
Founding Nuremberg: Innovation and Orthodoxy at the 1945 London Conference

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No document better conveys the roughness and expediency of the negotiations leading up to the tribunal at Nuremberg than the transcript of the four-power London Conference, held from 26 June to 2 August 1945. Their success was by no means assured: the Americans repeatedly threatened to walk out, the British fretted over German counter-charges, the French objected to crimes against peace, and the Soviets refused anything other than *ad hoc* charges. This was history in the making, and its making was an unedifying business.

The negotiations started smoothly enough, and the chief American prosecutor, Robert Jackson, thought he would have the conference wrapped up within a week.¹ This initial optimism soon gave way to frustration, and then to outright pessimism. On 4 July he cabled Secretary of State James Byrnes: “Negotiations [...] progressing slowly due difficulty Russian understanding our system of law and our difficulty comprehending theirs.”² On 25 July he complained to Telford Taylor: “We have a great deal of trouble with some of our friends, who are very hard to understand. I think we are going to get an agreement, but some days I think not.”³ On 1 August, the day before the end of the conference, he told Samuel Rosenman that he had given up hope of reaching a consensus.⁴ Throughout, he repeatedly threatened to abandon the negotiations, either

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¹ B.F. Smith, *Reaching Judgment at Nuremberg*, André Deutsch, London, 1977, p. 48.

² Jackson to Byrnes, 4 July 1945: Box 110, Jackson Papers, Library of Congress (“LoC”).

³ Tele-conference, 25 July 1945: Box 110, Jackson Papers, LoC.

⁴ John W. Wheeler-Bennett and Anthony Nicholls, *The Semblance of Peace: The Political Settlement After the Second World War*, Macmillan, London, 1972, p. 401.

by leaving the trial to be run by the Europeans or proceeding with an American-run trial.⁵ These were not idle threats, and had they been carried out, the effect would have been profound, given that the United States held almost all the potential defendants and much of the incriminating evidence.

In the event Jackson stayed and the negotiations continued, with wrangles over the prosecution of organisations, the scope of the court's Charter, and the location of the proposed tribunal. Delegates also tried to get to grips with the differences between each other's criminal justice systems vis-à-vis the respective roles of judges and prosecutors, the tendering of evidence and the rights of defendants. The trial plan that emerged was based on a modified common law model that embodied concepts unfamiliar to the civil law delegates: they reportedly "boggled" at the idea of calling defendants as witnesses,⁶ and were shocked that the defence would not have prior knowledge of the whole case against their clients.⁷ Some practices were never satisfactorily explained, leading the Soviet delegate to enquire on the final day: "What is meant in the English by 'cross examination'?"⁸

17.1. The Question of Individual Responsibility

The radical premise of the proposed tribunal was that individuals could be held personally responsible for crimes of war under international law – an idea that represented a significant departure from previous practice. "Of course," Jackson wrote, "this principle of individual responsibility is a negation of the old and tenacious doctrine of absolute and uncontrolled sovereignty of the state and of immunity for all who act under its orders. The implications of individual accountability for violation of International Law are far-reaching and many old concepts may be shaken thereby."⁹ Yet the Americans did not arrive in London with a fully formed proposal for the incorporation of individual responsibility into the Charter. Early drafts

⁵ London Conference, *Report of Robert H. Jackson, United States Representative, to the International Conference on International Trials*, Department of State, Washington DC, 1949 ("London Conference"), pp. 213, 343, 370. This was not just brinkmanship, as Jackson threatened the same in private correspondence with Byrnes and McCloy (Smith, 1977, pp. 53–54, see *supra* note 1).

⁶ London Conference, 1949, p. 190.

⁷ *Ibid.*, p. 319.

⁸ *Ibid.*, p. 403.

of the section setting out the crimes under the Tribunal's jurisdiction (later Article 6) made no specific reference to individual responsibility. Because it was not spelt out that responsibility for those violations rested with individuals, the door was left open for the judges to debate whether individuals or states (the latter being the traditional subject of international law) could be held to account for them.

In Washington, Hans Kelsen, who was then advising the Treaty Section of the Judge Advocate General's Department, considered this question in an untitled and hitherto overlooked memo, which was then passed to Jackson in London. Kelsen broached the subject of how to create new law, and in particular how to posit the innovative concept of individual responsibility under international law. He argued that it was important to "establish certain guarantees",¹⁰ and drafted a paragraph emphasising that individuals would be held personally responsible for the enumerated crimes:

*Persons who, acting in the service of any state (of one of the Axis powers) or on their own initiative, have performed acts by which any rule of general or particular international law forbidding the use of force, or any rule concerning warfare, or the generally accepted rules of humanity have been violated, as well as persons who have been members of voluntary organizations whose criminal character has been established by the court, may be held individually responsible for these acts or for membership in such organizations and brought to trial and punishment before the court.*¹¹

Kelsen's point was taken. Jackson thereafter insisted that the Charter specify that *individuals* were responsible for the enumerated crimes, saying:

We must declare that [the accused] are answerable personally, and I am frank to say that international law is indefinite and weak in our support on that, as it has stood over the recent years [...T]he Tribunal might very

⁹ R.H. Jackson, "Foreword", E.W. Kintner (ed.), *Trial of Alfons Klein, Adolf Wahlmann, Heinrich Ruoff, Karl Willig, Adolf Merkle, Irmgard Huber, and Philipp Blum: The Hadamar Trial*, William Hodge, London, 1949, pp. xv-xvi.

¹⁰ Kelsen, untitled, c. July 1945: Box 104, Jackson Papers, LoC.

¹¹ *Ibid.* (emphases added).

reasonably say, that no personal responsibility resulted if we failed to say it when we are making an agreement between the four powers which fulfils in a sense the function of legislation.¹²

He was absolutely adamant that the judges should not be given the option “to adjudge that, while these persons had committed the acts we charge, these acts were not crimes against international law and therefore to acquit them”.¹³

The principle was duly declared. Article 6, which set out the various crimes on the Tribunal’s roster, stated: “The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility.¹⁴ The commanding “shall” made it clear that the Charter was binding on the Tribunal, and that if a person had committed the designated crimes, he could not be deemed *not* personally responsible. At the same time, Article 7 denied the accused the traditional sovereign immunity defence – a defence which pierced the membrane of sovereignty and provided for individual responsibility under international law.

17.2. The Problem of Aggression

Of all the crimes, the major sticking point at the conference was the formulation of the crime of aggression. There were serious disagreements over both its remit and its definition, for, as British delegate David Maxwell Fyfe stated early on, there were “different schools of thought as to whether that is an existing offence against international law [... and] whether we are breaking new ground”.¹⁵ All parties agreed that Germany had violated treaties and agreements; the dissension arose over the idea that such actions were *crimes*, not delicts, for which *individuals*, not states, were liable. It was thus the issues of criminality – and hence individual liability – of aggression, that generated the most controversy.

Jackson maintained that aggression was the heart of the case – “the crime which comprehends all lesser crimes”¹⁶ – and he did so for several

¹² London Conference, p. 331, see *supra* note 5.

¹³ *Ibid.*, p. 330.

¹⁴ *Ibid.*, p. 423.

¹⁵ *Ibid.*, p. 98.

¹⁶ *Ibid.*, p. 51.

reasons. The charge had two overwhelming advantages: it provided a conceptual framework for the interpretation of events that occurred preparatory to and during the Second World War; and it enabled the prosecution to target the highest-level civilian and military planners of the war. In addition, the charge addressed a specifically American – or more precisely, Democratic Party – political problem. Isolationism had been a major political force in the United States before the war, and it was widely expected that it would revive after the war's end. The laying of charges of aggression against the Germans provided a justification for the United States' abandonment of neutrality in 1940–1941, thereby retrospectively exonerating the Roosevelt Administration, and, connected to that, countering the anticipated resurgence of isolationist sentiment against Truman's post-war shouldering of responsibilities in Germany and elsewhere. In short, the charge of crimes against peace was harnessed to the United States' internationalist cause.

There was little chance of the other conference delegates overlooking this point, because Jackson repeatedly drew their attention to it. He explained that most Americans were three thousand miles from the scene of the war, and had not suffered German depredations first hand.¹⁷ They were consequently less motivated by their immediate experiences of atrocities than by the broader consideration of world order. “The thing that led us to take sides in this war is that we regarded Germany's resort to war as illegal from its outset, as an illegitimate attack on the international peace and order,” he said.¹⁸ It was mainly on the basis of German *aggression* that the United States justified, prior to its entry into the war, “its lend-lease and other policies of support for the anti-Nazi cause”.¹⁹ This was why Jackson was irritated that the Allied beneficiaries of lend-lease were not now willing to wholly support the view that aggression was a crime. He felt that he and others had embarked upon a contentious domestic policy in Washington to assist the Allies, and that they in return should help him to vindicate this policy. He said:

[T]he justification was made by the Secretary of State [Cordell Hull], by the Secretary of War, Mr. Stimson, by myself as Attorney General, that this war was illegal from

¹⁷ *Ibid.*, p. 126.

¹⁸ *Ibid.*, pp. 383–84.

¹⁹ *Ibid.*, p. 127.

the outset and hence we were not doing an illegal thing in extending aid to peoples who were unjustly and unlawfully attacked [...] We want this group of [Allied] nations to stand up and say, as we have said to our people, as President Roosevelt said to the people [...] that launching a war of aggression is a crime and that no political or economic situation can justify it. If that is wrong, then we have been wrong in a good many things in the policy of the United States which helped the countries under attack before we entered the war.²⁰

Jackson's argument that the Allies should mount aggression charges to satisfy American public opinion and justify the policies of Roosevelt's Administration must have struck the other delegates as deeply, even shockingly, parochial. But his points were not entirely misdirected, for he was perfectly well aware that the Allies had an equally strong interest in perpetuating American internationalism, from which they all gained in terms of enhanced global status, financial support or military security. They certainly had no wish to see the United States withdraw once again into isolation as it had after the previous war, leaving Europe in a state of near destitution.

17.3. The Issue of Retroactivity

Just before the opening of the negotiations, the American delegates, who were determined to set the terms of the debate, distributed a trial plan that proposed the following categories of crime:

- 1) That at some time prior to 1 September 1939 the defendants entered into a common plan or enterprise aimed at the establishment of complete German domination of Europe and eventually the world [...]
- 2) That on or about 1 September 1939, and at various times thereafter, the defendants launched illegal wars of aggression [...]
- 4) That before and after the launching of such illegal wars [...] the defendants instigated, committed or took a consenting part in atrocities and other crimes.²¹

²⁰ *Ibid.*, p. 384.

²¹ *Ibid.*, pp. 64–65.

The formula proposed a logical sequence of criminality, from conspiracy to aggression to war crimes and “other crimes” (later entitled “crimes against humanity”). It also presented the launching of wars of aggression as a discrete crime, distinct from war crimes and “other crimes”. Yet as British conference secretary R.A. Clyde observed, it was plain from the outset that there was dissent from the other delegations.²² At first they tried to postpone the discussion of crimes, by delegating the matter to a drafting committee somewhat earlier than was warranted. But after inconclusive debates there, the question was sent back to the full conference, where it had to be faced.²³

It was at this point, nearly four weeks into the negotiations, that André Gros made a stand against the American construction of the charge of aggression. His main objection to the American proposal was that it held the German leaders personally responsible for actions that were not considered criminal when they had taken place. His point was that when they had launched their invasions, war was considered to be unlawful but not criminal: “If we declare war a criminal act of individuals, we are going farther than the actual law.”²⁴ He predicted that the defence would raise Robert Lansing and James Brown Scott’s objections to charging the former Kaiser in 1919²⁵ (though he omitted to mention that at the same time, Clemenceau had supported the idea of trying Wilhelm II). And he pointed out that the League of Nations had concluded on several occasions that an aggressor state was required to repair the damage that it had caused, but had not proposed criminal sanctions: “We think it will turn out that nobody can say that launching a war of aggression is an international crime – you are actually inventing the sanction.”²⁶ A few days later he denounced the aggression charge as “*ex post facto* legislation”.²⁷

It was this fateful phrase, *ex post facto*, that would dog future discussion of crimes against peace. None of the delegates doubted for a moment that Germany had embarked on unlawful wars under the terms of

²² Clyde to Scott Fox, 28 July 1945, 3, National Archives, UK (‘TNA’), FO 371/51031.

²³ *Ibid.*

²⁴ London Conference, p. 295, see *supra* note 5.

²⁵ *Ibid.*, p. 297.

²⁶ *Ibid.*, p. 295.

²⁷ *Ibid.*, p. 335.

the Kellogg-Briand Pact – Gros made this point himself later during the negotiations.²⁸ But were these wars criminal? The delegates were all perfectly well aware that the interwar years were characterised by an absence of *opinio juris* or state practice to support this contention. So, to get around this problem, Gros proposed a “bottom up” rather than “top down” plan for trying the German leaders. He argued that the Germans had first broken treaties, and then “annexed populations, run concentration camps, and violated international law by criminal acts against people, [...] acts which in fact are criminal in all legislation”.²⁹ Thus, he reasoned, “we start from the bottom, say that there have been indisputable crimes and go up the line of responsibility to the instigator of the war”.³⁰ There was therefore an important difference between French and American conceptions: Gros regarded a war of aggression as a catalyst for other crimes, whereas Jackson regarded a war of aggression as a crime *per se*.³¹

Whichever way the charges happened to be laid, Gros’s main concern was that the Charter should not depart from existing law. “My difficulty is that this charter is not made to declare new international law,” he said, “it is made to punish war criminals and the basis must be a safe one.”³² To this end, he submitted on 19 July a draft on crimes stating:

The Tribunal will have jurisdiction to try any person who has [...] directed the preparation and conduct of:

- i) the policy of aggression against, and of domination over, other nations, [...] in breach of treaties and in violation of international law;
- ii) the policy of atrocities and persecutions against civilian populations;
- iii) the war, launched and waged contrary to the laws and customs of international law,³³

²⁸ *Ibid.*, p. 385.

²⁹ *Ibid.*, p. 297. This comment suggests that Gros had no difficulty with the equally newly minted crimes against humanity charge because its constituent elements were already prohibited under national jurisdictions.

³⁰ *Ibid.*, p. 296.

³¹ R.H. Jackson, “Some Problems in Developing an International Legal System”, in *Temple Law Quarterly*, 1948, vol. 22, p. 154.

³² London Conference, p. 297, see *supra* note 5.

³³ *Ibid.*, p. 293.

This proposal was cautious on both the crime of aggression and on individual responsibility. First, it avoided the taint of retroactivity because it did not declare aggression to be a crime under international law. It merely stated that the charge was for a “policy of aggression [...] in breach of treaties and in violation of international law” – a formulation that did not go beyond the law as it stood at the time. Second, it sidestepped the unprecedented nature of an international trial of individuals by stating that the Tribunal “will have the jurisdiction” to try those who had directed the preparation and conduct of aggressive wars. In other words, by simply creating a jurisdiction rather than dictating the crimes, it passed to the judges the responsibility for deciding whether aggression was a crime, and if so, who should be held accountable.³⁴

Gros’s proposal forced Jackson onto the defensive. He restated his belief that aggression was the pre-eminent problem: “[O]ur view,” he said, “is that this isn’t merely a case of showing that these Nazi Hitlerite people failed to be gentlemen in war; it is a matter of their having designed an illegal attack on the international peace.”³⁵ He also insisted that American opinion had moved on since 1919, as indicated by the Roosevelt Administration’s move away from neutrality.³⁶ Unfortunately for Jackson, though, international law had not followed where those policies had led, and this was precisely the conundrum raised by Gros. According to R.A. Clyde, the Americans then agreed to accept the French proposals as a basis of discussion – despite their very different approaches to the problem – but eventually Jackson called a halt.³⁷ Clyde recalled that “all he had to say was that he was not prepared to depart from Article 6 in its original form: and the meeting stranded”.³⁸ Although Clyde does not elaborate further, it is reasonable to conclude that the French gave way in order to avoid scuttling the conference.

³⁴ R.A. Clyde wrote: “[T]he French attach great importance to their draft because it avoided declaring, as a matter of international law, that to launch a war of aggression, or, for the matter of that, to make a breach of a treaty, was a matter for which the Head of the State that did it, could, in his own person, be hanged” (Clyde to Scott Fox, 28 July 1945, p. 4, TNA, FO 371/51031).

³⁵ London Conference, p. 299, see *supra* note 5.

³⁶ *Ibid.*

³⁷ Clyde to Scott Fox, 28 July 1945, p. 5, TNA, FO 371/51031.

³⁸ *Ibid.*

17.4. Excising the Causes of War

When discussing the problem of aggression, the delegations were agreed on one thing: they did not want the Tribunal to address the causes of the Second World War. The Europeans had no wish to embroil their prosecution teams in debates about appeasement of or collaboration with the Nazi regime in the 1930s, which would cast their nations' foreign policies in an unfavourable light. Jackson, meanwhile, had no wish to defend the European Allies' actions, which would play into the hands of those in the United States who wanted to revive isolationist debates about entanglements in discreditable Old World affairs.³⁹

There was certainly plenty of scope for debate about the causes of the war. A memo drafted by the State Department in summer 1945 anticipated some of the arguments that the defence might raise:

- English support of German 'equality' in arms.
- English sanction of German acquisition of areas occupied by 'racial' Germans (Runciman Report, in particular).
- French and possibly English consent to German 'free hand' in the East (Bonnet-Ribbentrop Accord of December, 1938).
- Colonel Beck's refusal to negotiate the Danzig issue.
- Beck's declaration that 'anschluss' of Danzig with Germany would be cause of war.
- Polish atrocities against Germans in Poland, 1938–39.
- Mobilization of Poland in August 1939.
- Alleged British-French plans to invade Norway.
- Alleged 'encirclement' of Germany.
- Defence against bolshevism.
- War is no crime.
- Imperialism of British.
- Dollar Diplomacy of Americans.
- Russian Aggression against Finland.⁴⁰

³⁹ London Conference, p. 380, see *supra* note 5.

⁴⁰ "Assistance to Mr Justice Jackson in Preparation of Case", c. July–August 1945 (with hand-written annotation: "From State Dept"), 7: Box 1: RG238, US Counsel for the Prosecution, Wheeler correspondence, National Archives and Records Administration, Maryland ('NARA').

Anticipating the difficulties, Telford Taylor advised his American colleagues against allowing such discussions into the courtroom. “It is important that the trial *not* become an inquiry into the *causes* of the war,” he wrote, adding:

It can not be established that Hitlerism was the sole cause of the war, and there should be no effort to do this [...] The question of causation is important and will be discussed for many years, but it has no place in this trial, which must rather stick rigorously to the doctrine that the planning and launching of aggressive war is illegal.⁴¹

So how might a ban on debate about the causes of the war be introduced without appearing to restrict the rights of the defendants and without raising suspicions about Allied motives? This was a tricky matter, not least because it obviously went against what was needed: a thorough airing of the issues that had contributed to tensions in Europe, so as to enable the court to determine whether the ensuing actions were aggressive.

As it turned out, a solution was close to hand. Early in the negotiations, the Soviet delegate Iona Nikitchenko asked, “Don’t you think it reasonable that provisions must be made to stop all attempts to use the trial for propaganda?”⁴² Jackson replied affirmatively, but stressed the importance of “skilful” drafting of a provision to avoid the suggestion that “the nations conducting this trial are afraid of something”⁴³ From this exchange onwards, it became apparent that any discussion of the causes of the war (which was desirable from a legal point of view) could be recast as Nazi propaganda (which obviously was not). Two days later, the British delegates returned to this question. The draft under consideration stated that the Tribunal should “disallow action by defendants which will cause unreasonable delay or the introduction of irrelevant issues or evidence”.⁴⁴ The British stiffened this formula by stating that the Tribunal should “take strict measures to prevent any action which will cause

⁴¹ Taylor, “An Approach to the Preparation of the Prosecution of Axis Criminality”, 2 June 1945, 2: Box 7, RG238, US Counsel for the Prosecution, Washington, correspondence 1945–46, NARA (original emphases).

⁴² Jackson Report, p. 84, see *supra* note 5.

⁴³ *Ibid.*

⁴⁴ *Ibid.*, p. 59.

unreasonable delay and rule out any irrelevant issues including attempts to introduce irrelevant political propaganda”.⁴⁵

Jackson was not happy with this amendment. He pointed out that such a forthright reference to propaganda would make it appear as if the Allies were trying to exclude inconvenient lines of enquiry. He thought that American critics would ask who had inserted this phrase, and predicted that those unfriendly to Britain would say, “I told you so” and those unfriendly to Russia would say, “I knew it all the time”.⁴⁶ At this point, another American delegate, William J. Donovan, suggested replacing the words “including attempts to introduce irrelevant political propaganda” with “of whatever kind or nature”⁴⁷ – a broader formulation that covered practically any contingency. The upshot of this was that no overt prohibition on propaganda appeared in the Charter. The delegates went along with the American decision to tackle the problem by less direct but more effective means. Article 18 opens with the following clauses:

The Tribunal shall

- (a) confine the Trial strictly to an expeditious hearing of the issues raised by the charges,
- (b) take strict measures to prevent any action which will cause unreasonable delay, and rule out irrelevant issues and statements of any kind whatsoever,⁴⁸

This article, read in conjunction with Articles 1 and 6 stating that the Tribunal was convened to try “major war criminals of the European Axis”, indicated that criticism of Allied actions during the proceedings would not be acceptable. But in case the point was missed, Jackson used his opening speech at Nuremberg to instruct the judges and warn the defence about the limits imposed by the Charter. Debates about the causes of the war would cause unwarranted delay, he argued, and were anyway irrelevant to the charge of crimes against peace and the conspiracy to commit them. No political, military, economic or other considerations may serve as justification for aggression, so there would be no need to

⁴⁵ *Ibid.*, p. 88.

⁴⁶ *Ibid.*, p. 102.

⁴⁷ *Ibid.*

⁴⁸ *Ibid.*, p. 426.

consider Germany's reasons for going to war. He continued, by way of disclaimer:

It is important to the duration and scope of this Trial that we bear in mind the difference between our charge that this war was one of aggression and a position that Germany had no grievances. We are not inquiring into the conditions which contributed to causing this war. They are for history to unravel. It is no part of our task to vindicate the European *status quo* as of 1933, or as of any other date. The United States does not desire to enter into discussion of the complicated pre-war currents of European politics, and it hopes this trial will not be protracted by their consideration. The remote causations avowed are too insincere and inconsistent, too complicated and doctrinaire to be the subject of profitable inquiry in this trial.⁴⁹

On the whole, the Tribunal accepted this instruction. It restricted the submission of evidence about Allied activities, and largely acceded to the time frame set out by the Indictment on crimes against peace – from 1 September 1939 (the initiation of war against Poland) to 11 December 1941 (the declaration of war against the United States). Consequently, material related to antecedents was frequently excluded: when, for example, the defence repeatedly tried to present evidence suggesting that the terms of the Treaty of Versailles were unjust or imposed under duress, the Tribunal ruled that further references to it would be inadmissible.⁵⁰ As a result, the defence could not really challenge the aggression charge on grounds of, say, provocation or condonation, because they could not refer consistently to events before the war. They had no option but to fight on the only ground allowed, namely that the charge was a retroactive enactment.

17.5. The Debate About Definition

In Jackson's view, another way to foreclose debates about the political and economic causes of the Second World War would be to incorporate within the Nuremberg Charter a *definition* of aggression focusing

⁴⁹ International Military Tribunal, *Trial of the Major War Criminals before the International Military Tribunal*, The Blue Series, 42 vols., vol. 2, IMT, Nuremberg, 1947–49, p. 149.

⁵⁰ *Ibid.*, vol. 10, p. 90.

narrowly upon the physical act of attack.⁵¹ He warned that without such a definition,

Germany will undoubtedly contend, if we don't put this in, that this wasn't a war of aggression although it looked like it. They will say that in reality they were defending against encirclement or other remote menaces. Then you are in the whole political argument of who was doing what to whom in Europe before 1939.⁵²

Jackson's main aim for summoning up a definition was therefore to protect the prosecuting powers from counter-charges⁵³ (he expressed no interest whatsoever in the other purpose of definition, which is to articulate the elements of a crime for the purposes of clarity). In the meantime, his advisors scoured the international record for a ready-made definition of aggressive war, and duly produced the Soviets' 1933 Convention for the Definition of Aggression,⁵⁴ which set out examples such as declaration of war; armed invasion; attack on a nation's territory, vessels or aircraft; naval blockade; and support for armed bands.

The delegates of the Soviet Union, France and (less openly) Britain⁵⁵ were all absolutely opposed to defining aggression – indeed, Jackson recalled that the disagreements over this “threatened at times to break up the Conference”.⁵⁶ Nikitchenko, perhaps contrary to expectation, ignored Jackson's summoning of the Soviet treaty, and instead made his

⁵¹ London Conference, p. 302, see *supra* note 5. Sidney Kaplan of the Judge Advocate General's Treaty Project advised Jackson: “Unless the protocol defines aggression, or unless the Tribunal will accept some limiting definition by way of construction, there is a risk that the trial will become one of ‘war guilt’ or at least that difficult and complicated issues relating to the defendants' excuses and justifications will be relevant, e.g., frontier incidents, etc.” (Kaplan to Jackson, “Present Status of and Immediate Prospects for JAG Treaty Project”, 3 July 1945: Box 108, Jackson Papers, LoC).

⁵² London Conference, p. 302, see *supra* note 5.

⁵³ *Ibid.*, pp. 273, 302, 305–6.

⁵⁴ *Ibid.*, pp. 273–74. The treaty referred to was signed by Afghanistan, Estonia, Latvia, Persia, Poland, Romania, Turkey and the Soviet Union on 3 July 1933.

⁵⁵ Maxwell Fyfe initially appeared to support the idea of definition, but withdrew when Jackson came under fire from the Soviets and French. It is possible that he had strayed from the Foreign Office brief on this issue; Patrick Dean noted that at the conference Maxwell Fyfe “gave way on two points which were of vital importance to the Foreign Office”, only one of which was later retrieved with “a great effort” (Dean, 10 August 1945, TNA, FO 371/51033).

⁵⁶ Jackson, “Some Problems”, 1948, p. 153, see *supra* note 31.

case by reference to the UN Charter, which had been signed a few weeks earlier. “We looked through the Charter,” he said, “and observed that, while aggression is mentioned several times, it is not defined anywhere [...] Apparently, when people speak about ‘aggression’, they know what that means, but, when they come to define it, they come up against difficulties which it has not been possible to overcome up to the present time.”⁵⁷ He added that the London negotiators were in any case not in a position to draft a definition because it “would really be up to the United Nations or the security organization which has already been established to go into questions of that sort”.⁵⁸ Gros took up Nikitchenko’s theme, arguing that a definition of aggression would anticipate decisions arrived at by the United Nations, and that if the latter’s interpretation differed from the Tribunal’s, “we would be in difficulty”.⁵⁹ (This was the first post-war outing of an argument that is still being used by powerful states today.)

The Soviet and French response was understandable. Both countries had a huge stake in the preservation of their newly acquired Security Council prerogatives. Mindful of Article 39 of the UN Charter, which invests the Security Council with the power to determine the existence of, and make recommendations on, “any threat to the peace, breach of the peace, or *act of aggression*”,⁶⁰ they had no wish to create a competing source of authority, which might be used to undermine the Big Five’s freedom of action. When warning of a potential jurisdictional conflict between the International Military Tribunal and the UN Security Council over aggression, Nikitchenko and Gros were expressing the plain and unvarnished fear that the London Conference would take away privileges won at the San Francisco Conference. This is why Nikitchenko, who was prepared to compromise on many issues raised at the London Conference so long as the proposed tribunal dealt solely with the Germans, was not prepared to compromise on this one.

Jackson countered that the judges would require a definition that would enable them to avoid the minefield of extenuating circumstances

⁵⁷ London Conference, p. 328, see *supra* note 5.

⁵⁸ *Ibid.*, p. 303.

⁵⁹ *Ibid.*, p. 304.

⁶⁰ Charter of the United Nations, *Documents of the United Nations Conference on International Organization*, United Nations Information Organizations, New York, 1945–55, vol. 15, p. 343.

thrown up by the German defence. Without this, he was sure that a common law judge would say to a defendant, “You may prove your claim”,⁶¹ opening the door to arguments about provocation, threats and economic strangulation.⁶² So, he said, the delegates had a choice: “We either have to define it now, in which case it will end argument at the trial, or define it at the trial, in which case it will be the subject of an argument in which the Germans will participate.”⁶³ Jackson was outnumbered, and no definition appeared.

17.6. More Limits on Aggression

The Americans were not the only delegates to propose restrictions to the charge of aggression. The French and Soviets both drafted proposals explicitly limiting the aggression charge to the European Axis powers, and the British voted in support of these. On 19 July the French submitted a draft referring to “the policy of aggression against, and of domination over, other nations, carried out by the European Axis powers in breach of treaties and in violation of international law”.⁶⁴ Four days later, the Soviet delegates proposed a similar formula: “Aggression against or domination over other nations carried out by the European Axis in violation of the principles of international law and treaties.”⁶⁵ The crimes against peace charge was thus conceived as an *ad hoc* charge. As Erich Hula noted the following year, “[T]he Nuremberg rule on crimes against peace [...] is not so much what any law is meant to be, that is, a general rule to be generally applied, but rather what was called in Jacobin France *une loi de circonstance*. In other words, the Nuremberg rule on crimes against peace aims exclusively at a definite group of purposely selected men.”⁶⁶

Robert Jackson was uneasy with this particular selective approach, and when the Soviets produced their formula, he balked. In his view, the charge of aggression should be presented as being universally applicable to all nations, even if it happened to be applied only in the context of an *ad hoc* trial. He said:

⁶¹ London Conference, p. 306, see *supra* note 5.

⁶² *Ibid.*, p. 305.

⁶³ *Ibid.*, p. 302.

⁶⁴ *Ibid.*, p. 293.

⁶⁵ *Ibid.*, p. 327.

⁶⁶ E. Hula, “Punishment for War Crimes”, in *Social Research*, 1946, vol. 13, p. 17.

If certain acts in violation of treaties are crimes, they are crimes whether the United States does them or whether Germany does them, and we are not prepared to lay down a rule of criminal conduct against others which we would not be willing to have invoked against us. Therefore, we think the clause ‘carried out by the European Axis’ so qualifies the statement that it deprives it of all standing and fairness as a juridical principle.⁶⁷

The Soviets and the French did not budge. Even Maxwell Fyfe, who usually supported the American position, questioned Jackson’s approach: “no one in the future could say we were discriminating in limiting this definition to Axis aggression”, he argued, because the whole trial was already so limited.⁶⁸ (He added, in an unusually open acknowledgment of states’ interests, that the point “seems one on which we are governed by limitations from our governments”.)⁶⁹ Their concern was that the aggression charge might prove to be a double-edged sword, for had not Britain and France declared war on Germany, and had not the Soviets invaded Finland and Poland? All in all, Nikitchenko insisted, a general condemnation “would not be agreeable”.⁷⁰

This debate between Jackson and the European delegates was replicated elsewhere in the conference. Sidney Alderman, the chairman of the drafting committee, recalled how the Soviets held out against a general application of the crime there too. One obvious sticking point, Alderman noted, was the fact that “our allies, the Russians, had invaded Poland at the same time that Hitler invaded the country”.⁷¹ The Soviets contended that they had not waged aggressive war but “merely came in the back door, peacefully, and to protect their own interests and boundaries at the same time that Hitler waged aggressive war through the front door”.⁷² Even so, they were “very sensitive as to any properly generalized definition of the launching and waging of aggressive war”.⁷³

⁶⁷ London Conference, 1949, p. 330, see *supra* note 5.

⁶⁸ *Ibid.*, p. 336.

⁶⁹ *Ibid.*

⁷⁰ *Ibid.*, p. 387.

⁷¹ Alderman draft chapter, “The London Negotiations for War Crimes Prosecutions”, 41: Box 112, Jackson Papers, LoC.

⁷² *Ibid.*

⁷³ *Ibid.*

For example, a subcommittee draft, produced on 11 July, with text still to be agreed inside square brackets, read as follows:

(c) [Invasion or threat of invasion of or] initiation of war against other countries in breach of treaties, agreements or assurances between nations or otherwise in violation of International Law.⁷⁴

It was interesting, Alderman observed, that the bracketed phrase, “invasion or threat of invasion of or”, had been reserved by the Soviet delegate, “obviously since it could hardly be argued that Russia had not *invaded* Poland, even if it could be argued that Russia had not launched or waged aggressive war against Poland”.⁷⁵

A compromise was reached because the Europeans knew that the Tribunal’s jurisdiction would in any case be restricted to the German leadership, and because Jackson suggested adding a reference to the Axis powers to the preamble of Article 6, which he said would remove the immediate problem but nonetheless “keep the idea of a limitation”.⁷⁶ The first clause of the preamble was duly modified to read as follows:

Article 6. The Tribunal established by the Agreement referred to in Article 1 hereof for the trial and punishment of the major war criminals of the European Axis countries shall have the power to try and punish persons who, acting in the interests of the European Axis countries, whether as individuals or as members of organizations, committed any of the following crimes.⁷⁷

This passage referred to the “European Axis” twice, as well as citing Article 1, which declared that the Tribunal was established “for the just and prompt trial and punishment of the major war criminals of the European Axis”.⁷⁸

One way or another all the negotiating teams sought to restrict the scope and content of the charge of crimes against peace: the French and Soviets proposed limiting its application to the European Axis powers alone, while the Americans proposed drafting a narrow definition to

⁷⁴ *Ibid.*, p. 42.

⁷⁵ *Ibid.* (emphasis added).

⁷⁶ London Conference, p. 361, see *supra* note 6.

⁷⁷ *Ibid.*, p. 423.

⁷⁸ *Ibid.*, p. 422.

forestall the defence. Although none succeeded entirely, they accepted this state of affairs only because both the charges and the Tribunal itself were *ad hoc*.

17.7. The “Common Plan or Conspiracy” Proposal

In its final form, Article 6(a) stated that “major war criminals of the European Axis countries” were being tried for certain crimes, first among them:

- (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;⁷⁹

This formula contained within it three elements: engaging in a war of aggression; engaging in a war in violation of international treaties; and participating in “common plan or conspiracy” for the accomplishment of the others.⁸⁰ It is the third and final element, “common plan or conspiracy”, that we shall now consider.

When constructing the general trial plan, the Americans conceived of conspiracy as playing a dual role, both as a substantive crime punishable in its own right, and as a method of establishing liability for other substantive crimes. Both approaches appear in Article 6. In the aforementioned crimes against peace paragraph, “common plan or conspiracy” is treated as a substantive crime, alongside “planning, preparation, initiation or waging of a war of aggression” and “planning, preparation, initiation or waging of [...] a war in violation of international treaties, agreements or assurances”.

Another reference to “common plan or conspiracy” appears in the final paragraph of Article 6, beneath the paragraphs setting out crimes against peace, war crimes and crimes against humanity. This reads, in its entirety: “Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any

⁷⁹ *Ibid.*, p. 423.

⁸⁰ A war might be both a war of aggression and a war in violation of treaties, but the Americans insisted that aggression was a stand-alone crime irrespective of whether treaties had been violated; *ibid.*, pp. 380, 387.

persons in execution of such plan.”⁸¹ Here, “common plan or conspiracy” is proposed as a method for establishing liability for the commission of the previously cited crimes, including crimes against peace.

The Americans had initially conceived the “common plan or conspiracy” theory in autumn 1944 because, as its creator Murray Bernays had argued, it enabled them to reach those senior figures otherwise beyond the law, such as the SS bureaucrats responsible for the organisation of the exterminations,⁸² and leading civilian financiers and bankers, such as Hjalmar Schacht.⁸³ There were other motives too. By the beginning of the London Conference, the Americans still feared that they might not uncover sufficient evidence to convict some of the most obvious candidates, and saw the charge as potentially easing the burden of establishing individual guilt. As Jackson explained to his fellow delegates, the charge was useful because “a common plan or understanding to accomplish an illegal end by any means, or to accomplish any end by illegal means, renders everyone who participated liable for the acts of every other”.⁸⁴ Later at the Conference, Maxwell Fyfe pressed Jackson to say more on the subject, asking: “Mr. Justice Jackson, just to clarify the discussion, could your point be fairly put this way: that you want the entering into the plan to be made a substantive crime?”⁸⁵ Jackson replied: “Yes. The knowing incitement and planning is as criminal as the execution.”⁸⁶ This approach later assumed its concrete form as Count 1 of the Indictment.

This idea of holding the German leaders to account for “common plan or conspiracy” was accepted by all delegates without a great deal of discussion, despite some claims in the later literature that the civil law delegates opposed it.⁸⁷ The American and Soviet delegates in particular

⁸¹ *Ibid.*, p. 423.

⁸² *Ibid.*, pp. 138–39.

⁸³ *Ibid.*, p. 254.

⁸⁴ *Ibid.*, p. 129.

⁸⁵ *Ibid.*, p. 376.

⁸⁶ *Ibid.*

⁸⁷ Bradley Smith wrote that when the charge was suggested, the Soviets and French delegates “seemed unable to grasp all the implications of the concept; when they finally did grasp it, they were genuinely shocked” (Smith, 1977, p. 51, see *supra* note 1). Smith’s comment was repeated in Arie J. Kochavi, *Prelude to Nuremberg: Allied War Crimes Policy and the Question of Punishment*, University of North Carolina Press, Chapel Hill, 1998, p. 225, and Stanislaw Pomorski, “Conspiracy and Criminal Organizations”, in G. Ginsburgs and

were strong advocates of such doctrines – which, although arising from very different legal traditions and practices, served not dissimilar purposes. (The umbrella term “common plan or conspiracy” was coined in deference to the distinctions between common law and civil law.⁸⁸) At the conference, Nikitchenko, who, as a former judge at Soviet purge trials was already well versed in the uses of complicity, explained to his colleagues that “we should not, of course, confine ourselves to persons who have actually committed the crimes but should also especially reach those who have organized or conspired them”.⁸⁹ André Gros, who also hailed from the civil law jurisdiction, was likewise favourably disposed towards the doctrine, stating that: “There has been an organized banditry in Europe for many years [...] and we want to show that those crimes have been executed by a common plan.”⁹⁰ The British delegates, who were perhaps most familiar with the potential uses of the conspiracy doctrine, expressed no strong views, although they sought legal guidance on its applicability at Nuremberg. Anthony Eden wrote to Winston Churchill: “This, I am advised, is sound in law, though it is a new departure to apply it in the international sphere.”⁹¹

17.8. A New Legal Regime

At the end of the Second World War, the Allies sought peace, security and the consolidation of their spheres of influence. This aim was reflected in their respective efforts to criminalise disruptions of the *status quo* detrimental to their own interests. Many jurists – from Hersch

V.N. Kudriavtsev (eds.), *The Nuremberg Trial and International Law*, Martinus Nijhoff, Dordrecht, 1990, pp. 218–19. Others claim that Jackson had to compel his fellow delegates to accept the conspiracy charge, such as Judith N. Shklar, *Legalism: Law, Morals, and Political Trials*, Harvard University Press, Cambridge, MA, 1964, p. 239, fn. 78; and Jeffrey D. Hockett, “Justice Robert H. Jackson, the Supreme Court, and the Nuremberg Trial”, in *Supreme Court Review*, 1990, vol. 257, p. 269. These claims are not borne out by the transcript.

⁸⁸ London Conference, p. 387, see *supra* note 6.

⁸⁹ *Ibid.*, p. 298.

⁹⁰ *Ibid.*, p. 382. Pierre Renouvin, the French delegate to the negotiations over the Indictment, did, however, raise the tactical concern that the prosecution would be compelled to examine the causes of the war in the course of proving conspiracy. “Minutes of Meeting of Committee Four”, 10 September 1945, 4: War crimes file, K. Lincoln papers, Harry S. Truman Presidential Museum and Library.

⁹¹ Eden to Prime Minister, 17 July 1945, p. 2, TNA, PREM 4/100/12.

Lauterpacht in Cambridge, to Andrei Vishinsky and Aron Trainin in Moscow, to Bohuslav Ečer and Robert Wright in London, to Henry Stimson and William Chanler in Washington – shaped the concept of crimes against peace. Robert Jackson’s great achievement was to put aggression at the centre of the case against the German leaders as the principal substantive crime. This was a victory for the Americans, who believed that the Germans’ worst crime had been to launch wars that had drawn the Allies into a ruinous global conflict. If, in the process, they could consolidate an internationalist consensus at home, and bring about “containment by integration” of powerful allies abroad,⁹² then so much the better. But before Jackson had departed for the London Conference, he had sounded a note of caution about the high expectations associated with tribunals, noting that: “Courts try cases, but cases also try courts.”⁹³ The Nuremberg court would soon be put to this test.

⁹² J.L. Gaddis, *Strategies of Containment: A Critical Appraisal of Postwar American National Security Policy*, Oxford University Press, Oxford, 1982, p. 9.

⁹³ R.H. Jackson, “The Rule of Law Among Nations”, in *American Bar Association Journal*, 1945, vol. 31, p. 292.