

**FRANCIS BIDDLE AND THE NUREMBERG LEGACY: WAKING THE  
HUMAN CONSCIENCE**

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**I. INTRODUCTION**

On 1 October 1945, former United States Attorney General Francis Biddle embarked for Europe on the *Queen Mary*.<sup>2</sup> The weather was unseasonably hot and the boat was filthy, covered in graffiti left by soldier transports. Only the day before, Biddle was being fêted in Washington, D.C., where he had been sworn in as the American member of the International Military Tribunal for the Trial of German Major War Criminals, the Nuremberg Tribunal.<sup>3</sup> Now he was heading to war-ravaged Germany to help oversee what President Harry S. Truman would call ‘the first international criminal assize in history.’<sup>4</sup> Biddle was accompanied by his advisors, Assistant Attorney General Herbert Wechsler and Quincey Wright of the University of Chicago.<sup>5</sup> The men were already vigorously discussing

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2 Francis Biddle Collection of International Military Tribunal Nuremberg Trial Documents and Related Material, Syracuse University, New York (Biddle Collection) Box 1, Journal, 2 October 1945. Two works identify the ship as the *Queen Elizabeth*. See, eg, Joseph E. Persico, *Nuremberg: Infamy on Trial* (1994) 77; Ann and John Tusa, *The Nuremberg Trial* (1984) 116. However, Biddle in his own journal identifies it as the *Queen Mary*.

3 Biddle Collection, above n 2, Box 1, Journal, 2 October 1945.

4 *US Department of State Bulletin*, Vol. 15 (27 October 1946) 755.

5 From 1944 to 1946, Wechsler served as Assistant Attorney General in charge of the War Division. He was a member of the Columbia faculty throughout his career, also serving as Director of the American Law Institute for 21 years. In Memoriam: Herbert Wechsler, 1909-2000, *American Law Institute Reporter* (2000), American Law Institute, [http://www.ali.org/ali\\_old/R2204\\_Wechsler.htm](http://www.ali.org/ali_old/R2204_Wechsler.htm) at 16 August 2012; Tamar Lewin, Herbert Wechsler, Legal Giant, Is Dead at 90, *New York Times*, 28 April 2000. During WWII, Quincey Wright served as an advisor on international law to the Department of State and the Foreign Economic Administration. Dr. Quincy Wright, 79, Is Dead; Authority on International Law, *New York Times*, 18 October 1970, 92. He subsequently served as President of the American Society of International Law from 1955 to 1956. The American Society of International Law Presidents Gallery, <http://www.asil.org/asilpresidents.html>, at 18 August 2012.

the difficult task at hand. Wright was concerned that the legitimacy of the Tribunal would be undermined by claims that the legal principles to be applied were generated *ex post facto*.<sup>6</sup> ‘It seems to me,’ Biddle wrote, ‘that we can state that we are bound by and cannot examine the instrument under which we are acting, particularly after we have taken an oath so to act – but that we are not thereby excluded from pointing out the large body of international law existing in 1939. Our opinion must at least have its roots in the past even if its fruits are to ripen in the future.’<sup>7</sup>

This article will offer new insights into the legal and historical significance of the Nuremberg Tribunal gleaned from the personal papers of the American member. That Nuremberg serves as the juridical touchstone of modern international criminal law almost goes without saying. Hardly a work on the subject fails to mention the Tribunal’s significance for the development of international criminal law.<sup>8</sup> Drawing on primary sources, particularly the papers of Francis Biddle and meeting notes of the Tribunal,<sup>9</sup> this article shows that the Members were acutely aware that the proceedings at Nuremberg represented an important pivot point in the history of international law, and that they managed the proceedings accordingly.<sup>10</sup> Biddle knew that a great deal more was at stake at Nuremberg than the fate of the twenty-two Nazi defendants on trial. The future of international criminal law was also in the Tribunal’s hands.

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6 Biddle Collection, above n 2, Box 1, Journal, 2 October 1946.

7 Ibid. Hans Kelsen took the view that [t]he judgment rendered by the International Military Tribunal in the Nuremberg Trial cannot constitute a true precedent because it did not establish a new rule of law, but merely applied pre-existing rules of law laid down by the International Agreement concluded on August 8, 1945, in London.[.] Will the Judgment in the Nuremberg Trial Constitute a Precedent in International Law? (1947) *International Law Quarterly* 153, 154.

8 Ruti G. Teitel has noted, The period immediately following World War II was the heyday of international justice. Transitional Justice Genealogy (2003) *Harvard Human Rights Journal* 73. See also, Michael J. Kelly and Timothy L.H. McCormack, Contributions of the Nuremberg Trial to the Subsequent Development of International Law in David A. Blumenthal and Timothy L.H. McCormack (eds), *The Legacy of Nuremberg: Civilising Influence or Institutionalised Vengeance?* (2008) 101, 103 (It is hardly surprising then that Nuremberg, as the first champion of the principle of individual criminal responsibility for violations of international law, retains an exalted status.).

9 The Special Collections Research Center of the Syracuse University Library in New York houses the Francis Biddle Collection of International Military Tribunal Nuremberg Trial Documents and Related Material. The collection consists of nineteen boxes of documents, including personal notes and correspondence, meeting minutes and notes, draft opinions, photographic evidence, and scrapbooks.

10 M. Cherif Bassiouni, The ‘Nuremberg Legacy’ in Guénaél Mettraux (ed), *Perspectives on the Nuremberg Trial* (2008) 577, 583.

It was in this vein that, while sailing to Europe, Biddle asked Wright, ‘to let [Biddle] have, briefly, the principles of international law [Wright] would like to see established’<sup>11</sup> by the Tribunal. Wright responded as follows:

1. The definition of crimes in Article VI of the protocol is declaratory of preexisting international law.
2. Individuals are subjects of international law in the sense that international law confers upon them certain rights and holds them liable for certain crimes.
3. The individual cannot avoid responsibility for his acts on the ground that they were authorized by a government of the State for which the government purporting to act lacked power under international law to give such an authorization.
4. States lack power under international law to authorize the exercise of rights of war except in necessary self defense or as permitted by appropriate international procedures.<sup>12</sup>

In exploring Biddle’s role on the Tribunal, this article will also examine how Nuremberg fulfilled Wright’s ambitions for international law.

## II. RELEASE, SUMMARY PUNISHMENT, OR TRIAL?

Even before the War was over, the Allies were preparing to address the systematic atrocities perpetrated by Nazi Germany. The question was not whether those responsible for the War and its horrors should be held to account for their conduct; the question was how. ‘There were three different courses open to us when the Nazi leaders were captured: release, summary punishment, or trial,’ wrote Henry L. Stimson, Roosevelt’s Secretary of State. ‘Release was unthinkable; it would have been taken as an admission that there was here no crime.’<sup>13</sup> That left summary punishment or trial. Whatever the chosen course, the U.S. Office of Strategic Services (OSS), the precursor to the Central Intelligence Agency, was ready. OSS personnel had been on the ground throughout the war, collecting evidence of Nazi repression, murder, torture, rape, persecution, concentration camps, and a litany of other Holocaust-related horrors in anticipation of a post-war reckoning.<sup>14</sup> This section shows that the path to Nuremberg was by no

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11 Biddle Collection, above n 2, Box 1, Journal, 3 October 3 1945.

12 Ibid.

13 Henry L. Stimson, *The Nuremberg Trial: Landmark in Law*, *Foreign Affairs*, January 1947, 179.

14 Michael Salter, *US Intelligence, the Holocaust and the Nuremberg Trials: Seeking Accountability for Genocide and Cultural Plunder*, (Vol. 1, 2009) 161-220. The other Allied powers shared in this project. In January 1942, the very month that top SS brass were meeting at Wansee to discuss the Final Solution, Allied leaders declared their intention to place among their

means a certain one. Arguments that persist to this day about the legitimacy of Nuremberg long antedated the decision establish the war crimes tribunal; yet adjudication was ultimately viewed as the best course of action. This section will explain why.

In the Joint Declaration of Four Nations on General Security (Moscow Declaration) the Allies made clear their commitment to bringing war criminals to justice.<sup>15</sup> Issued on November 1, 1943, the Declaration officially acknowledged Nazi ‘atrocities, massacres and executions’<sup>16</sup> and pledged that the Allies would pursue those responsible ‘to the uttermost ends of the earth and . . . deliver them to their accusers in order that justice may be done.’<sup>17</sup> Where a specific territorial nexus with crimes could be established, the perpetrators would ‘be brought back to the scene of their crimes and judged on the spot by the peoples whom they ha[d] outraged.’<sup>18</sup> Such crimes would be dealt with in municipal legal fora.<sup>19</sup> Where offenses had ‘no

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principal war aims the punishment, through the channel of organized justice, of those guilty and responsible for these crimes, whether they have ordered them, perpetrated them, or in any way participated them. *Resolution by the Allied Governments Condemning German Terror and Demanding Retribution*. 12 January 1942. British and Foreign Papers, 1940-42, 144 (Her Majesty's Stationery Office, 1952). The following year, the allies established the United Nations Commission for the Investigation of War Crimes, a body that bore the name of the United Nations two years before the Charter of the organization even came into force. Timothy L.H. McCormack, *From Sun Tzu to the Sixth Committee: The Evolution of an International Criminal Law Regime*, in Timothy L.H. McCormack and Gerry J. Simpson, (eds), *The Law of War Crimes: National and International Approaches* (1997) 33, 57; *United Nations War Crimes Commission: 1943-1949*, United Nations Archives, Predecessor Archives Group, PAG-3/Rev. 1, 1987, i-iii, United Nations, <http://archives.un.org/ARMS/sites/ARMS/uploads/files/Finding%20Aids/Predecessors/ag-042%20UNWCC.pdf>, at 16 August 2012.

15 *US Department of State Bulletin*, Vol. 9 (1943) 308, Avalon Project, <http://avalon.law.yale.edu/wwii/moscow.asp> at 16 August 2012.

16 *Ibid.*

17 *Ibid.*

18 *Ibid.*

19 From 1947 to 1949, the United Nations War Crimes Commission reported on the more significant war crimes proceedings of WWII. The result was a fifteen-volume series, *Law Reports of Trials of War Criminals Selected and Prepared by the United Nations War Crimes Commission* (1947-49). Most of the reported trials were held in military tribunals convened by the occupying powers. Others were held in the municipal courts of liberated states (see eg *Trial of Kriminalsekretär Richard Wilhelm Hermann Bruns and two others*, Eidsivating Lahmannsrett and the Supreme Court of Norway (29 March and 3 July 1946) Vol. III 15 (torture as a war crime); *Trial of Wilhelm Gerbsch*, Special Court in Amsterdam, First Chamber (28 April 1948) Vol. XIII, 131 (defendant intentionally committed terrorism against Netherlanders and against persons through whom the interest of the Netherlands was or could be harmed.) *Ibid.* 132.) The series also reported on domestic legislative measures passed for the purpose of trying war criminals (eg *Norwegian Law Concerning Trials*

particular geographical localization' perpetrators would 'be punished by joint decision of the government of the Allies.'<sup>20</sup> But how would that joint decision be made?

At the Second Quebec Conference (1944), Churchill and Roosevelt agreed that summary punishment was the appropriate course of action against high officers of the Third Reich. No trials were necessary: Germany had perpetrated unprecedented atrocities during the war, and the fact that the principal criminals possessed the authority to order and orchestrate them was all the proof of guilt the Allies needed. Churchill wrote, 'these persons should be declared, on the authority of the United Nations, to be world outlaws'.<sup>21</sup> As such, they were to be punished in whatever way the Allies saw fit. Trial was both unnecessary and inappropriate for Nazi leadership because, Churchill argued, 'the question of their fate is a political and not a judicial one.'<sup>22</sup> Punishment, according to Roosevelt's advisor Henry Morgenthau Jr., ought to be exemplary and severe.<sup>23</sup>

The Soviet Union was an early and vigorous advocate of adjudication, not because it was committed to fair judicial process, but because of the

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*of War Criminals*, Vol. III, p. 81.) According to one estimate, by 1950 almost 10,000 persons had been tried for war crimes in domestic legal fora. M. Cherif Bassiouni, *International Criminal Law* (3rd ed, Vol. III, 2008) 307. By 1988, over 91,000 individuals had been tried in German courts for WWII war crimes. Of them, about 6,500 were convicted. Axel Marschik, *The Politics of Prosecution: European National Approaches to War Crimes* in Timothy L.H. McCormack and Gerry J. Simpson (eds), *The Law of War Crimes: National and International Approaches* (1997) 66, 74-5.

20 Above n 15.

21 Winston Churchill, Draft of a Suggested Telegram to be Sent by the President and the Prime Minister to Marshal Stalin in *Foreign Relations of the United States: The Conference at Quebec, 1944*, (1972) 489 (hereinafter *Draft Churchill Memorandum*). See also, Memorandum by the British Lord Chancellor (Simon): Major War Criminals, 4 September 1944, in *ibid* 91-93. The Draft Churchill Memorandum adopts the position advocated by the Lord Chancellor in his memorandum on major war criminals.

22 *Draft Churchill Memorandum*, above n 21, 489. There was also a strategic element to this argument. By treating high-level Nazi officials differently from the majority of war criminals, he hoped to isolate the upper echelons of Nazi leadership from the masses of German foot soldiers. If the average German soldier knew that he would be afforded a fair trial in his home country as opposed to swift and summary punishment, he would be less likely to fight as desperately as his superiors, thus preventing the prolongation of the war. *Ibid* 490.

23 Morgenthau advocated the summary execution of major war criminals by a firing squad made of United Nations soldiers. Memorandum from Henry Morgenthau Jr. to President Roosevelt, 5 Sept. 1944 in Bradley F. Smith (ed), *The American Road to Nuremberg: The Documentary Record* (1982) 27-28.

propagandist ends to which it could turn a show trial on so grand a scale.<sup>24</sup> By January 1945, President Roosevelt had begun leaning toward adjudication, albeit for different reasons. His advisors cautioned that summary execution of top Nazi brass would ensure their immediate martyrdom in Germany and create the appearance that the Allies were no more respectful of law and justice than the Nazis had been. What was more, adjudication ‘would make available for all mankind to study in future years an authentic record of Nazi crimes and criminality.’<sup>25</sup> There were lessons to be learned from the past. A trial would preserve them for posterity. Britain remained skeptical of the propriety of a trial. ‘If the method of public trial were adopted,’ Sir Alexander Cadogan wrote, ‘the comment must be expected from the very start to be that the whole thing is a ‘put-up-job’ designed by the Allies to justify a punishment that they have already resolved on.’<sup>26</sup>

Even more distressing to public opinion, though, would have been summary execution. In a memorandum to the Allies of 30 April 1945 the

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24 The Soviet member of the Tribunal, Major General Nikitchenko, Vice-Chairman of the Soviet Supreme Court, had presided over numerous show trials in Russia during the 1930s. Michael J. Bazylar, *The Role of the Soviet Union in the International Military Trial at Nuremberg* in Herbert R. Reginbogin and Christoph J.M. Safferling (eds) *The Nuremberg Trials: International Criminal Law Since 1945* (2006) 45. Indeed, Robert Jackson commented of Soviet participation, ‘This is not an ordinary trial. Some of the proprieties went by the way when General Nikitchenko. . . was made a member of the Tribunal. Biddle Collection, above n 2, Box 1, Meeting in Mr. Biddle’s Residence, Sunday, 21 October 1945, p. 2. As early as 1942, the Soviet government was pledging to bring major Nazi leaders to trial when the war was over. Interestingly, the stated purpose of adjudication was to provide the Soviet public with the retribution they demanded through public trial and harsh punishment. Letter from V. Molotov, Soviet Commissar for Foreign Affairs, to M. Z. Fierlinger, Czech Minister, 14 October 1942, Avalon Project, <http://avalon.law.yale.edu/imt/jack01.asp#2> at 16 August 2012. One of the most startling moments at Nuremberg (and certainly the most discreditable) came when the Soviet prosecutor attempted to blame the Soviet-led massacre of nearly 15,000 Poles at the Katyn Forest on the accused. Persico, above n 2, 358-9.

25 Memorandum from Henry Stimson, Francis Biddle, and Edward R. Stettinius, Jr. to President Roosevelt, 22 January 1945, Avalon Project, <http://avalon.law.yale.edu/imt/jack01.asp#2> at 16 August 2012.

26 Sir Alexander Cadogan, Aide-Memoire from the United Kingdom to the United States, 23 April 1945, Avalon Project, <http://avalon.law.yale.edu/imt/jack02.asp>, at 16 August 2012. The British alternate for the Tribunal, Sir Norman Birkett, later remarked in a different spirit that the proceedings at Nuremberg were intended to be a world object lesson. . . and anything which brought home to the world at large, or the English public, in particular, the importance of the trial would have a good effect upon public opinion. Biddle Collection, above n 2, Box 1, Notes of Tenth Organizational Meeting (October 14, 1945, 3:00 p.m.) p. 17.

United States made the case for adjudication.<sup>27</sup> The United States argued that '[n]o principle of justice is so fundamental in most men's minds as the rule that punishment will be inflicted by judicial action.'<sup>28</sup> True, the legal right to summarily execute war criminals existed under the laws of war, but here public adjudication was preferable to the isolation of the firing squad. The war had been public; the reckoning that followed ought to be public, too. A trial would serve as a deterrent to future crimes and would raise international standards of conduct. By revealing the scope and scale of German aggression, a fair public trial would underscore the moral rectitude of the Allied cause and discredit totalitarianism.<sup>29</sup> Most importantly for the immediate future, a fair and expeditious trial would develop legal and judicial institutions in Germany while 'bring[ing] home the truth to those Germans who remain[ed] incredulous about the infamies of the Nazi regime.'<sup>30</sup> To pursue retribution for its own sake would be to squander the many opportunities that a fair trial presented for the development of law, reconciliation, and peace.<sup>31</sup>

In the memorandum of 30 April, the United States anticipated many of the aspirations of the system of international criminal law to which the Nuremberg Tribunal was a precursor:<sup>32</sup> deterrence of future crimes;<sup>33</sup> the expression of the world community's condemnation of criminal conduct;<sup>34</sup>

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27 Memorandum of Proposals for the Prosecution and Punishment of Certain War Criminals and Other Offenders, 30 April 1945, Avalon Project, <http://avalon.law.yale.edu/imt/jack05.asp>, at 16 August 2012.

28 Ibid.

29 Ibid.

30 Ibid.

31 Benjamin Ferencz, chief prosecutor of the largest murder trial in history, that of the *Einsatzgruppen* (Hitlers killing squads), framed the problem of retribution as follows: If you decide to shoot people, the argument becomes, Whom are you going to shoot, and when do you stop shooting? Nuremberg, A Prosecutors Perspective in Belinda Cooper (ed), *War Crimes: The Nuremberg Legacy* (1999) 33.

32 For a rich discussion of the Nuremberg Tribunal and the objectives of international criminal law, see Gerry J. Simpson, War Crimes: A Critical Introduction in Timothy L.H. McCormack and Gerry J. Simpson (eds) *The Law of War Crimes: National and International Approaches* (1997) 5-30.

33 Kathryn Sikkink, *The Justice Cascade: How Human Rights Prosecutions Are Changing World Politics* (2011); Payam Akhavan, Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities? (2001) *American Journal of International Law* 7; David Wippman, Atrocities, Deterrence, and the Limits of International Justice (1999) *Fordham International Law Journal* 473; Johannes Andenaes, *Punishment and Deterrence* (1974).

34 Mirjan Damaska, What is the Point of International Criminal Justice? (2008) *Chicago-Kent Law Review* 300.

the allocation of individual guilt;<sup>35</sup> the establishment of an historical record of atrocities;<sup>36</sup> the cultivation of a rule of law in post-conflict society;<sup>37</sup> and, indeed, retribution.<sup>38</sup> The memorandum succeeded in its immediate objective of persuading Britain to support and participate in an international war crimes trial.<sup>39</sup> From June to August 1945, representatives of the Four Powers (the United States, the United Kingdom, the Soviet Union, and France) convened an international conference in London for the purpose of deciding the law and procedure to be applied against the major German war criminals. Unprecedented criminality demanded unprecedented justice.

### III. EX POST FACTO LAW?

At the heart of the crimes to be confronted at Nuremberg was what Winston Churchill called ‘a crime without a name.’<sup>40</sup> Rafaël Lemkin named it ‘genocide.’<sup>41</sup> This atrocity, along with the crime of waging an aggressive

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35 Gary Jonathan Bass, *Stay the Hand of Vengeance: The Politics of War Crimes Tribunals* (2000); Steven R. Ratner and Jason S. Abrams, *Accountability for Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy* (1997).

36 Lawrence Douglas, *History and Memory in the Courtroom: Reflections on Perpetrator Trials*, in David A. Blumenthal and Timothy L.H. McCormack (eds), *The Legacy of Nuremberg: Civilising Influence or Institutionalised Vengeance?* (2008) 95; Susan Haack, *Epistemology Legalized: Or, Truth, Justice, and the American Way* (2004) *American Journal of Jurisprudence* 43 (on the perils of judicial historiography); Mark Osiel, *Mass Atrocity, Collective Memory, and the Law* (1997). Notwithstanding the lofty aspirations of the 30 April memorandum, on one occasion the French alternate for the Nuremberg Tribunal, Judge Robert Falco, objected to the length of the Tribunals draft judgment, saying, we are judges and not historians. Biddle Papers, Box 14, Notes of Third Conference on Opinion (17 July 1946).

37 Erik G. Jensen, *Justice and the Rule of Law in Charles Call* (ed), *Building States to Build Peace* (2008) 119; Mark A. Drumbl, *Punishment, Postgenocide: From Guilt to Shame to Civis in Rwanda* (2000) *New York University Law Review* 1221.

38 Graham T. Blewitt, *The Importance of a Retributive Approach to Justice* in David A. Blumenthal and Timothy L.H. McCormack (eds) *The Legacy of Nuremberg: Civilising Influence or Institutionalised Vengeance?* (2008) 39.

39 British Memorandum, 28 May 1945, Avalon Project, <http://avalon.law.yale.edu/imt/jack06.asp> at 16 August 2012 (the United Kingdom Government had become convinced of the desirability of proceeding along the general lines outlined in the American proposal). Aide Memoire from the United Kingdom, 3 June 1945. Available at <http://avalon.law.yale.edu/imt/jack07.asp> at 16 August 2012 (His Majestys Embassy are instructed to inform the State Department that His Majestys Government have now accepted in principle the United States draft as a basis for discussion by the representatives appointed by the Allied Governments to prepare for the prosecution of war criminals.).

40 Quoted in William Schabas, *Genocide in International Law* (2000) 14.

41 Lemkin was a Polish Jew who fled his homeland in 1939. He was a tireless campaigner for the development of international rules prohibiting genocide and advised the Secretary-

war, became one of the focal points of the Four Powers' efforts in developing the International Military Tribunal. Sir David Maxwell Fyfe made it clear from the outset of the London conference that legal clarity was essential to the adjudication of the crimes: 'What we want to abolish at the trial is a discussion as to whether the acts are violations of international law or not. We declare what the international law is so that there won't be any discussion on whether it is international law or not.'<sup>42</sup> The resulting Charter for the International Military Tribunal attempted to do precisely that, declaring that the Tribunal had jurisdiction over the following offenses, for which there would be personal responsibility:

(a) Crimes Against Peace: namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing;

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

(c) Crimes Against Humanity: 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

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General of the United Nations on the drafting of the Genocide Convention. *Ibid.* at 24-30. In addition to the six million Jews (two-thirds of European Jewry) murdered by Nazi Germany, it is estimated that between 200,000 and 250,000 disabled, three million ethnic Poles, between 250,000 and 1.5 million Gypsies (250 of which were children used in a Zyklon-B experiment at Buckenwald), and 3,000 to 9,000 homosexuals were killed. Steven Lipman, Hitlers Other Victims, *Jewish Week*, 2 May 1997, 30. *See also* Gunnar Heinsohn, What makes the Holocaust a uniquely unique genocide? (2000) *Journal of Genocide Research* 411.

42 International Conference on Military Trials, Minutes of Conference Session of 29 June 1945, Avalon Project, <http://avalon.law.yale.edu/imt/jack17.asp> at 16 August 2012.

with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.<sup>43</sup>

The category of war crimes was not particularly contentious during the London Conference, as it had precedents in customary international law and treaty law, namely, the Hague Convention Respecting the Laws and Customs of War on Land (1907)<sup>44</sup> and the Geneva Convention relative to the Treatment of Prisoners of War.<sup>45</sup> Under these treaties, the person, property and dignity of civilians and prisoners of war alike were to be treated with all due care and respect. Thus the substantive content of the offense did not undergo substantial revision during the Conference.<sup>46</sup>

The category of crimes against peace was more contentious even though it had an indirect precedent in international law under the 1928 Kellogg-Briand Pact. Parties to that treaty, including Germany, had pledged to ‘condemn recourse to war for the solution of international controversies, and renounce it, as an instrument of national policy in their relations with one another.’<sup>47</sup> It had effectively outlawed recourse to war unless in self-

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43 Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis Powers and Charter of the International Military Tribunal, Aug. 8, 1945, art. 6(c), 59 Stat. 1544, 82 U.N.T.S. 279 [hereinafter IMT Charter]. Available at Avalon Project, <http://avalon.law.yale.edu/imt/jack60.asp> at 16 August 2012.

44 Convention Respecting the Laws and Customs of War on Land, 18 October 1907, 36 Stat. 2277. Available at International Committee of the Red Cross, <http://www.icrc.org/ihl.nsf/full/195> at 16 August 2012.

45 Geneva Convention relative to the Treatment of Prisoners of War, 27 July 1929, 118 LNTS 343. Available at International Committee of the Red Cross, <http://www.icrc.org/ihl.nsf/full/305?opendocument> at 16 August 2012. In particular, the Nuremberg Tribunal held that crimes defined by Article 6 Section (b) of the Charter were already recognized as war crimes under international law by Articles 46, 50, 52 and 56 of The Hague Convention of 1907, and Articles 2, 3, 4, 46, and 51 of the Geneva Convention of 1929. That violation of these provisions constituted crimes for which the guilty individuals were punishable is too well settled to admit of argument. Judicial Decisions: International Military Tribunal (Nuremberg), Judgment and Sentences (October 1, 1946) (1947) *American Journal of International Law* 172, 248 (Judgment of the Nuremberg Tribunal). The Judgment is also available online at Avalon Project, [http://avalon.law.yale.edu/subject\\_menus/judcont.asp](http://avalon.law.yale.edu/subject_menus/judcont.asp) at 16 August 2012.

46 An early draft proposal defined war crimes as violations of the laws, rules or customs of war. Such violations shall include murder and ill-treatment of prisoners of war: atrocities against and violence towards civil populations: the deportation of such populations for the purpose of slave labour: the wanton destruction of towns and villages: and plunder: as well as other violations of the laws, rules and customs of war. Redraft of Charter Submitted by British Delegation, 23 July 1945, Avalon Project, <http://avalon.law.yale.edu/imt/jack45.asp> at 16 August 2012.

47 Treaty between the United States and other Powers Providing for the Renunciation of War as an Instrument of National Policy (Kellogg-Briand Pact), 27 August 1928, 46 Stat.

defense, making warfare an unlawful method by which to execute state policy. In addition, the prohibition of wars of aggression had deep roots in customary international law, from the Scholastic lawyers' concern with just war theory to Grotian and Vattelian writings on *jus ad bellum*.<sup>48</sup> However, the Nuremberg Charter did nothing to define a war of aggression. This was deliberate. The Soviets knew that they themselves might be considered guilty of crimes against peace as a result of the Ribbentrop-Molotov Pact, a secret non-aggression agreement wherein the two states divided Europe into spheres of influence.<sup>49</sup> So for the sake of the Charter, the Four Powers were content to paper over the cracks in the category of crimes against peace with the hazy notion of 'wars of aggression'.<sup>50</sup>

The Charter also introduced an altogether new category of offense into international law: crimes against humanity. In order to constitute a crime against humanity, 'murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population' had to occur before or during the war.<sup>51</sup> Why, though, was this category even necessary?<sup>52</sup> At first glance, it seems redundant in light of the Article 6(b)

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2343. Also available at Avalon Project, [http://avalon.law.yale.edu/20th\\_century//kbpact.asp](http://avalon.law.yale.edu/20th_century//kbpact.asp) at 16 August 2012. See also J. L. Brierly, *The Law of Nations: An Introduction to the International Law of Peace* (6th ed, 1963) 406-12.

48 Stephen C. Neff, *War and the Law of Nations: A General History* (2006) 49-82, 314-56; Richard Tuck, *The Rights of War and Peace: Political Thought and the International Order from Grotius to Kant* (1999) 51-108; William C. Bradford, *International Legal Regimes and the Incidence of Interstate War in the Twentieth Century: A cursory Quantitative Assessment of the Associative Relationship* (2001) *American University International Law Review* 647, 666-721; John F. Murphy, *Crimes against Peace in George Ginsburg and Vladimir Nikolaevich Kudriavtsev* (eds), *The Nuremberg Trial and International Law* (1990) 121.

49 Henry Kissinger, *Diplomacy* (1994) 359-68. For Soviet views of the definition of aggression under the Charter of the Tribunal, see Minutes of Conference Session, 25 July 1945, Avalon Project, <http://avalon.law.yale.edu/imt/jack51.asp> at 16 August 2012.

50 In discussing the draft judgment of the Tribunal, Judge de Vabres urged his colleagues to abstain from any definition because the notion of aggressive war was too dependent on the precise context in which hostilities occurred. Biddle Collection, above n 2, Box 14, Notes of Third Conference on Opinion (17 July 1946). Biddle himself resisted elaborating on the definition of aggression on the ground that it was dangerous and academic and bad international law. *Ibid*.

51 For discussion, see Antonio Cassese, *International Criminal Law* (2003) 69-71. The temporal nexus between war and crimes against humanity has begun to disappear. See text beginning at n 84 below.

52 Ian Brownlie has written of the two, The category of war crimes was certainly orthodox law in 1945, and crimes against humanity were to a great extent war crimes writ large. *Principles of Public International Law* (5th ed, 2001) 566.

prohibition of war crimes. However, the category was far from superfluous. It was meant to fill two jurisdictional gaps in international law. The first gap it filled was the lack of a robust legal regime protecting civilians from deliberate harm in wartime. The second had to do with the singular nature of crimes against German nationals. The category of crimes against humanity enabled the Allies to address the horrors perpetrated by Germany, within Germany, against German citizens, and in compliance with German law. It would not be enough for a Hermann Göring to defend himself by saying, '[T]hat was our right! We were a sovereign State and that was strictly our business.'<sup>53</sup> Crimes against humanity were now the business of all states. The source of offense was not the law of nations, according to the United Kingdom, but rather a transcendent 'law of humanity'.<sup>54</sup>

This category of offense was most vulnerable to the charge of *ex post facto* lawmaking, and the members of the Tribunal appear to have known it. It was difficult to assert that the Charter was simply declaratory of existing international law while it elaborated so novel a category.<sup>55</sup> Yet throughout the War, the Allies expressed concern that prevailing norms might not suffice when it came to holding the enemy accountable for atrocities against his own people.<sup>56</sup> The notion of crimes against humanity represented the high water mark of the Tribunal's challenge to traditional conceptions of state sovereignty. Conduct by a state towards its own citizens within its own borders which was thoroughly permissible and, in fact, *required* by domestic law could be declared criminal under international law and its perpetrators held to account in an international legal forum.

Antonio Cassese suggested that this approach discomforted the judges of the Nuremberg Tribunal, as they shied away in the judgment from addressing whether crimes against humanity constituted an *ex post facto* legal category, focusing instead on the antiquity of the category of crimes against

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53 G. M. Gilbert, *Nuremberg Diary* (1961) 39.

54 Draft Showing Soviet and American Proposals (in Parallel Columns), 1945, Avalon Project, <http://avalon.law.yale.edu/imt/jack23.asp> at 16 August 2012.

55 Shortly after the trial, one scholar characterized the category as a legal innovation of the first magnitude. F.B. Schick *The Nuremberg Trial and the International Law of the Future* (1947) *American Journal of International Law* 770, 785.

56 See discussion in Egon Schwelb, *Crimes Against Humanity in Mettraux*, 120 at 125-26. Philosopher Jean François Lyotard wrote of the Holocaust, Suppose that an earthquake destroys not only lives, building, and objects but also the instruments used to measure the earthquake. Cited in Marion A. Kaplan, *Between Dignity and Despair: Jewish Life in Nazi Germany* 229 (1998). In the aftermath of that earthquake, the Four Powers had to develop a juridical framework within which to make legal sense of the horrors that had just transpired.

peace.<sup>57</sup> Yet memoranda exchanged by the members of the Tribunal suggest otherwise. In notes taken on 16 March 1946, Biddle wrote, “The maxim of nullum crimen nulla poena is not a limitation of sovereignty and in certain circumstances and particularly in International Law it may be just for the sovereign power to treat some acts as crimes which had not been designated as crimes at the time they were committed.”<sup>58</sup> He was agreeing with a memorandum circulated by the French member of the Tribunal, Donnedieu de Vabres, Professor of Law at the University of Paris. After an exhaustive review of the principle *nullum crimen nulla poena sine lege* from Roman antiquity to the modern era, de Vabres concluded that it was a doctrine unique to domestic legal systems, a doctrine that found its articulation only during periods of legal codification as a check on the power of the sovereign. If the international community wished to recognize an analogous doctrine for international law, it would have to codify international criminal law.<sup>59</sup> In the meantime, to insist on applying the principle to the defendants at Nuremberg would be to disregard the higher interests of justice and the common interest of States that the Tribunal was meant to serve.<sup>60</sup>

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57 For discussion, see Antonio Cassese, *International Criminal Law* (2003) 69-71; *ibid*, *International Law* (2002) 248-49. To Henry Stimson, the notion of *ex post facto* law was an ill fit for defendants such as those before the Tribunal. That concept is based on the assumption that if the defendant had known that the proposed act was criminal he would have refrained from committing it. Nothing in the attitude of the Nazi leaders corresponds to that assumption; their minds were wholly untroubled by the question of their guilt or innocence. The Nuremberg Trial: Landmark in Law (1947) *Foreign Affairs* 179, 183.

58 Biddle Collection, above n 2, Box 14. See also the views of American alternate John J. Parker in the meeting of 19 August 1946 (Maxim *nulla crimen* is not a limitation on sovereignty and does not apply here) in *ibid*.

59 Biddle Collection, above n 2, Box 14, Note by Donnedieu de Vabres (Nous souhaitons vivement que, dans le plus bref delai possible, il sinstitute une codification du droit penal international).

60 *Ibid*. (Mais attendre pour châtier les grands criminels de guerre que cette codification sit vu le jour, ce serait sacrifier a un scrupule, sans fondement historique ni rationnel, les exigences supérieures de la justice et lintérêt commun des Etats.) The Russian member was far less rigorous in his approach. In a two-hour peroration to the other members of the Tribunal, Nikitchenko argued that the Charter of the Tribunal introduces many new things in [the] field of international law such as criminal responsibility for actions that were previously announced but not made punishable. . . . [The] Tribunal [is] not an institution to protect old law and to shield old principles from violation. Biddle Collection, above n 2, Box 15, Notes from Session on Opinion, 15 August 1946. In a letter to Wechsler of 10 July 1946, Biddle confided that for all the Members arguments about *nullum crimen*, I find no improvement in the vagueness of the English mind, nor in the tight logic of the French. I sometimes feel that the Russians understand what it is all about better than any of us. Biddle Collection, above n 2, Box 1. The comment suggests a cynical approach to the issue

#### IV. INDIVIDUAL RESPONSIBILITY: ‘THE VERY ESSENCE OF A POSITIVE AND MORAL INTERNATIONAL LAW’<sup>61</sup>

Essential to justice at Nuremberg was the establishment of individual criminal responsibility for violations of international law. Reflecting on his work on the Tribunal, Biddle wrote,

There is a moral value in fixing responsibility in a field of anonymous responsibility. A state, after all, like a corporation, is a fictitious body. . . Of course the representatives of a state under certain circumstances are protected under the doctrine of international comity. But authors of acts criminal under international law cannot shelter themselves behind their official positions. If the state moves outside of its competence under international law the authority to act cannot create immunity.<sup>62</sup>

It should not have been altogether surprising, then, when Robert Jackson told the Americans at Nuremberg that the defendants were being cooperative. ‘They did not dispute the fact that crimes had been committed,’ he said. ‘Their defense would be that a particular individual did not participate. They would attempt to lay everything on Hitler.’<sup>63</sup> Holding the defendants individually accountable for their illegal conduct during the war would require that the Tribunal pierce the veils of command responsibility and the act of state doctrine. This section will examine Biddle’s role in doing precisely that, taking into account the way his views on individual responsibility for violations of international law were shaped by his experiences as Attorney General of the United States.

Francis Biddle had served as Attorney General under President Roosevelt from 1941 to 1945. Only a few weeks after he was sworn into office, the Japanese attack on Pearl Harbor launched the United States into the Second World War. As Attorney General, Biddle was responsible for representing the U.S. government in some of the most controversial causes of the day, not least of which was the *Nazi Saboteurs* case, *Ex parte Quirin*.<sup>64</sup> The case

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of ex post facto law, but it must be remembered that Biddle penned the letter to Wechsler more than a week before coming around to de Vabres position. See above n 59.

61 Biddle, *The Nürnberg Trial in Mettraux* 200, 207 (referring to the Tribunals ruling that the very essence of the Charter is that individuals have international duties which transcend the national obligations of obedience imposed by the individual state.)

62 *Ibid* 207

63 Biddle Collection, above n 2, Box 1, Notes of Meeting in Mr. Biddles Residence, Sunday, 21 October 1945.

64 317 US 1 (1942).

involved seven German-born men who landed secretly on American shores in 1942. German submarines had dropped them off the coasts of New York and Florida. Wearing German Marine Infantry uniforms, the men made their way ashore, armed with explosives and carrying maps of strategic facilities. Disguising themselves as civilians, they set out to carry out their orders from the German High Command: to destroy war industry facilities in the United States.<sup>65</sup> However, one of the saboteurs informed the Federal Bureau of Investigation of the plot. Ten days after the men landed, they were rounded up and taken into custody by the FBI.

The Attorney General found himself in a bind. If he tried the men in federal court, he might not be able to prove the charge of attempted sabotage because the defendants were not close enough to undertaking the planned attack to meet the elements of the offense under federal criminal law.<sup>66</sup> Perhaps worse, he might also be required to disclose that the plot had not been foiled through capable investigative work on the part of the FBI, but by sheer luck: one of the saboteurs had turned informant on the others.<sup>67</sup> After consulting with President Roosevelt and the Department of Defense, Biddle decided to hand the men over to the military for trial outside the regular courts. On July 2, President Roosevelt appointed a special military commission to try the men swiftly and secretly, with trial beginning as early as the next week. Biddle would serve as prosecutor alongside Major General Myron Cramer, Judge Advocate General of the U.S. Army.<sup>68</sup>

Seven of the eight accused sought writs of habeas corpus from the Supreme Court of the United States, arguing that they could not be tried by a military commission while the regular courts of the United States were still open.<sup>69</sup>

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65 Ibid.

66 Francis Biddle, *In Brief Authority* (1962) 328.

67 The *New York Times* reported, Praise for the swift and sure work of the Federal Bureau of Investigation was heard on all sides. . . . FBI officials maintained their customary silence, refusing to comment on reports that their agents had infiltrated into the German secret service or had stationed men to watch the landing of the saboteurs. Saboteurs Face Military Justice; Inquiry Widens: Biddle Statement is Taken to Mean that Army Will Try at Least Six Invaders, *New York Times*, 30 June 1942, 1.

68 Lewis Woods, Army to Try 8 Nazi Saboteurs: President Names 7 Generals on commission to Hear Case Beginning Wednesday, *New York Times*, 2 July 1942, 1; Secrecy Shrouds Saboteurs Trial: Comment is Refused on the Procedure, Set by Order to Be Started Today, *New York Times*, 7 July 1942, 25.

69 This argument had its basis in the Civil War case of *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866), in which the U.S. Supreme Court granted the writ to a civilian in Indiana who had been sentenced to death by a military commission for subversive activities. The Supreme Court held that as long as the regular civil courts were open, *Milligan*, a civilian, was entitled to trial in them. The Constitution of the United States is a law for rulers and

The Court rejected that argument on the ground that the accused were combatants and were therefore subject to trial by military authorities. It reasoned,

By universal agreement and practice, the law of war draws a distinction between the armed forces and the peaceful populations of belligerent nations and also between those who are lawful and unlawful combatants. Lawful combatants are subject to capture and detention as prisoners of war by opposing military forces. Unlawful combatants are likewise subject to capture and detention, but in addition they are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful.<sup>70</sup>

It is worth here noting that the military commission appointed by the President had jurisdiction over the defendants by merit of their status as combatants in time of war. The law to be applied by the commission was the international law of war as codified in treaties and enshrined in customary law. To Biddle, the Nuremberg Tribunal was convened in this vein:

In the *Saboteur* case as Attorney General I was assigned to take charge of the prosecution. My mail was filled with hundreds of indignant letters suggesting that the saboteurs should be immediately shot and not tried. So too in the Nürnberg case it was urged that what is loosely termed ‘political’ treatment would have been appropriate – i.e. execution or expulsion to some convenient Elba, without trial. . . Yet all standards of justice required some measure of trial even where ‘political’ methods are used.<sup>71</sup>

The policy arguments for the trial of the German saboteurs mirror those made for the trial of the Nazi war criminals at Nuremberg.<sup>72</sup> More importantly, though, the trial of the saboteurs was an instance in which individuals were held judicially accountable for violations of the international laws of war. It was a fitting prelude to what was to come at

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people, equally in war and in peace, the Court held, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. Ibid 71 U.S. 120-121.  
70 *Ex parte Quirin*, 317 US at 31.

71 Biddle, above n 61, 201.

72 Above Section I. But while domestic due process requirements obligated the U.S. government to try the saboteurs, the laws of war would have permitted the Allies to summarily execute the Nuremberg defendants if they so wished.

Nuremberg and, perhaps, one of the reasons that President Truman appointed Biddle to the Tribunal.<sup>73</sup>

One of the great achievements of the Nuremberg Tribunal was signaling to the society of states that the time had come to consider regulating states' conduct toward their nationals not only in time of war, but in time of peace.<sup>74</sup> Notwithstanding U.S. efforts to secure convictions for pre-war atrocities through conspiracy charges,<sup>75</sup> the Tribunal declined in its Judgment to hold the defendants responsible for crimes against humanity committed prior to the outbreak of the war.<sup>76</sup> As long as an individual's conduct occurred in time of international war, he could be held criminally liable for his conduct. Beyond that, the veil of sovereignty would remain drawn over the face of human rights violations.

The decades following the Tribunal's efforts have become what one scholar termed "The Age of Rights."<sup>77</sup> Immediately following the Tribunal's judgment, the United Nations General Assembly issued Resolution 95 (I), Affirmation of the Principles of International Law recognized by the Charter of the Nürnberg Tribunal,<sup>78</sup> directing the International Law Commission 'to treat as a matter of primary importance plans for the formation, in the context of a general codification of offences against the peace and security of mankind, or of an International Criminal Code, of the principles recognized in the Charter of the Nuremberg Tribunal and in the

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73 Joseph Persico has suggested that Truman chose Biddle because he felt badly about having demanded Biddle's resignation from his position as Attorney General over the phone rather than in person. While Attorney General, Biddle had opposed Truman's candidacy for Vice President, so it made sense for Truman to appoint a more loyal person to lead the Department of Justice. Persico, above n 2, 61-63. This interpretation seems overly simplistic given Biddle's ample qualifications to serve the United States on the Tribunal.

74 Ratner and Abrams, above n 35, 6.

75 Biddle Collection, above n 2, Box 14, Secret Memorandum to Attorney General Tom C. Clark from Herbert Wechsler, 29 December 1944. For discussion of the crime of conspiracy at Nuremberg, see Jackson Nyamuya Maogoto, *State Sovereignty and International Criminal Law: Versailles to Rome* (2003) 90-95.

76 To constitute crimes against humanity, the acts relied on before the outbreak of war must have been in execution of, or in connection with, any crime within the jurisdiction of the Tribunal. The Tribunal is of the opinion that revolting and horrible as many of these crimes were, it has not been satisfactorily proved that they were done in execution of, or in connection with, any such crime. The Tribunal therefore cannot make a general declaration that the acts before 1939 were crimes against humanity within the meaning of the Charter. Judgment of the Nuremberg Tribunal, above n 46, 254.

77 Louis Henkin, *The Age of Rights* (1990) 13-15.

78 G.A. Res. --95 (I), U.N. GAOR, 1st Sess., pt. 2, at 1144, U.N. Doc. A/236 (1946).

judgment of the Tribunal.<sup>79</sup> The resultant Nuremberg Principles limited crimes against humanity to acts undertaken in conjunction with crimes against peace.<sup>80</sup> Nevertheless, the Nuremberg Principles would be central to the progressive development of international criminal law and international human rights law.<sup>81</sup>

## V. THE LEGACY OF NUREMBERG

In assessing the legacy of any tribunal it is tempting to let the privilege of hindsight obscure the difficult context in which decisions were made. Too frequently, the tribunal's decision is taken for the totality of its jurisprudential achievement. It is hoped that this article has helped enrich the reader's appreciation of the turbulent context from which the Nuremberg Tribunal emerged and the troubled context in which it operated. In particular, this article has demonstrated the seriousness which the Members of the Tribunal considered the controversial issue of *ex post facto* law in applying the law of the Charter to the defendants. It has shown the energy with which the members challenged one another's views, as well as some of the compromises that resulted from this process of engagement. It has also shown that Francis Biddle, like his counterparts on the bench, was acutely aware that the Tribunal's function was not simply to adjudicate the recent past. It was also to serve as a model for the future, to progressively develop existing norms of international law, and to lay the foundation of a system of international criminal law that would bring to account perpetrators of war crimes and related atrocities.<sup>82</sup> In this sense, the

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79 Ibid.

80 Report of The International Law Commission, 5 U.N. GAOR, Supp. No. 12, at 14, U.N. Doc. A/1316 (1950). M. Cherif Bassiouni has explained the relationship between these categories of offense as follows: [T]hree charges were set forth in the Nuremberg Charter: crimes against peace, crimes against humanity, and war crimes. Crimes against humanity emerge from war crimes. The drafters were very careful in making sure that they were deemed to be an outgrowth of war crimes because of their concern with the principles of legality. This is why Article 6(c) states that crimes against humanity are those crimes that were committed in connection with one of the other two crimes within the jurisdiction of the court. Although the language seems somewhat confusing, its purpose was to establish a connection with the war. The International Criminal Court in Historical Context (1999) *Saint Louis-Warsaw Transatlantic Law Journal* 55, 60.

81 Rich discussions of Nuremberg's effect on the development of international criminal law can be found in Ratner and Abrams, above n 35 and Reginbogin and Safferling, above n 24.

82 Hans-Heinrich Jescheck, The Development of International Criminal Law after Nuremberg in Guénaél Mettraux (ed), *Perspectives on the Nuremberg Trial* (2008) 408, 409. The Soviets initially (and understandably) resisted these ambitions lest the principles enshrined at Nuremberg be turned against Stalins own policies. The members of the Tribunal were

work of the Tribunal was as much prospective as it was retrospective, fulfilling Biddle's vision of the Tribunal as having roots in the past and fruits that would ripen in the future.<sup>83</sup>

In the decades following Nuremberg individual responsibility for crimes against humanity expanded well beyond the limits of international armed conflict, if only because of the seemingly boundless human capacity for atrocity.<sup>84</sup> The category of "crimes against humanity" is no longer firmly tethered to the other offenses of the Nuremberg Principles. The first significant step in this direction was the Convention on the Prevention and Punishment of the Crime of Genocide, which provides that genocide, 'whether committed in time of peace or in time of war, is a crime under international law which [states] undertake to prevent and to punish.'<sup>85</sup> Subsequent treaties have stipulated that policies of apartheid and forced disappearance are likewise crimes against humanity regardless of whether they accompany a state of war.<sup>86</sup> The independent character of crimes against humanity has been recognized under customary international law as well as in treaties. In 1995, the International Criminal Tribunal for the Former Yugoslavia notably held, 'It is by now a settled rule of customary international law that crimes against humanity do not require a connection to international armed conflict. Indeed. . . customary international law may

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particularly cautious about the potential ends to which the Soviet Union might put the trial. Biddle wrote in his diary, Many difficult problems. If we hold these organizations [i.e., the Gestapo and the S.S.] to be criminal it opens the door to the Russians – to everyone in fact – to shoot on proof of membership, referring to our judicial approval – not a very desirable result. Biddle Collection, above n 2, Box 1, Journal (4 October 1945).

83 Biddle Collection, above n 2, Box 1, Journal (October 2 1946). See discussion above at n 7.

84 Since the post-War period, states have been grappling with the Nuremberg Charter's tangled categories of 'war crimes' and 'crimes against humanity.' Matthew Lippman, *Crimes Against Humanity*, (1997) *Boston College Third World Law Journal* 171.

85 9 December 1948, 78 U.N.T.S. 277, Art. 1.

86 International Convention on the Suppression and Punishment of the Crime of Apartheid , 30 November 1973, 1015 UNTS 243; Inter-American Convention on the Forced Disappearance of Persons, 9 June 1994, OEA Doc. AG/RES. 1256 (XXIV-0/94). See also, *Draft Code of Crimes Against the Peace and Security of Mankind Seventh Report*, Mr. Doudou Thiam, Special Rapporteur, (1989) II Year Book of the International Law Commission 81, 86, ¶ 38, U.N. Doc. A/CN.4/419/Add.1 ('First linked to a state of belligerency, . . . the concept of crimes against humanity gradually came to be viewed as autonomous and is today quite separate from that of war crimes. Thus, not only the 1954 draft code but even conventions which have entered into force (on genocide and *apartheid*) no longer link that concept to a state of war.')

86 9 December 1948, 78 U.N.T.S. 277, Art. 1

not require a connection between crimes against humanity and any conflict at all.<sup>87</sup>

This principle lies at the heart of Article 7(1) of the Rome Statute of the International Criminal Court. The Statute stipulates that crimes against humanity consist of certain acts undertaken ‘as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack’.<sup>88</sup> The ‘attack’ need not be part of a broader war. It is sufficient that civilians be unlawfully targeted by any government, be it a foreign state’s or their own. The provenance of Article 7 can be directly traced to the work of the Nuremberg Tribunal. It is fitting, then, that Benjamin Ferencz, who at the age of 27 prosecuted a case before the Nuremberg Tribunal,<sup>89</sup> remarked before the International Criminal Court last year, ‘The most significant advance I have observed in international law has gone almost unnoticed; it is the slow awakening of the human conscience.’<sup>90</sup> Ferencz, by then 92 years old, was delivering the closing arguments in the case against Congolese war criminal Thomas Lubanga Dyilo.<sup>91</sup> The Nuremberg Tribunal was instrumental in rousing the human conscience from its wartime slumber. It has been the project of international criminal law ever since to keep that conscience attentive, responsive, and engaged.

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87 *Prosecutor v. Dusko Tadić*, Decision on the Def. Motion for Interlocutory Appeal on Jurisdiction, Case No. IT-94-1-AR72, 2 October 1995, ¶ 151. See also Guénaél Mettraux, ‘Crimes Against Humanity in the Jurisprudence of the International Criminal Tribunals for the Former Yugoslavia and for Rwanda’ (2002) *Harvard International Law Journal* 237; Beth Van Schaak, The Definition of Crimes Against Humanity: Resolving the Incoherence (1999) *Columbia Journal of Transnational Law* 787.

88 2187 U.N.T.S. 90 (entered into force on 1 July 2002).

89 See above n 31.

90 ‘Ferencz Closes Lubanga Case for ICC’ (25 August 2011) Benjamin J. Ferencz: Law Not War, <http://www.benferencz.org/index.php?id=5&media=38> at 19 August 2012.

91 *The Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06, 14 March 2012.