german-soviet-pact> (last visited May 27, 2021).

²⁷ Charter of the International Military Tribunal, *supra* note 18, 59 Stat. at 1547, 82 U.N.T.S. at 286–88.

²⁸ *Id.*

²⁹ *Id.* (defining crimes against peace as “namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing”).

up and simply kill people).³⁰ Finally, Article 6 identified “war crimes” as violations of international law (e.g., killing prisoners of war, needless destruction of private or public property).³¹ These are the three crimes declared in Article 6.

V. Trial Participants and Procedures

There were four judges at the IMT: Iona Nikitchenko of the Soviet Union; Francis Biddle of the United States; Geoffrey Lawrence of the United Kingdom; and Henri Donnedieu de Vabres of France.³² Francis Biddle had been the U.S. Attorney General under Franklin Roosevelt and, in fact, he and the U.S. Army Judge Advocate General in 1942 prosecuted the U-boat saboteurs.³³ The Soviet judge was a major general and the only judge of the four who was in the military.³⁴

There were four prosecutors, although we really only hear about Robert Jackson, the lead prosecutor. Each country had a prosecutor.³⁵ And how about defense counsel? Everybody got a defense counsel, almost all of whom were German lawyers.³⁶

³⁰ *Id.* (defining crimes against humanity as “namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated”).

³¹ *Id.* (defining war crimes as “namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labour or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity”).

³² *United States v. Göring*, 1 Trial of the Major War Criminals Before the International Military Tribunal, Members and Alternate Members of the Tribunal, at 1 (Oct. 1, 1946).

³³ *Ex parte Quirin*, 317 U.S. 1, 11 (1942).

³⁴ *Göring*, 1 Trial of the Major War Criminals Before the International Military Tribunal, at 1.

³⁵ *Id.* at 3–5.

³⁶ *Id.* at 6–7.

How about procedure? All evidence with probative value could be considered by the court;³⁷ the basic standard was relevance.³⁸ Does hearsay come in? Sure. Can an accused testify? Yes; under Article 24(g) of the IMT charter, the accused could testify³⁹ and present evidence.⁴⁰ This was something that Stalin and the Soviets were really upset about: “Wait a minute. We are not interested in hearing the Nazi side here or seeing a defense. That is not why we are here.” But you can see that the Allies said, “If we are going to have a trial, we have to have some due process.” As a result, by the last day of the trials, 31 August 1946, the IMT judges heard 360 witnesses, and there is now a 42-volume record of the trial.⁴¹

We do not have time to go into all the results, but to summarize: eight defendants were found guilty of crimes against peace; twelve were found guilty of waging aggressive war. Some actually were found not guilty.⁴² Twelve of the accused were sentenced to death and the remainder to prison terms.⁴³

VI. Subsequent Proceedings

Originally, the idea was that there would be more than one IMT. In fact, at the beginning, every one of the Allies contemplated that there would be several follow-on IMTs.⁴⁴ Why did that not happen? Why did we only have one and then go to these “subsequent proceedings”? There are a couple of reasons, but the chief one was that Mr. Justice Jackson advised President

³⁷ Charter of the International Military Tribunal, *supra* note 18, 59 Stat. at 1551, 82 U.N.T.S. at 296 (“The Tribunal shall not be bound by technical rules of evidence. It shall adopt and apply to the greatest possible extent expeditious and non-technical procedure, and shall admit any evidence which it deems to have probative value.”).

³⁸ MANUAL FOR COURTS-MARTIAL, UNITED STATES, MIL. R. EVID. 401 (2019) (“Evidence is relevant if (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action.”).

³⁹ Charter of the International Military Tribunal, *supra* note 18, 59 Stat. at 1551–52, 82 U.N.T.S. at 298.

⁴⁰ *Id.*

⁴¹ See *Trial of the Major War Criminals Before the International Military Tribunal*, LIBR. OF CONGR., https://www.loc.gov/rr/frd/Military_Law/NT_major-war-criminals.html (May 4, 2016), for access to the forty-two volumes.

⁴² *United States v. Göring*, 1 *Trial of the Major War Criminals Before the International Military Tribunal*, Judgment, at 279–341 (Oct. 1, 1946).

⁴³ *Id.* at 365–66.

⁴⁴ Donald Bloxham, ‘*The Trial That Never Was: Why There Was No Second International Trial of Major War Criminals*, 82 *HIST.* 41, 45–49 (2002).

Truman that the United States should not participate in any future IMTs.⁴⁵ Jackson argued that the IMT process was too complicated: four judges of four different nationalities meant that an IMT had to conduct all proceedings in four languages, plus German.⁴⁶ Additionally, the mix of common law and civil law at the IMT was confusing. It would be a lot more efficient, said Jackson, if we could simply try future cases in the American zone and just call them “subsequent proceedings.”

President Truman also was afraid that another IMT would end up turning into a propaganda vehicle for the Soviets.⁴⁷ The Cold War was already beginning, and the fear was that if we have another IMT, it would just be an opportunity for Stalin to do mischief.

Who was tried at these twelve subsequent proceedings? The “less” major war criminals. Not a whole lot of trigger-pullers, though there are some. These were military trials in the sense that the prosecutor was Brigadier General Telford Taylor, who was not a judge advocate but had been an assistant to Mr. Justice Jackson at the IMT,⁴⁸ so he knew his way around the proceedings and the courtroom. Taylor was the prosecutor, but the judges were civilians. Each one of the twelve subsequent proceedings had three civilian judges who sat in judgment.⁴⁹ Very similar to a tribunal that you would see in a civil law country, with three judges deciding guilt or innocence and any punishment. Regarding the rules of evidence: again, all evidence probative to a reasonable person may be considered by the tribunal.⁵⁰

I am going to go quickly through each of the twelve cases.

⁴⁵ *Id.* at 50.

⁴⁶ Letter from Robert H. Jackson, U.S. Chief of Couns., to Harry S. Truman, U.S. President (Oct. 7, 1946), in U.S. DEP’T OF STATE, REPORT OF ROBERT H. JACKSON, UNITED STATES REPRESENTATIVE TO THE INTERNATIONAL CONFERENCE ON MILITARY TRIALS 432, 433 (1949).

⁴⁷ Hirsch, *supra* note 14.

⁴⁸ Drexel A. Sprecher, *Central Role of Telford Taylor as U.S. Chief of Counsel in the Subsequent Proceedings*, 37 COLUM. J. TRANSNAT’L L. 673, 673 (1999).

⁴⁹ BRIGADIER GENERAL TELFORD TAYLOR, FINAL REPORT TO THE SECRETARY OF THE ARMY ON THE NUERNBERG WAR CRIMES TRIALS UNDER CONTROL COUNCIL LAW NO. 10, at 35 (1949).

⁵⁰ *Id.* at 288 (setting forth in Article VII the rules of evidence under Ordinance No. 7).

In the Medical Case,⁵¹ twenty-three doctors and officials were tried and convicted for conducting horrific experiments on concentration camp inmates and prisoners of war, including experiments with malaria, freezing, and sterilization. Most of them were found guilty; some of them were executed.

In the Milch Case,⁵² Luftwaffe Field Marshal Erhard Milch was in charge of the Nazi slave labor program. As you might imagine, if millions of German men are fighting in the Wehrmacht, you have shortage of labor. The way you fix this is that you simply deport Dutch, Belgian, and French citizens to Germany to do the work. Five million workers were deported to Germany. Milch was in charge of the program. He was prosecuted and found guilty.

We have a speaker this morning who is going to talk about the third subsequent proceeding,⁵³ the Justice Case.⁵⁴ Here, fifteen defendants were charged with having transformed German courts into a system of cruelty and injustice. There was a rule of law, but it had been perverted. The Nazis ran special courts and People's Courts, all of which were used to eliminate, kill, and murder Germans who opposed them.

The Pohl Case⁵⁵ was the fourth of the twelve subsequent proceedings. Schutzstaffel General Oswald Pohl and seventeen defendants oversaw the operation of the concentration camps at Buchenwald, Dachau, Auschwitz, and Treblinka. They were obviously up to no good, tried, and many of them were hanged.

One of the things that the Allies were really upset about was that German industrialists, men like Friedrich Flick, had really made the rise to Nazi power possible, and it fed the German war machine. We had subsequent proceedings against industrialists, of whom Flick was one. In

⁵¹ United States v. Brandt (Medical Case), Case No. 1, 1 Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10 (Aug. 20, 1947).

⁵² United States v. Milch (Milch Case), Case No. 2, 2 Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10 (Apr. 16, 1947).

⁵³ William F. Meinecke Jr., *German Justice on Trial: The Justice Case*, 229 MIL. L. REV. 173 (2021).

⁵⁴ United States v. Altstoetter (Justice Case), Case No. 3, 3 Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10 (Dec. 3, 1947).

⁵⁵ United States v. Pohl (Pohl Case), Case No. 4, 5 Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10 (Nov. 3, 1947).

the Flick Case,⁵⁶ which was the fifth case to be tried, the offenses charged were crimes against humanity, inhumane acts against civilians, and what was called the “Aryanization of private property.” Even today, you still hear about this. If you read the *New York Times* or the *Washington Post* or listen to Fox News, you frequently learn about a painting that has been returned to the heirs of a person or persons who had it seized by the Nazis during World War II.⁵⁷ This Aryanization of private property was a big problem, and Flick and his co-defendants were prosecuted for this. Not only for taking paintings and other works of art, but also for seizing companies.

The sixth proceeding was the so-called I.G. Farben Case.⁵⁸ This was a big pharmaceutical company financing the Nazi regime, manufacturing far in excess of the needs of the peacetime economy.

The seventh proceeding, called the Hostage Case,⁵⁹ is a very interesting case for those of us who are military lawyers or interested in the LOAC. In this particular case, the Germans decreed, and it was an arbitrary rule, that if one German were wounded, say, in an attack by the French or Dutch resistance, the Germans would execute twenty-five to fifty Frenchmen or Dutchmen. The Germans would kill 50 to 100 for each German killed. The Germans argued that the principle of military necessity required this, which, of course, is ridiculous. The Hostage Case stands, then, for the proposition that you cannot conduct reprisals, at least of this magnitude, and insist that military necessity requires it. The law on reprisals has changed since World War II,⁶⁰ but the Hostage Case is very important: no arbitrary executions. “Arbitrary,” here, is used in the sense that the Germans never conducted an investigation or trial. They simply took out civilians and killed them.

⁵⁶ United States v. Flick (Flick Case), Case No. 5, 6 Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10 (Dec. 22, 1947).

⁵⁷ E.g., Colin Moynihan, *Heirs Sue Over Ownership of a Picasso, Saying It Was Seized by Nazis*, N.Y. TIMES (May 13, 2021), <https://www.nytimes.com/2021/05/13/arts/design/picasso-painting-lawsuit-nazis.html>.

⁵⁸ United States v. Krauch (I.G. Farben Case), Case No. 6, 7 Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10 (July 29, 1948).

⁵⁹ United States v. List (Hostage Case), Case No. 7, 11 Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10 (Feb. 19, 1948).

⁶⁰ See generally A. R. Albrecht, *War Reprisals in the War Crimes Trials and in the Geneva Conventions of 1949*, 47 AM. J. INT’L L. 590 (1953).

In the RuSHA Case,⁶¹ the eighth proceeding, there were fourteen defendants in an SS organization that was in charge of racial purity in Germany and carried out a systematic program of genocide.

The ninth subsequent proceeding was the Einsatzgruppen Case.⁶² The Einsatz Special Task Force consisted of mobile death squads that would go around in the east, particularly in the part of the Soviet Union that had been under German rule, and executed Jews and other “undesirables.” Twenty individuals were sentenced to death and hanged for their crimes against humanity.

The tenth trial, the Krupp Case,⁶³ is like the I.G. Farben Case. It involved another industrialist who was tried for waging, or allowing the Nazis to wage, aggressive war and financing the Nazi rise to power.

In the eleventh subsequent proceeding, known as the Ministries Case,⁶⁴ defendants who were part of German ministerial organizations were prosecuted for carrying out the policy of murdering Jews and killing Allied aircrews instead of taking them prisoner.

Finally, there was the High Command Case,⁶⁵ the twelfth and final subsequent proceeding, in which senior German officers were prosecuted for waging wars of aggression and invasion and the murder of Soviet prisoners of war.

VII. Conclusion

If you are interested in further reading on the history of the Nuremberg military tribunals, Telford Taylor’s book⁶⁶ is the book to read. If you are

⁶¹ United States v. Greifelt (RuSHA Case), Case No. 8, 4 Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10 (Mar. 10, 1948).

⁶² United States v. Ohlendorf (Einsatzgruppen Case), Case No. 9, 4 Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10 (Apr. 8, 1948).

⁶³ United States v. Krupp (Krupp Case), Case No. 10, 9 Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10 (July 31, 1948).

⁶⁴ United States v. Weizsaecker (Ministries Case), Case No. 11, 12 Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10 (Apr. 11, 1949).

⁶⁵ United States v. Leeb (High Command Case), Case No. 12, 10 Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10 (Oct. 27, 1948).

⁶⁶ TAYLOR, *supra* note 2.

interested in the twelve subsequent proceedings, the best book is by Jon Heller.⁶⁷ And if you are interested in Soviet participation in Nuremberg, a brand new book by Francine Hirsch,⁶⁸ who is a professor at the University of Wisconsin, provides a perspective that, until now, we have not had.

In getting to the bottom line of IMT, I think it is that, for the first time in history, a court has decided, and the world is accepting, that an individual has obligations that transcend obedience to the state. You can no longer say, “I did what I did because that was required of me as a citizen of a nation.” Nuremberg stands for the proposition that there is something more important than obedience to domestic law, and that is that our acts as individuals also must conform to international law and the LOAC.

Thank you.

⁶⁷ KEVIN JON HELLER, *THE NUREMBERG MILITARY TRIBUNALS AND THE ORIGINS OF INTERNATIONAL CRIMINAL LAW* (2011).

⁶⁸ FRANCINE HIRSCH, *SOVIET JUDGMENT AT NUREMBERG: A NEW HISTORY OF THE INTERNATIONAL MILITARY TRIBUNAL AFTER WORLD WAR II* (2020).