

**THE SIGNIFICANCE OF THE NUREMBERG
INTERNATIONAL MILITARY TRIBUNALS
ON THE PRACTICE OF MILITARY LAW***

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I. Introduction

I begin my remarks to this wonderful symposium with a quote.

If all the leaders of the Third Reich had been sadistic monsters and maniacs, then these events would have no more moral significance than an earthquake or any other natural catastrophe. But this trial has shown that under a national crisis, ordinary—even able and extraordinary—men can delude themselves into the commission of crimes so vast and heinous that they beggar the imagination.¹

These are the words of Spencer Tracy, referred to earlier today by Professor Solis, as he pronounced judgment at his trial in the movie *Judgment at Nuremberg*, which I commend to all of you. And, yes, it is a bit of Hollywood, but, frankly, it is emblematic of what we have talked about today.

This is why I begin with this notion of a crushed and discarded moral compass. That is what I want to discuss with all of you today, and why our focus on principled counsel in our Army Judge Advocate General's (JAG) Corps²—or in the vernacular, “doing the right thing”—and constantly talking about doing the right thing is so important.

Good afternoon to all of you; I am grateful to be here. I listened to the marvelous speakers from this morning, beginning with the Dean, who talked about our purpose, how these lessons learned are still relevant, and that the process did not have to be what it was.³ From Mr. Borch, that the trials were not inevitable, that an individual—and I think that we all should have written this down—has obligations that transcend obligations to the state.⁴ From Dr. Meinecke, that the judges must consider the effect on those judged, and that the judges who took a principled stand were made

¹ JUDGMENT AT NUREMBURG (Roxlom Films 1961).

² LIEUTENANT GENERAL CHARLES N. PEDE & MAJOR GENERAL STUART W. RISCH, TJAG & DJAG SENDS, VOL. 40-16, PRINCIPLED COUNSEL—OUR MANDATE AS DUAL PROFESSIONALS (2020).

³ Colonel Sean T. McGarry, *Opening Remarks for the Seventy-Fifth Anniversary of the International Military Tribunal at Nuremberg*, 229 MIL. L. REV. 155 (2021).

⁴ Fred L. Borch III, *The Nuremberg Military Tribunals: A Short History*, 229 MIL. L. REV. 159 (2021).

irrelevant.⁵ From Geoff Corn, what right looks like in the international community and the role of legitimacy.⁶ And from our guest speakers this afternoon who, reluctantly and sadly, I was not able to listen to, but I know provided great counsel to each and every one of us.

I want to start by thanking our speakers and our sponsors for marking this anniversary so purposefully and meaningfully. And a very warm welcome to our students of the Fighting 212th Officer Basic Course, the 69th Graduate Course, and our guests from the University of Virginia, my alma mater. I am privileged and humbled to be a part of this remembrance today.

Marking such profound history—indeed, legal history—ensures *our* compass is in working order and sets each of us on the right path. The lessons that we have discussed resonate, even if on a grand and hard-to-comprehend scale. Even if in your mind you say, “I will never be faced with such calamity or difficulty,” I say to you, “Do not be so sure.” Frankly, whether the difficulty is large or small, wherever you might find yourself, reference points in learning like the Nuremberg Symposium today will light your way and illuminate how you solve your problems. Your personal reflections on Nuremberg will serve as the magnetic north for *your* compass.

I am certainly humbled by my role this afternoon in closing out this important discussion, but I take heart that my experience in the practice of law permits me the vantage point, perhaps, of seeing clearly one aspect that serves as a mooring for each of us as we approach the future: having studied the lessons of the past.

I want to talk with you as we close today about values-based lawyering; practicing law where the wellspring of your advice and counsel is virtue. We sometimes flounder at such notions as virtue in our world today. Aristotle was good enough to establish timeless guideposts for us. His list of virtues is something that, once consumed, we all recognize instantly and

⁵ William F. Meinecke Jr., *German Justice on Trial: The Justice Case*, 229 MIL. L. REV. 173 (2021).

⁶ Geoffrey S. Corn, *Individual Criminal Responsibility for War Crimes*, 229 MIL. L. REV. 191 (2021).

say, “Of course.” The timeless virtues of courage, temperance, liberality, truthfulness, and justice, to name but a few.⁷

Why do I start with this discussion of virtue and principled counsel? It is because when we, as lawyers, ask what right looks like, this is where we must begin. And this is why we talk in the Army JAG Corps about principled counsel. Principled counsel is the north-pointing direction on our Corps’s North Star, designed to remind each of us—constantly—the origin of our advice and counsel, which are our shared values sourced from timeless virtues.

And what does principled counsel have to do with Nuremburg? My point exactly. I want to share today three aspects with you that illuminate principled counsel. Two of the examples demonstrate the crushed compass, and they are both lessons which we must absorb and we have learned of this morning and this afternoon. Saying, “It would never happen on my watch,” or “I would know exactly what to say and do to resist such momentum if it were to happen to us,” is naïve. We live in a hard world sometimes, and we learn through examples—sometimes bad ones—so, we must contemplate them. Thankfully, my third example is one of triumph—a triumph of virtue.

II. The Justice Case

We heard this morning about the Justice Case.⁸ Allow me to add my thoughts to the excellent discussion of Dr. Meinecke. Nine officials from the German Ministry of Justice and seven members of the Nazi-era People’s and Special Courts were charged with “judicial murder and other atrocities which they committed by destroying law and justice in Germany, and by then utilizing the emptied forms of legal process for persecution, enslavement, and extermination on a vast scale.”⁹ The prosecutor, Telford Taylor, called the pretense by the Nazi party of a legitimate regime the “unholy masquerade of brutish tyranny designed as justice.”¹⁰ The events that allowed Hitler to rise to power—a power grab in which lawyers and

⁷ See ARISTOTLE, *NICOMACHEAN ETHICS* (F.H. Peters trans., 10th ed. 1906) (c. 384 B.C.E.).

⁸ See Meinecke, *supra* note 5.

⁹ *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, Opening Statement, at 32–33 (Mar. 5, 1947).

¹⁰ *Id.* at 31.

judges were fully complicit—demonstrates that Hitler understood precisely the power of the law.

The ascension of the Third Reich and its agenda happened right out in the open, and that is at least partly because it was allowed, and even designed, to happen under the veneer of law.¹¹ That is something that we, as lawyers, do well to remember: law, as Professor Corn reminded us, conveys legitimacy. As its stewards, we are charged with making sure that the law is not contorted in ways that make it unrecognizable to our society.¹² At that time, those who should have provided principled counsel either became complicit, looked away, or were silenced, save the two that Dr. Meinecke described for us. We are sure there were more, but those were the only two he has been able to find.

More than six years before Germany invaded Poland in 1939, Hitler had become Chancellor of the German Republic.¹³ He understood the outsized importance of appearing to operate within the confines of the law. Upon the torching of the Reichstag building in 1933, rather than simply mobilizing his militaristic supporters, Hitler obtained from President von Hindenburg the “Reichstag Fire Decree.”¹⁴ That decree rescinded key civil liberties for German citizens and became the legal basis for imprisoning anyone opposed to the Nazis. It allowed for secret arrests and detentions with no hearing, no evidence, no charges, and no counsel. And it set a precedent which would continue for the next twelve years of the Nazi regime, harnessing the power of the law to bring about its crimes against humanity.

¹¹ Karl Loewenstein, *Law in the Third Reich*, 45 *YALE L.J.* 779 (1936).

¹² U.S. DEP’T OF ARMY, DOCTRINE PUB. 6-22, *ARMY LEADERSHIP AND THE PROFESSION* para. 1-5 (31 July 2019) (C1, 25 Nov. 2019) (“Professionals accept the responsibility to be stewards of the people and resources entrusted to them by society and to advance the state of their profession in anticipation of changes to the world around them.”); Major General Stuart W. Risch & Lieutenant Colonel Aaron L. Lykling, *The War for Talent*, *ARMY LAW.*, no. 3, 2020, at 2 n.1 (“Stewardship is one of our Corps’s Constants . . . [A]dvice must be effectively communicated with appropriate candor and moral courage, so that leaders can make fully informed decisions.”).

¹³ *Adolph Hitler*, U.S. HOLOCAUST MEM’L MUSEUM, <https://encyclopedia.ushmm.org/content/en/article/adolf-hitler> (last updated Mar. 21, 2017).

¹⁴ Lorraine Boissoneault, *The True Story of the Reichstag Fire and the Nazi Rise to Power*, *SMITHSONIAN MAG.* (Feb. 27, 2017), <https://www.smithsonianmag.com/history/true-story-reichstag-fire-and-nazis-rise-power-180962240>.

The Enabling Act, which followed, dealt a killing blow to the Reichstag and allowed Hitler and the Nazis to pass laws—even unconstitutional ones—without even pretending to go through the Reichstag.¹⁵ The same year, Jews were excluded from the legal profession and the civil service by operation of law.¹⁶ Then—and this contemporaneous anniversary should not go unnoticed—eighty-five years ago this week, in 1935, the Nuremberg Laws were passed.¹⁷ These laws deprived German Jews of citizenship; cancelled their civil, voting, and most employment rights; and prohibited marriage and relationships between Jews and non-Jews.¹⁸

A parade of new laws legitimizing theft and murder by the Third Reich followed in rapid succession and continued even after the beginning of an illegal war. Those laws forced Jews into ghettos and required them to wear identifying markers.¹⁹ They legalized secret abductions and incarcerations. They authorized the death penalty in sham trials that we learned of this morning, and the summary executions of Soviet political commissars and enemy commandos, even after surrender.²⁰ The Nazis became experts at sham trials, and—as in the famous Katzenberger and White Rose trials showed us and Dr. Meinecke described for us²¹—proved their willingness to send people to the guillotine and the hangman’s noose. Yes, I said, “guillotine.” It is estimated that the Germans executed in their preferred method upwards of sixteen thousand people by guillotine.²²

Even the horrors of the concentration camps were duly authorized by law.²³ The regime later consolidated the camps, in which many of the worst

¹⁵ *Id.*

¹⁶ *Antisemitic Legislation 1933–1939*, U.S. HOLOCAUST MEM’L MUSEUM, <https://encyclopedia.ushmm.org/content/en/article/antisemitic-legislation-1933-1939> (last visited Mar. 17, 2021).

¹⁷ Greg Bradsher, *The Nuremberg Laws*, PROLOGUE MAG., Winter 2010, at 24, 25.

¹⁸ *Id.* at 24, 27; *Antisemitic Legislation 1933–1939*, *supra* note 16.

¹⁹ *Ghettos*, U.S. HOLOCAUST MEM’L MUSEUM, <https://encyclopedia.ushmm.org/content/en/article/ghettos> (Dec. 4, 2019).

²⁰ *United States v. Von Leeb (High Command Case)*, Case No. 12, 11 Trials of War Criminals Before the Nuernberg Military Tribunals Under Control Council Law No. 10, Judgment, at 492–93 (Oct. 27, 1948); 2 OFF. OF U.S. CHIEF OF COUNS. FOR PROSECUTION OF AXIS CRIMINALITY, NAZI CONSPIRACY AND AGGRESSION 535 (1946).

²¹ See Meinecke, *supra* note 5, at 184–88.

²² *COMPARATIVE CAPITAL PUNISHMENT* 170 (Carol S. Steiker & Jordan M. Steiker eds., 2019).

²³ Gesetz zum Schutze des deutschen Blutes und der deutschen Ehre [Law for the Protection of German Blood and Honor], Sept. 15, 1935, RGL I at 1145 (Ger.); Reichsbürgerschaftsgesetz [Reich Citizenship Law], Sept. 15, 1935, RGL I at 1146 (Ger.).

atrocities of the Holocaust occurred under Heinrich Himmler and the SS, empowered to create their own systems of administration, regulations, and de facto laws.²⁴ The reference to some kind of law was never discarded. The camps, murders, torture, barbarity—the Nazi regime endeavored to whitewash them all with the protective cloak of legal trappings. Put succinctly in the opinion of the Justice Case: “The dagger of the assassin was concealed beneath the robe of the jurist.”²⁵

For example one, our lesson as lawyers is clear: when we allow the power of law to be co-opted and corrupted by those who would seek to use it against the powerless, we have collectively failed. Simply, the stewards of the rule of law allowed the law to be debased. This was not simply an act of omission. It was, in fact, a crime of commission. Virtue was trampled. The moral compass was crushed on a scale the world had not yet known and which, once observed and discovered, seemed incomprehensible.

I want each of you to reflect and ask, “How could this happen? How could judges trained in the law and precepts of impartiality and fairness be so corrupted?” This is where our Corps’s drumbeat matters. You may think us immune to such horrid notions as we have seen with the Justice Case, and I do believe we are, absolutely. But it makes a difference that our standard of principled counsel based on virtue and shared values is bigger than any one person. What principled counsel means must be so fixed in our culture and cultivated constantly that individual or collective lapses are truly seen as aberrations—as anathema to the health of our system and each other. I want each of you to think of lapses and transgressions, even when minor, as lapses and transgressions, not to be ignored but corrected. Our culture of what right looks like must be so common among all of us—so infused into our professional and personal legal ethos—that variances from the norm produce the now-proverbial reaction, “Wait, what? Did I hear what I thought I heard?” Transgressions stop conversation and should produce shock and dismay.

²⁴ *E.g.*, Theodor Eicke, Disciplinary and Punitive Regulations for the Internment Camp (Oct. 1, 1933), in 3 OFF. OF U.S. CHIEF OF COUNS. FOR PROSECUTION OF AXIS CRIMINALITY, NAZI CONSPIRACY AND AGGRESSION 550, 550–54 (1946).

²⁵ *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, Opinion and Judgment, at 985 (Dec. 3, 1947).

Admittedly, the gross violations of legal professionals in the years preceding Nuremberg seem impossible to replicate or conceive. We tend to dismiss these failures as too grand to be repeated or to seriously be at risk in today's transparent, flat world. I would commend each of you to never be comfortable with this notion. It is not always evil that looms; sometimes, it is complacency. To Tracy's eloquent point in the movie, the wrongs were committed by ordinary lawyers of ordinary means.

III. The Malmedy Massacre

This brings me to my second example of a different sort of lapse in virtue. It is one smaller in scope than the lapses which led to the International Military Tribunal. As I describe this, I want you again to challenge yourself and ask, "How could this happen?"

And I want to be very clear on this point: Americans are not immune from failures in virtue or from failure to uphold our values. Every judge advocate should be familiar with the Malmedy massacre trial at Dachau in 1946,²⁶ which is why I speak of it today and why I am grateful that other speakers mentioned it earlier. The Malmedy trial was one of the many proceedings, described by Professor Solis and others, after the Nuremberg trial. Instead of an international tribunal, the respective Allies attempted to bring to justice those responsible for war crimes within their designated sectors. The failure of principled counsel manifest in this joint trial of seventy-three German soldiers should be part of our collective regimental memory. It is a cautionary tale that we, as judge advocates, should hold as a reference point in our shared legal history, albeit an unpleasant one.

The crimes themselves were appalling. Near Malmedy, Belgium, during the Battle of the Bulge in 1944, hundreds of American Soldiers and a number of Belgian civilians were lined up and murdered with machinegun fire by Kampfgruppe Peiper, an advancing German SS unit.²⁷ Prisoners who tried to flee or feign death were shot at point-blank range or bludgeoned with rifle butts. The massacre outraged Americans in the United States and

²⁶ United States v. Bersin, Case No. 6-24 (U.S. Mil. Gov't Ct. July 16, 1946).

²⁷ See Fred L. Borch III, *The "Malmedy Massacre" Trial: The Military Government Court Proceedings and the Controversial Legal Aftermath*, ARMY LAW., Mar. 2012, at 22; WHITNEY R. HARRIS, TYRANNY ON TRIAL 181 (1954).

in Germany and, in 1946, there was great pressure to prosecute and convict the SS members responsible for these crimes.²⁸

The Malmedy war crimes trial took place between May and July 1946 inside the former Dachau concentration camp, under the authority of the U.S. Third Army's Judge Advocate General's Office.²⁹ The panel of commissioned officers found all of the defendants guilty of some part in the murders³⁰ and handed down forty-three death sentences.³¹

A Senate investigation later revealed that the seventy-three convictions in the Malmedy trial were compromised by misconduct by American investigators and prosecutors.³² For some time, the investigators were unable to gain statements from the German soldiers that would implicate their fellow soldiers. To break the evidentiary impasse, the investigators and Army lawyers got creative—a cautionary mark on the road to failure—and implemented a mock trial known as the “Schnell Procedure.”³³ The Senate subcommittee described them as follows:

There was a table within a room, which was covered with a black cloth and on which was a crucifix and two lighted candles. Behind this table would be placed two or three members of the war crimes investigation team, who, in the minds of the suspects, would be viewed as judges of the court. A prisoner would be brought in with his hood on, which was removed after he entered the room. Two members of the prosecution team, usually German-speaking members, would then begin to harangue the prisoner, one approaching the matter as though he were the

²⁸ SUBCOMM. OF THE COMM. ON ARMED SERVS., 81ST CONG., MALMEDY MASSACRE INVESTIGATION 33–34 (Comm. Print 1949) (describing the subcommittee's investigation, findings, and recommendations).

²⁹ *Bersin*, Case No. 6-24, at 1.

³⁰ *Id.* at 3209.

³¹ *Id.* at 3251–67.

³² See generally SUBCOMM. OF THE COMM. ON ARMED SERVS., *supra* note 28, at 7.

³³ See generally *Investigation of Action of Army with Respect to Trial of Persons Responsible for the Massacre of American Soldiers, Battle of the Bulge, Near Malmedy, Belgium, December 1944: Hearings Before a Subcomm. of the S. Comm. on Armed Servs.*, 81st Cong. 134–35 (1949) (statement of Morris Ellowitz). This procedure was designed to “get [a prisoner] to make a statement” as the result of psychological manipulation. See, e.g., *id.* at 1267–92 (statements of Harry W. Thon).

prosecutor or hostile interrogator, and the other from the angle of a defense attorney or friendly interrogator.³⁴

Interrogators would then convince the soldier of his likely fate—typically execution in the morning—and, prior to announcing findings, would release the prisoner, who then provided incriminating information.³⁵ The American defense counsel for the multiple accused repeatedly raised the issue of mistreatment and trickery.³⁶ Despite objections at trial, the soldiers were convicted and forty-three were given death sentences.³⁷

Once the disturbing news of the departures from normal methods of investigation were discovered at higher echelons, the commanding general began an investigation. Ultimately, the Senate investigation, which went so far as to conduct hearings on site at Dachau prison, gave the most comprehensive view of the trials.

Because of the mistreatment of prisoners, primarily through the Schnell Procedure, relief was granted in these cases. Eventually, all of the death sentences issued were commuted to sentences of imprisonment in the interests of fundamental fairness. In its criticism of the conduct of investigators, the Senate subcommittee wrote:

The subcommittee feels that the use of the mock trials was a *grave mistake*. The fact that they were used has been exploited to such a degree . . . that American authorities have unquestionably leaned over backward in reviewing any cases affected by mock trials. As a result, it appears many sentences have been commuted that otherwise might not have been changed.³⁸

Let no one think I place what happened at the Malmedy trials on the same scale as the state-sponsored crimes of the Nazis. What I do suggest,

³⁴ SUBCOMM. OF THE COMM. ON ARMED SERVS., *supra* note 28, at 7.

³⁵ *E.g.*, *Investigation of Action of Army with Respect to Trial of Persons Responsible for the Massacre of American Soldiers, Battle of the Bulge, Near Malmedy, Belgium, December 1944: Hearings Before a Subcomm. of the S. Comm. on Armed Servs.*, *supra* note 33, at 16 (statement of Sen. Joseph R. McCarthy, Member, S. Comm. on Expenditures in Exec. Dep'ts).

³⁶ SUBCOMM. OF THE COMM. ON ARMED SERVS., *supra* note 28, at 4.

³⁷ *United States v. Bersin*, Case No. 6-24, at 3251-67 (U.S. Mil. Gov't Ct. July 16, 1946).

³⁸ SUBCOMM. OF THE COMM. ON ARMED SERVS., *supra* note 28, at 8 (emphasis added).

though, is a failure of virtue and values—a failure of principle. At Dachau, the interest of justice was subverted to pursue a desired end. Principled counsel fell victim to frustration and revenge. Our normal procedures of investigation, interrogation, and proof were discarded and replaced by novel and unlawful methods.

These images of improper interrogation tactics should give us serious pause. Bells should be ringing. I do not want any judge advocate in the U.S. Army JAG Corps to ever leave this place of learning, our Regimental Home, without the memory of Malmedy and the long shadow of Abu Ghraib in their mind. I want each of you to know how thin the line is between virtue and vice and how Malmedy—that is, changing the rules of interrogation techniques to gain confessions—was done by well-meaning and accomplished lawyers and investigators. And as you think on that, I want you to remember the lessons of Abu Ghraib—so similar in character, so similar in the changes made by well-meaning people—and the extraordinary fact that sixty years later, we again changed the interrogation rules, having forgotten the lessons of Malmedy.³⁹

I pause and I finger-wag to all of us—all of us—to never let such a thing happen again due to a lapse of memory. I want your azimuth straight, which is why we talk about Nuremberg seventy-five years later. Because the lessons are ours on the next battlefield. They are yours on the next battlefield.

IV. Justice Robert Jackson

To my last example, we come full circle, back to the extraordinary Justice Jackson. And what better way to close than on the high note of virtue. Justice Jackson offers an example of what principled counsel looks like when it works. His commitment to values-based lawyering is the primary reason we celebrate the triumph of the rule of law when we reflect on the International Military Tribunal. He simply insisted that we do what is

³⁹ See, e.g., Lieutenant Colonel Jennifer L. Crawford, *Abu Ghraib Trials, 15 Years Later*, ARMY LAW., no. 4, 2019, at 49; Paul T. Bartone, *Lessons of Abu Ghraib: Understanding and Preventing Prisoner Abuse in Military Operations*, DEF. HORIZONS, NOV. 2008, at 1; Colonel Anthony J. MacDonald, *Strategic Lessons Learned from Abu Ghraib* (Mar. 29, 2007) (unpublished manuscript) (on file with author).

right. That insistence is a very big part of the legacy of Nuremberg and an enduring lesson for us.

At Nuremberg, for the very first time in history, individuals were held criminally liable for acts of war and war crimes on a world stage.⁴⁰ Gone was the truism that those most responsible for waging war were those least accountable for it. Gone, too, was their ability to hide behind government positions, superior orders, and positive national law. The undertaking of aggressive war was made forever a crime by those who conspired to do so. Aggressive war and associated war crimes were now definitively criminal acts. And, significantly, as a triumph of virtue, individuals accused of crimes under international law were entitled to a fair trial. The watershed trials at Nuremberg, and the principles derived from them, shaped our modern law of armed conflict, which, of course, became the bedrock of our operational law.

What we often forget as we talk about the Nuremberg trials and their place in the development of international law is that they were far from inevitable. As we learned this morning and this afternoon, they were not guaranteed to be trials, even with regard to the presumption of innocence.⁴¹ The fact that some of the worst men in history were given a fair trial at the hands of the international community was the result of something remarkable indeed: principled counsel in action.⁴² It was Justice Jackson's overwhelming sense of the importance of legitimacy in history—how the

⁴⁰ *E.g.*, President of the Special Tribunal for Lebanon, Affirmation of the Principles of International Law Recognized by the Charter of the Nürnberg Tribunal (June 2009), https://legal.un.org/avl/pdf/ha/ga_95-I/ga_95-I_e.pdf.

⁴¹ *See* Borch, *supra* note 4, at 162–64.

⁴² Throughout his opening statement at the International Military Tribunal, Justice Jackson remained steadfast in his dedication to impartial justice:

The former high station of these defendants, the notoriety of their acts, and the adaptability of their conduct to provoke retaliation make it hard to distinguish between the demand for a just and measured retribution, and the unthinking cry for vengeance which arises from the anguish of war. It is our task, so far as humanly possible, to draw the line between the two.

United States v. Göring, 2 Trial of the Major War Criminals Before the International Military Tribunal, Opening Statement, at 101 (Nov. 21, 1945).

trials would be remembered.⁴³ And so we must study it with this lens to learn from it.

Consider the state of the world in 1945. The war was over, the Allies were victors, and it was up to them to make some sense of the devastation and chaos caused by the worst war in history. It is impossible to overstate the magnitude of human suffering and lawlessness caused by six years of war. It devastated on every level every sphere of human life. Soldiers arriving in Frankfurt in 1946 for occupation duties would describe the vast destruction and, most significantly, the stench of death and decay.⁴⁴ Estimates range as high as seventy-five million soldiers and civilians dead.⁴⁵ We cannot conceive of it: natural resources devastated, industries destroyed, economies wrecked, borders redrawn, legal and financial institutions rebuilt from scratch. The survivors of the war were reeling from the changing face of warfare and the terrifying shock of air campaigns and the first use of nuclear bombs. They were, at the time of the trials, only just discovering the depth and breadth of the Holocaust's horrific cruelty and being confronted with crimes of a magnitude beyond contemplation. The world's power balance had shifted, international law developed at the speed of relevance like an airplane being built in flight, and tensions between new superpowers loomed.

I mention that to place into context the remarkable foresight exercised by the Allies in conceiving and planning the trials. The Nazis had utterly corrupted their laws and legal institutions. Restoration of faith in legal institutions—in the rule of law—was a moral imperative. It was also not the only challenge the Allies faced. By today's standards, the trials were certainly imperfect, and there is extensive scholarship focused on victors'

⁴³ Justice Jackson reminded the International Military Tribunal's judges, and the world, of the great import of fair justice and just fairness in his opening statement:

We must never forget that the record on which we judge these defendants today is the record on which history will judge us tomorrow. To pass these defendants a poisoned chalice is to put it to our own lips as well.

We must summon such detachment and intellectual integrity to our task that this Trial will commend itself to posterity as fulfilling humanity's aspirations to do justice.

Id.

⁴⁴ DEREK S. ZUMBRO, *BATTLE FOR THE RUHR: THE GERMAN ARMY'S FINAL DEFEAT IN THE WEST* 14 (2006).

⁴⁵ *E.g.*, KRISTEN RENWICK MONROE, *A DARKLING PLAIN: STORIES OF CONFLICT AND HUMANITY DURING WAR* 38 (2015).

justice: whether it was even possible to hold fair trials;⁴⁶ whether their validity should be questioned because of jurisdictional hurdles, the retroactive application of new crimes;⁴⁷ whether the judges should have come only from the Allies; and whether Nuremberg's focus on only a small number of leaders understated the harm of the Holocaust.⁴⁸ These are all thought-provoking questions that spur healthy debate.

But what is remarkable to me, as a Soldier-lawyer, what should be remarkable to all of you with an understanding of both the horror of war and the sanctuary provided by due process, is that these victors wanted not revenge, but justice. That is attributable in no small part to Justice Jackson.

In the course of his passionate advocacy for fair trials, Justice Jackson continually modeled principled counsel and championed due process of law. Before he knew he was to become the chief prosecutor at Nuremberg, he took the podium at the annual meeting of the American Society of International Law, which still holds its meeting annually. He said,

The ultimate principle is that you must put no man on trial under the form of judicial proceedings if you are not willing to see him freed if not proven guilty. If you are determined to execute a man in any case, there is no occasion for a trial; the world yields no respect for courts that are merely designed to convict.⁴⁹

It was a memorable speech, delivered the day after the death of President Roosevelt, who had only recently been won over to Jackson's position. It was a controversial one, particularly with the Allies from civil law traditions. The presumption of innocence is steeped in our common law. It took tireless advocacy for what he knew was morally right, and Jackson eventually succeeded in winning over his client, the American Government. Two weeks after he succeeded Roosevelt, President Truman asked Jackson

⁴⁶ E.g., JONATHAN HAFETZ, *PUNISHING ATROCITIES THROUGH A FAIR TRIAL: INTERNATIONAL CRIMINAL LAW FROM NUREMBERG TO THE AGE OF GLOBAL TERRORISM* (2018).

⁴⁷ E.g., DANILO ZOLO, *VICTORS' JUSTICE: FROM NUREMBERG TO BAGHDAD* (M. W. Meir trans., 2020).

⁴⁸ See Kirsten Sellars, *Imperfect Justice at Nuremberg and Tokyo*, 21 EUR. J. INT'L L. 1085, 1089–90 (2011).

⁴⁹ Robert H. Jackson, *The Rule of Law Among Nations*, 31 A.B.A. J. 290, 293 (1945).

to be the chief prosecutor at Nuremberg and approved his plan to negotiate with the Allies to conduct fair trials.⁵⁰

It is not easy to do the right thing. In the post-war planning phase and later in the long, contentious negotiations that produced the London Charter governing the proceedings, Justice Jackson, Secretary of War Henry Stimson, and other legal professionals worked tirelessly to model American values. They were candid; they were courageous. They knew, and Jackson admitted as much in his opening statement before the tribunal, that the nature of the crimes committed by the Nazis was such that they must be judged and that any tribunal ran the risk of being reduced to victors' justice in retrospect.⁵¹ You should never think they were not conscious of the criticisms we levy today; they were hypersensitive to it. Knowing that there would be criticism and feeling immense pressure, Jackson persevered with his moral compass fixed on what he knew to be right. He said, "We must never forget that the record on which we judge these defendants today is the record on which history will judge us tomorrow."⁵²

The legal advisors to the Allied team wrestled for weeks in London with the question of what justice looked like. Simply securing an agreement to conduct trials was difficult enough. Stalin, in a nod to the wartime atrocities committed against Soviet soldiers and civilians on the Eastern front, had once suggested shooting the fifty thousand top Nazis outright.⁵³ Churchill agreed that the crimes and responsibility of the Nazis were too great to be reviewed by a juridical procedure.⁵⁴ And even Roosevelt had to be convinced that summary executions were not in the best interests of

⁵⁰ Executive Order 9547, 10 Fed. Reg. 4961 (May 4, 1945).

⁵¹ United States v. Göring, 2 Trial of the Major War Criminals Before the International Military Tribunal, Opening Statement, at 101 (Nov. 21, 1945).

⁵² *Id.*

⁵³ Tripartite Dinner Meeting, November 29, 1943, 8:30 P.M., Soviet Embassy (Nov. 29, 1943), *reprinted in* U.S. DEP'T OF STATE, FOREIGN RELATIONS OF THE UNITED STATES: CONFERENCES AT CAIRO AND TEHRAN: 1943, at 552, 553–54 (1961); GARY JONATHAN BASS, STAY THE HAND OF VENGEANCE: THE POLITICS OF WAR CRIMES TRIBUNALS 147 (2000).

⁵⁴ *E.g.*, Michael J. Bazylar, *The Role of the Soviet Union in the International Military Tribunal at Nuremberg*, in THE NUREMBERG TRIALS: INTERNATIONAL CRIMINAL LAW SINCE 1945, at 45, 45 (Herbert R. Reginbogen & Christoph J. M. Safferling eds., 2006).

justice.⁵⁵ Prominent American jurists opposed the plan, including Harlan Fiske Stone, Chief Justice of our Supreme Court and Jackson's boss.

When the Allies finally agreed to conduct trials at all, legal teams from four nations and at least two very different systems of law had to figure out what they would look like. The Allies knew from the failed Leipzig Trials after World War I that to allow Germans to conduct their own trials of Nazi leaders would be both farcical and futile.⁵⁶ But bringing them to trial before an Allied court meant the legal teams were faced with the monumental task of reconciling two very different perspectives on the law—civil law and common law—into something which looked like justice to the world.

The common law practiced in the United States and the United Kingdom differed on many major points from Russia, France, and Germany. Every detail was negotiated, from the form of the indictment to the presentation of evidence to cross-examination and whether it would even be allowed. Jackson argued vigorously with his counterpart, Soviet General Nikitchenko, who was diametrically opposed to a presumption of innocence—that was not a given. Jackson carried the day on that point only after threatening that the United States would not participate if the proceedings were to be premised on the presumption of guilt. Jackson's insistence on the presumption of innocence led to the acquittal of three defendants, and this is of critical importance. Even knowing that insisting on due process could allow the commissioners of horrific crimes to evade conviction, Jackson stuck to his guns.

Each of us at that point should ask ourselves what we would have done with such a horrific world that we had just lived in and produced after war—where we would have fallen on Jackson's spectrum.

Veteran and journalist Norbert Ehrenfreund, who was a member of the press at the tribunals, called "the decision in London to have a fair trial in Nuremberg . . . a splendid victory for Robert Jackson, [and] an even greater

⁵⁵ Arie J. Kochavi, *Discord Within the Roosevelt Administration over a Policy Toward War Criminals*, 19 *DIPLOMATIC HIST.* 617, 635–39 (1995).

⁵⁶ See generally CLAUD MULLINS, *THE LEIPZIG TRIALS: AN ACCOUNT OF THE WAR CRIMINALS' TRIALS AND A STUDY OF GERMAN MENTALITY* (1921) (describing and evaluating the trials and their context).

victory for humanity.”⁵⁷ I submit to you that it was also, in no small part, a victory for the concept of principled counsel. The lawyers who were involved in the negotiation of the London Charter and, later, in the trials at Nuremberg and those that followed, felt the heavy mantle of its responsibility. It was through their tenacity that leaders hardened and scarred by war agreed to end it in a way that war had never ended before. It defied the imagination of many that something as savage as war could be addressed by something as civilized as a trial. It shocked the conscience of many to hear war crimes distilled into indictments. Even more difficult to digest were the acquittals. But we must remind ourselves of what Jackson admonished amid the critics’ cries of victors’ justice: “The world yields no respect for courts that are merely designed to convict.”⁵⁸ A fair trial, predicated on the presumption of innocence and grounded in incontrovertible evidence created by the defendants themselves, would stand the test of time. And now we can say that it has, along with Jackson’s values—our values—which demand fairness and which inform principled counsel.

V. Conclusion

In trying to articulate the legacy of the Nuremberg trials, there is a quote I find instructive, even without its rather entertaining context. A young Jewish sergeant in the U.S. Army who was in attendance toward the latter end of the trials later reflected about the proceedings. He said,

We gave Goering and the other war criminals a chance not only to defend themselves but in some cases, preach hate and violence. In a ruined Germany, where so many corpses still lay buried in the rubble and life seemed so very fragile, we found it in ourselves to give the worst of men due process.⁵⁹

I do not know that there is a better summation of what occurred between November 1945 and October 1946 in the Palace of Justice in Nuremberg. It turns out the Jewish Soldier was Clancy Sigal, who later became a well-

⁵⁷ NORBERT EHRENFREUND, *THE NUREMBERG LEGACY: HOW THE NAZI WAR CRIME TRIALS CHANGED THE COURSE OF HISTORY* 219 (2007).

⁵⁸ Jackson, *supra* note 49.

⁵⁹ Clancy Sigal, *A Jewish Soldier Witnesses Nuremberg*, NAT’L PUB. RADIO (Oct. 2, 2006, 12:05 PM), <https://www.npr.org/templates/story/story.php?storyId=6166891>.

known journalist, political radical, and Hollywood agent. Clancy had snuck away from his unit with a concealed .45 pistol, determined to, in his own words, “look Herman Goering in the eye and shoot him dead.”⁶⁰ It was not a well thought out plan and, to his disappointment, the military police confiscated his weapon in the foyer. Inside the makeshift courtroom without it, Sergeant Sigal said, “I felt something like relief. Suddenly, it was unthinkable to add one more act of violence” to the parade of horrors in the courtroom that day.⁶¹

For those of you watching this today who have yet to take your place before an impartial trier of fact, charged with arguing one side or another in the wake of the perpetration of an unthinkable act of violence, it may seem too surgical, boiling crimes against humanity down to what Sigal called the “solemn, businesslike presentation of evidence.”⁶² But it is what we do as lawyers, and if the trials at Nuremberg have no better lesson for Soldier-lawyers, it may be that the due process of law is the best way to lay bare the very worst things of which humanity is capable. And to preserve the lessons, both good and bad, for introspection and study, decades and decades later, in a fervent attempt to do our part in preventing a recurrence of the evils judged at Nuremberg. The necessary ingredient for this recipe is principled counsel.

As you assemble your reflections on today’s lessons, as you think back on them when facing the challenges posed to you as Soldier-lawyers engaged in our unique practice of law, I ask that you remember in particular two things. One, the example of high virtue we see in Jackson’s measured insistence—not just on trials, but on fair trials—in the face of extraordinary pressure to take an easier route. His role in bringing about trials amid chaos is reminiscent of Kipling’s famous charge to “keep your head when all about you are losing theirs and blaming it on you.”⁶³ We should all strive to be, like Jackson, the cool head in the room with a steadfast commitment to our values. Two, I ask that you never forget the crushed compass evident in the Nazi laws that enabled the war and in our own failings with respect to Malmedy and Abu Ghraib. I want you to be always aware of the razor-

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ RUDYARD KIPLING, REWARDS AND FAIRIES 200 (1910).

thin line between virtue and vice and of the ever-present pressure to walk that line in tough situations.

Like Jackson, I charge you to be candid, be courageous, be right. Keep your compass intact. And know with unwavering confidence that each of you carry the legacy of principled counsel wherever our great Army sends you.